Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00343/2017**

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 27 February 2018	**On 11th October 2018**
And 25 September 2018	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR OSAZEE EGUAGIE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Pickering, instructed by David Gray Solicitors
For the Respondent: Mr Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against a decision of the respondent made on 7 June 2017 to deport him pursuant to Regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016. His appeal against that decision was allowed in a decision promulgated on 7 November 2017. For the reasons set out below, following a hearing on 27 February 2018, I found that that decision involved the making of an error of law and I set it aside. The remaking of that decision took place on 25 September 2018.

2. The appellant is an Italian national who has been resident in the United Kingdom since 16 July 2012. His father, mother and brother live in the United Kingdom, are also Italian nationals, and have now acquired permanent residence.

© CROWN COPYRIGHT 2018

3. On 22 December 2016 the appellant was convicted of four counts of sexual activity with a female child under 16 years of age which involved penetration. He was sentenced to 22 months' imprisonment, placed on the Sex Offenders' Register for ten years.

4. The respondent's case is that given the assessment that he posed a medium risk of reoffending and that the serious harm which would be caused as a result and that he has the propensity to reoffend, that he represents a genuine and present and sufficiently serious threat to the public to justify his deportation. She considered also that it was proportionate having had regard to the factors set out in Regulation 27.

5. The judge found, having directed himself in accordance with Schedule 1 of the EEA Regulations [39] that:-

   (i) That there are concerns raised by the nature of the offence and the attitude of the appellant towards it certainly leading up to the time of his sentence, the offence being a serious one which does relate to several of the fundamental interests of society as it involved the appellant aged 20 meeting a 14 years old girl on social media, knowing her age, and have penetrative sex with her involving ejaculation on two occasions with severe aggravating features that has caused severe psychological harm to her [42];

   (ii) It was relevant to take into the fact that this was not the most serious form of grooming and there was no indication of repetition or continuing offending [43];

   (iii) The appellant's attitude towards his offending at the time of plea and sentence raised concerns about the fact that he presents [44] and that this contributed to the assessment that although there was a low risk of probability of general reoffending he fell into a group classed as a medium risk of causing sexual harm [45], albeit the risk may be reduced if he were to explore his offending behaviour in depth via a treatment programme albeit both the report concluded [46] that the appellant still poses a medium risk of harm to children and concerns still existed about his attitude towards the victim.

   (iv) Having heard the evidence from the appellant and his family, and although his evidence of accepting full responsibility and being effectively a changed person had to be taken with a large note of caution, and there was little doubt about the genuineness and support from the family [50] that the respondent had not shown that the personal conduct the appellant represents is genuine and present and sufficiently serious threat affecting one of the fundamental interests. of society [52].

6. The respondent sought permission to appeal on the grounds that the judge had:-

(i) Failed properly to assess the seriousness of the risk that would flow from the appellant's reoffending given the potential harm to female children.

(ii) That the judge had erred in his assessment of the prospect of rehabilitation given that the appellant had not required permanent residence.

(iii) That the judge had erred in why he had accepted that the appellant had changed given his attitude towards the offending in the past.

7. On 28 November 2017 First-tier Tribunal Judge Martins granted permission to appeal.

8. Mr Diwnycz submitted that it was legitimate to look both at the likelihood of reoffending and the harm that would be caused by reoffending. He submitted that it was clear that the risk in this case was of serious harm to children and that the judge had not attached weight to the damage to be caused by the reoffending. He did, however accept that weight was a matter for the judge where it was submitted that the judge had failed properly to consider this issue.

9. Miss Pickering submitted that the decision **Kamki [2017] EWCA Civ 1715** was not relevant to the facts of this case and was entirely different given that was an appeal brought by an appellant in respect of whom there was a finding that he was at high risk of harm to females and he had not accepted his guilt.

10. She submitted that the judge had in this case considered all the factors and it was difficult to see what more could have been done with the decision. She submitted it was clear from the decision at paragraphs 42 and 43 that the sentencing remarks and the presentence report had properly been taken into account and that he had weighed this report including the assessment against the appellant. She submitted that beyond this the Secretary of State's case was little more than attempts to reargue the case and that the judge would be entitled to note that on the facts of this case the appellant's family were able to provide protective links.

11. I accept that, as Ms Pickering submitted, **Kamk**i is not entirely on point with this case given that it rose in a different way it being argued for the appellant in that case that it was wrong to take into account both the likelihood of further offending and the harm to be caused thereby. The case does, however, illustrate there are two factors to be taken into account:-

    The chance of an offence being committed and also the harm and damage that would flow from that. Both of these must be taken into account in

assessing whether an individual presents a genuine, subsisting and sufficiently serious threat affecting the fundamental interests of society

12. It is evident from the pre-sentence report on which both parties addressed me that the author considered that in this case there was a risk of serious harm. It states that Mr Eguagie is currently assessed as posing a medium risk of sexual harm and subsequent emotional harm to children.

13. Whilst the judge clearly assessed the likelihood of reoffending there is no proper indication that he considered what the impact would be were it to occur. That was a material error as it forms an integral part of the assessment of risk and the decision must be set aside.

<u>Remaking the decision</u>

14. At the hearing on 25 September 2018 I heard evidence from the appellant as well as from his father and brother.

15. The appellant adopted his witness statement adding since his release earlier this year he had undergone a treatment programme called “Horizon” which he expected to finish the following day. This was to be followed by meeting his probation officer and others involved in the course, the expectation that his risk would be reassessed medium to low. He said that he had learnt from the programme about relationships and to be cautious and to stop to think before making a decision.

16. The appellant accepted that he had initially denied sexual activity with his victim and that he had initially told the probation officer the victim was 16; and, that he had initially told the officer the victim had fabricated the claim. He denied accepting responsibility shortly before the trial date to avoid a custodial sentence and that he should have accepted his responsibility. He said that he had thought about all his mistakes and at the time he was not thinking straight. That was when he said he did not know it was wrong and illegal to have sex with a 14 year old. He said that his attitude had now changed as he had had a chance to think about it in prison and he was not claiming to have changed simply to avoid deportation to Italy.

17. The appellant said that he had not shaken his head when being sentenced by the judge because he did not accept what he was saying, but through shame, and he did not have an opportunity to tell the judge that.

18. Re-examined the appellant said that he now knew what consent meant and that the victim had not been able to give consent due to her age.

19. I asked what the appellant thought he understood by remorse. He said he was not sure he thought that it meant somebody that you did not show compassion or feeling towards somebody. He said as a Christian he prays for his victim every day.

20. The appellant’s father adopted his statement adding that his son had changed since he had been released, always tells him where he is going

and makes sure that he goes to all his appointments with the Probation Service and the programme.

21. The appellant's brother adopted his letter in support noting that he observes his brother now attends all his appointments with the Probation Service and has now become more confident and happy since he had been released from prison.

22. Mr Howells drew my attention to the fact that there was no OASys Report and that the letter from 2018 states the appellant is of medium risk of sexual reoffending and medium risk of causing serious harm to children. It is submitted that whilst the probation officer had written there was not an imminent risk this was not a necessary requirement and that the existence of the appellant posing a medium risk justified deportation on public policy grounds, the sentencing judge having noting severe psychological harm to the victim which demonstrated the risk of seriousness of consequences if the appellant were to reoffend. Mr Howells submitted that the appellant's change of mind was due to the threat of the sentence of deportation and that it was telling that he was unable to explain what was meant by remorse.

23. Mr Howells submitted that there was nothing disproportionate in removing the appellant given his age, lack of ties other than adult family members and lack of employment. He submitted that the possibility of rehabilitation was not a matter which attracted much weight, that removal would be proportionate.

24. Miss Pickering submitted that the core issue was whether the applicant presents a genuine, present and sufficiently serious threat to public order. She accepted that there was currently an assessment he was of medium risk but he had had a programme and that a further assessment was to be made. It was submitted it was likely that the risk would be lowered on that basis and she accepted that he was on the Sex Offenders Register for ten years.

25. Assessing medium risk, Miss Pickering submitted that as described it means that at present he did not pose an active risk due to protective factors being in place. Therefore it was unlikely that he would cause serious harm. That was due to the protective factors.

26. Miss Pickering submitted that the appellant's attitude before the judge should be treated with caution given his evidence before me and that he had been candid and he now accepted the position that he had not been truthful in the past and accepted that he had denied the sexual activity. Miss Pickering submitted also that the appellant had in his first statement expressed regret for the harm caused to the victim.

27. Regulation 27 of the EEA Regulations provides as follows:-

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 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(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.

…

(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.).

28. It is important to note **<u>Dumliauskas</u> [2015] EWCA Civ 145** at [40]

I have to say that I have considerable difficulty with what was said by the Advocate General in relation to rehabilitation. In the first place, it had no, or very little, relevance to the questions referred to the Court, which concerned the meaning of "imperative grounds of public security". **Secondly, it is only if there is a risk of reoffending that the power to expel arises** [emphasis added] It is illogical, therefore, to require the competent authority "to take account of factors showing that the decision adopted (i.e., to expel) is such as *to prevent* the risk of re-offending", when it is that very risk that gives rise to the power to make that decision. Secondly, in general "the conditions of [a criminal's] release" will be applicable and enforceable only in the Member State in which he has been convicted and doubtless imprisoned. …

29. The sentence highlighted is confirmed at paragraph [55].

30. In **MC** the Upper Tribunal held as follows:-

    1. *Essa rehabilitation principles are specific to decisions taken on public policy, public security and public health grounds under regulation 21 of the 2006 EEA Regulations.*

    2. *It is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (regulation 21(5)(c)) that it becomes relevant to consider whether the decision is proportionate taking into account all the considerations identified in regulation 21(5)-(6).*

    3. *There is no specific reference in the expulsion provisions of either Directive 2004/38/EC or the 2006 EEA Regulations to rehabilitation, but it has been seen by the Court of Justice as an aspect of integration, which is one of the factors referred to in Article 28(1) and regulation 21(6) (Essa (2013) at [23]).*

    4. *Rehabilitation is not an issue to be addressed in every EEA deportation or removal decision taken under regulation 21; it will not be relevant, for example, if rehabilitation has already been completed (Essa (2013) at [32]-[33]).*

    5. *…*

31. The core issue in this case is whether the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It is common ground between the parties that he is not entitled to any enhanced level of protection pursuant to reg 27 (4).

32. The starting point in assessing the risk that the appellant presents are the pre-sentence reports dated 1 December 2016 and 15 December 2016. Both were prepared by Lorraine Wood. In the first report it is recorded that the appellant had pleaded guilty to the offences but denied any sexual activity with the victim other than kissing. The account given of the incident is that the appellant met the victim via social network; they met and kissed and that on the second occasion they met and it was on that occasion, upon leaving, that the victim told him that she was 14 adding

that he said they could not be in a relationship as a result. It was accepted that he had further contact with her by telephone.

33. The victim's version was different in that she said that he was fully aware of her age when they chatted on line; that he asked her to meet him; that she had felt somewhat forced into partaking oral, digital or penile penetration. It is also noted that the victim detailed emotional harm she had suffered which had affected her personal relationship with family and friends, her educational and her emotional wellbeing which may affect her in the long run into adult life.

34. It is recorded:-

> "Mr Eguagie admits to behaving inappropriately, in that he says that he accepts that he kissed the victim after she had told him her real age, but he attempts to justify this by stating the he 'felt sorry' for her. Mr Eguagie says that he was a different person when he made this "mistake" he has matured since then. He is of the opinion that the victim has fabricated the allegations because he would not have a relationship with her when he discovered her age.
>
> Mr Eguagie's denial of the sexual activity, knowledge of the victim's age and ………… of his offending behaviour. He denies requesting contact with the victim because of her age, being attracted to her for this reason, or targeting her because she was vulnerable. It is claimed that this offending was solely underpinned by immaturity is questionable and does raise concerns with regards to how effective any sort of treatment would be."

35. It is also of note that the appellant is assessed as posing a medium risk of sexual harm and subsequent emotional harm to children but although there are positive supportive factors in his life there are significant concerns regarding his attitude towards the offences to the victim. It is observed that the risk may be reduced if he is able to explore his offending behaviour in depth via a treatment programme and that he will be subject to Sex Offender Registration in future which may assist in reducing the risk.

36. In the second report it is recorded that the appellant now accepts that he was aware of the victim's age when he met her and fully admits to sexual activity that she describes taking place. The author wrote of the appellant: "he tells me that he accepted her 'friend request' out of 'kindness' but, with challenge, was able to explore this further and concedes he may have been attracted to her and meeting her with the potential of engaging in sexual activity with her.

37. It is also recorded that although the appellant knew the victim's age he did not consider that his behaviour was inappropriate or illegal at the time and acknowledged being attracted to the victim but denied any ongoing attraction to children. It is stated

> "Mr Eguagie expresses regret for his offending but he continues to be unable to explore the harm caused to the victim in much detail. This appears to be due to the ill feeling that she has 'ruined his life/career'.
>
> Mr Eguagie continues to be assessed posing a medium risk of harm to children as detailed in the previous report. Although he says that he now accepts responsibility for his offending, he has yet to engage and comply in any form of treatment that would aim to reduce the risk and concerns mainly regarding his attitude towards the victim. There are also additional concerns that his recent exceptions of the events could be due to the threat of a custodial sentence."

38. The appellant was sentenced on 22 December 2016. Ms Recorder Wigin stated as follows:-

> "You are now 22 years of age. When you were 20 years of age, you met, through social media, a girl whose age was 14. You always knew that was her age. You met her on two occasions, on both those occasions you committed offences of penetrative sexual intercourse with her.
>
> …
>
> You pleaded guilty on the day of your trial. It has been indicated the week before that the complainant should not attend on the first day of the trial, but nonetheless as far as she was concerned the first intermission she had of your plea was on the day that she was expecting to give evidence. Some nine months had passed from the time when you first entered your guilty plea.
>
> The severe aggravating feature of this case is the severe psychological harm you have caused to that complainant. You are shaking your head at me in the dock. May I say that I have noted in the presentence report that you are described as still feeling resentment towards the complainant on the basis that she has, in your words, 'ruined your life.'
>
> The case falls in the tariff at the very top of category 1B. The reasons I have put it in 1B is because having heard submissions from Counsel, I have taken the view that it is hard to see that communications which you had on the social media is conventional grooming I have taken the opportunity of reminding myself exactly what the contents of those communications were. He has argued eloquently that there was not a significant disparity in your age, there being some six years, nor can it be said on your behalf that you did not contribute to the severe psychological harm this girl has suffered, both by the fact that this was a plea entered at a very late stage and I have also read those texts in which you expressed to her what is summarised in the opening as your desire not to have a relationship or indeed a child by her.

> I have read the pre-sentence report and I take into consideration that you have no relevant previous convictions and that the view is that there is work that could be done with you in a non-custodial setting but taking all the matters into consideration it seems to me that the only appropriate sentence here is one of immediate custody and accordingly that is the sentence I impose upon you today. The shortest period of custodial sentence that I can impose upon you, taking all matters into consideration, is one of 22 months and I make that sentence on you accordingly.

39. It is noted also that a Sexual Harm Prevention Order has been made and that the appellant will be on the Sex Offenders Register for ten years.

40. Section 103A of the Sexual Offences Act 2003 permits a court to make a Sexual Harm Prevention Order in respect of a person when the court is satisfied it is necessary to make the order for the purpose of protecting the public or any particular members of the public from sexual harm from him or protecting children or vulnerable adults generally or any particular children or vulnerable adults from sexual harm from the defendant outside the United Kingdom. By operation of Section 103C an order prohibits him from doing things described in the order for a fixed period of at least five years or until further order.

41. I accept that the appellant has been released from prison and from the letter from his defendant manager, Cheryl McCulla. She records that the appellant has engaged well with probation, contact being reduced in level in line with his level of risk and due to good compliance. It is noted also that he has voluntarily enrolled in the Horizon Sexual Offending Programme and the feedback from the programme had been very positive. The letter also notes that he is not assessed as posing an imminent risk of harm and has said he has several protective factors in place including support from family, engaging in his licence provision, attending church, awareness and insight into his risk of offending behaviour, good internal controls and a high level of motivation capacity to desist further offending and to develop a pro-social lifestyle."

42. It is noted also that his risk management officer with Northumbria Police has no current concerns.

43. In the letter dated 10 April 2018 Ms McCulla confirms further that the appellant has attended all appointments, that the static risk assessment tool to assess the risk of reoffending to be low in relation to both general and violent offending and that the Risk Matrix 2000 Risk Assessment with regard to the risk of sexual reoffending assesses that he poses a medium risk of both sexual and non-sexual violent offending, basic consideration of static factors such as age did not take into account any dynamic risk factors. It is noted also that he is currently assessed as posing a medium risk of serious harm to children and a low risk of serious harm to known adults, members of the public, staff.

44. The definition from medium risk of serious harm is as follows: there are identifiable indicators of a risk of serious harm. The offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances. The low risk of serious harm is to find as: current evidence does not indicate a likelihood of serious harm. When referring to serious harm, this is defined as: an event which is life threatening and/or traumatic, and for which a recovery, whether physical or psychological can be expected to be difficult or impossible. The level of risk considers the likelihood of this event occurring.

45. The letter concludes that it is not assessed that the appellant poses an imminent or active risk of engaging similar behaviour when considering his current situation and protective factors in place including voluntary participation in the Horizon Programme. It is stated also:-

> "Although risk is dynamic it can change at any time, an assessment of low risk would not be considered at this stage of Mr Eguagie's sentence due to the relatively short duration of his time in the community. However should he continue in the current vein continuing to engage with the probation and address his risk of offending behaviour on the Horizon Programme, this is something that will be reconsidered at a later date."

46. I have considered this material, and the evidence of the appellant and his family as a whole, bearing in mind that attitudes and the threat a person poses can change over time, and that the purpose of probation and the Horizon Programme is to assist an offender to change.

47. There is a stark contrast between the appellant's attitude between the first and second probation reports which were written 14 days apart from denial and accusations of the complainant ruining his life to acceptance of the offence. I have considered carefully the reasons given for the change and for what is now said to be further positive changes. Much of this comes from Ms McCulla, and while it is encouraging, it is speculative as to whether the risk the appellant presents may be assessed as low. Nonetheless, looking at the evidence in the round, I consider that there is significant merit in Ms Wood's observation that the apparent change in heart is due to the fear of a custodial sentence. While I note that the appellant now says the shaking of his head before the sentencing judge was not a denial of the facts, I am not in a position to reach a conclusion different from her; I did not see what occurred, and she did.

48. I bear in mind that, as Miss Pickering submitted, medium risk means that the appellant is unlikely to cause serious harm unless there is a change in circumstances, but the risk is of course still there. It is still a serious risk, given the nature of the harm that may flow.

49. The evidence from the appellant and his family that he has changed. I attach less weight to their evidence. The appellant has every incentive to show he has changed, and his family are, naturally, disposed to support him. It is to their credit that they have supported him, but equally their

assessment of the risk he poses is understandably coloured by the strong emotional ties between them.

50. I consider that I can rely on the assessment by the National Probation Service that although the appellant does not pose an imminent risk of harm, nonetheless he is assessed as presenting a medium risk of serious harm. Given the gravity of serious harm as defined and given that he has been required to sign on the Sexual Offences Register and that there is a Sexual Harm Prevention Order against him I consider that notwithstanding his own and his family’s assessment that he is unlikely to commit a crime again, I am not persuaded me that I should not accept that assessment that he presents a risk of serious harm to children is in my view sufficient to show that there is a risk to the interests of society and that it is sufficiently serious. It is also genuine in that it is real.

51. I do not consider having had regard to proportionality, that removal would be disproportionate. The appellant presents a significant threat to children and young people. He is not in a relationship and while I accept he is close to his family, I am not persuaded that there is any degree of dependency over and above the usual emotional ties such that there exits a family life with them. He is young and healthy and he has some links with Italy. He has lived here for a number of years but has not acquired permanent residence. There is limited evidence of the appellant’s integration into the United Kingdom in any true sense and his offending behaviour and the circumstances in which the crime occurred indicates that he has not integrated into society.

52. The appellant has not yet acquired permanent residence, but he is, I accept, taking steps to rehabilitate himself as shown by his attendance on a relevant course, and the improvements which have been identified by Ms McCulla. There is, however, little evidence of anything further to be done, or that further courses, or other means of rehabilitation could not be undertaken in Italy. While it is a factor to be taken into account in the appellant’s favour it has to be balanced against the serious threat which he presents.

53. Taking all of the evidence into account, and weighing the factors identified in the balance, I conclude that notwithstanding the improvement in the appellant’s position, that the risk of serious harm, that is an event which is life threatening and/or traumatic, and for which a recovery, whether physical or psychological can be expected to be difficult or impossible, is such that removal is shown by the respondent to be proportionate and I dismiss the appeal on all grounds accordingly.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the decision by dismissing the appeal.

3. No anonymity direction is made.

Signed Date 5 October 2018

Upper Tribunal Judge Rintoul