Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2023-002269
DA/00069/2022

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 August 2023	**On 19th of December 2023**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BENEDETTO LICATA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms A. Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr A. Miah, counsel instructed by UK Migration Lawyers, Birmingham

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, we refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of Italy, born in 1977. On 14 June 2022 the respondent made a decision to deport him to Italy because of his criminal offending. In particular, on 15 December 2020 he was convicted of an offence of attempting as an adult to meet a girl under the age of 16 years following grooming, and six offences of attempting or engaging in sexual communication with a child. He received a total sentence of 24 months' imprisonment. The deportation decision was made pursuant to the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

3. The appellant appealed the decision and his appeal came before First-tier Tribunal Judge Robinson at a hearing on 18 April 2023, following which his appeal was allowed in a decision promulgated on 10 May 2023. Permission to appeal was granted by a judge of the FtT.

Judge Robertson's decision

4. Judge Robertson set out the legal framework governing the appeal and gave appropriate self-directions as to the burden and standard of proof. She identified the evidence before her and set out the issues to be decided. The appellant and his sister gave oral evidence.

5. She noted that the appellant had the highest level of protection against deportation under the EEA Regulations, namely that he could not be removed except on imperative grounds of public security, and she referred to relevant case law in that regard. She identified the seven offences of which the appellant had been convicted.

6. At para 17 she said that the offences were undoubtedly serious, and quoted extracts from the sentencing judge's remarks. She cited *LG and CC (EEA Regs: residence; imprisonment; removal) Italy* [2009] UKAIT 00024 in terms of the relationship between the sentence imposed and the finding of imperative grounds, which we understand is a reference to para 110 of that decision which suggests that a sentence of five years' imprisonment or more does not necessarily on its own indicate that imperative grounds for removal exist. She noted at para 19 that the total sentence in this case was one of "only 24 months" which she said was "some way short of the minimum period of five years suggested by Carnworth LJ". Judge Robertson said in the same paragraph that there was no indication from the sentencing remarks as a whole that this was a particularly exceptional set of circumstances.

7. At para 20 she referred to the offences having spanned a period of eight months between September 2018 and April 2019, that he was "only" sentenced to the one set of offences on 15 December 2021, that these were his first convictions and that there has been no repeat offending. We think, in fact, that the sentencing was on 3 February 2021 as that is the date of the sentencing remarks.

8. At para 21 Judge Robertson accepted the findings in the OASys report dated 7 April 2022 that the appellant posed a medium risk of indecent image reoffending, a low risk of sexual contact reoffending and a medium risk of serious offending over the following two years. She also noted that the appellant was communicating with ‘decoys’ and that if the victims had been children the impact could have been more severe. To contextualise this, we note that the appellant was ultimately confronted by a group of so-called ‘paedophile hunters’ which is how he was caught.

9. At para 22 she referred to the psychological report dated 7 April 2023 and reminded herself of relevant authority in relation to expert evidence. She found that the expert, Ian Anderson, had relevant expertise which does not appear to have been challenged by the respondent. She found that Mr Anderson had had regard to relevant documents, apart from the sentencing remarks, and examined the appellant appropriately. She found that Mr Anderson’s findings regarding the appellant’s sense of responsibility and remorse were consistent with the other evidence, being elements of his report to which she said that she attributed weight.

10. At para 23 Judge Robertson said that she accepted the submission made on behalf of the respondent that Mr Anderson and the author of the OASys report reached slightly different conclusions regarding the degree to which the appellant’s actions were a matter of “fantasy and reality”. In the light of the sentencing remarks that Mr Anderson did not consider, she found that the OASYs assessment was correct in concluding that meeting the victim was more of a realistic prospect rather than just a fantasy as suggested by Mr Anderson, given in particular that the appellant arranged a specific location, time and date to meet.

11. She also said that she placed more weight on the risk assessments made by “probation” given their more extensive engagement with the appellant. She noted that those assessments differed markedly from that of Mr Anderson who concluded that the appellant represented an “extremely low risk of any future sexual offending”.

12. Judge Robertson went on to state that even accepting the highest level of risk identified she did not find that the risk was within the realm of “exceptional circumstances”. She said that this was more particularly the case in the light of the significant degree of the appellant’s integration in the UK. Judge Robertson noted his continuous residence for 10 years and his having acquired a permanent right of residence. She found that the evidence demonstrated that he had resided in the UK for about 26 years, since he was approximately 18 years old. She also found that all his family are in the UK and that he does not have existing ties to Italy. The recent visits to Italy were brief and for holidays. She noted that he speaks English and has been employed.

13. She also found that there had been a degree of meaningful rehabilitation, noting that he had completed "the Horizon programme course" whilst in custody, in order to address his thinking and behaviour.

14. Judge Robertson referred at para 25 to his having pleaded guilty to all the offences and in oral evidence accepted responsibility for his actions. She noted that that was consistent with his witness statement, the OASys report and the report from Mr Anderson. There was no evidence of a lack of cooperation with offender management.

15. Finally, at para 26 she concluded as follows:

> "Considering all my findings and all the evidence in the round, I do not find on balance that the Appellant's circumstances viewed in their totality constitute the exceptional circumstances which would meet the imperative grounds threshold. Whilst his offences are undoubtedly serious, I make this finding in light of the length of his sentences (with associated notice and order), his significant integration into the UK, the level of risks he poses and his rehabilitation. For all these reasons I find that the decision is not accordance with the EEA Regulations and the appeal is allowed on this ground."

The grounds of appeal and submissions

16. We summarise the grounds of appeal and oral submissions.

17. The grounds of appeal highlight the seriousness of the offending and refer to the respondent's acceptance that imperative grounds were required in the light of the appellant's lawful residence.

18. Ground 1 asserts that Judge Robertson erred in law in her approach to the imperative grounds issue. The grounds rely on *Hafeez v The Secretary of State for the Home Department* [2020] EWCA Civ 406, in particular at para 47. From this, the grounds deduce that the focus must be on present and future risk, that imperative grounds is not determined by the length of sentence which is only a starting point, and that sufficiently serious criminality which threatens the public or a section of the public may make expulsion imperative. It is argued that Judge Robertson did not apply those principles despite referring to *LG and CC*.

19. The grounds then suggest that there is no rule of law requiring a minimum sentence of 5 years' imprisonment for imperative grounds, as Judge Robertson had suggested, and that the question of risk is forward looking not retrospective.

20. It is accepted in the grounds that "exceptional circumstances" are required for imperative grounds to apply but it is argued that Judge Robertson had not explained why a risk to a specific section of society, i.e. sexual exploitation of girls aged 10-13, is not exceptional. The judge, it is argued, appears to be looking for an additional factor rather than the actual nature

of the present and future threat to a fundamental interest/section of society.

21. Ground 2 argues that there was an inadequate consideration of the OASys report and the risk factors identified within it, with reference to various aspects of that report. It is further argued that Judge Robertson's approach to rehabilitation fails to have regard to those risk factors and the assessment of medium risk. The reference to the Horizon programme alone was insufficient.

22. It is further contended that the judge's approach to the acceptance of guilt and taking responsibility for his actions fails to have regard to the OASys report which refers to the evidence being such that he could not dispute his guilt. Likewise, his denial that he denied that he actually intended to meet any of the pseudo-victims and have sex with them.

23. This ground also contends that in accepting that the appellant poses a medium risk of indecent image reoffending, a low risk of sexual contact reoffending and a medium risk of serious offending, Judge Robertson had failed to address an evident tension in the OASys report's conclusion. The nature of the risk in the OASYs report is of emotional and sexual harm in terms of contacting female children online, coercing them into sexual communications, witnessing sexual acts and being asked to engage in sexual activity, as well as a risk of the appellant arranging to meet with them in order to engage in sexual activity. It is said that Judge Robertson failed to explain why she accepted that the risk of future conduct was low when the sentencing judge found that there had been an intention to meet his underage victim for sex.

24. It is next said that there was a failure by the judge to engage with the seriousness of the consequences of his reoffending, citing *Kamki v The Secretary of State for the Home Department* [2017] EWCA Civ 1715 at paras 16 and 35.

25. Lastly, ground 3 contends that there was a failure on Judge Robertson's part to make any clear findings on whether the appellant is a threat to a fundamental interest but instead conflates risk and proportionality.

26. Ms Ahmed relied on the grounds of appeal in her oral submissions, reiterating aspects of them. It is not necessary to summarise every aspect of Ms Ahmed's submissions which closely followed the grounds of appeal.

27. It was submitted in particular that a sentence of five years' imprisonment is not a benchmark for imperative grounds. It was further argued that it appeared that the judge was looking for something unique in order to find imperative grounds.

28. It was submitted that it was incumbent on Judge Robertson to deal with the presence of risk factors and what efforts had been made by the

appellant to address those risk factors. Her approach to rehabilitation did not have regard to those risk factors, it was submitted. It was also pointed out that the evidence against the appellant was overwhelming, as the OASys report states.

29. Mr Miah submitted that all of Judge Robertson's findings were open to her. She did engage with the risk factors. It was submitted that the respondent is merely expressing disagreement with the judge's findings.

30. Mr Miah argued that Judge Robertson went through the conclusions in the OASYs report. He pointed out that at para 23 she preferred the conclusion in the OASYs report rather than that in the psychological report of Mr Anderson as to whether the appellant's actions were more than mere fantasy, finding that they were not mere fantasy.

31. It was submitted that Judge Robertson did not use a sentence of five years' imprisonment as a benchmark. She had referred to the extent of his criminality and at para 19 had said that with reference to the sentence it was "some way short" of the five years that was suggested in *LG*. Even if it was to be found that Judge Robertson did apply a 'red line' of five years, this was in any event a sentence well short of that.

32. In reply, Ms Ahmed accepted that the judge had resolved the issue of fantasy/reality against the appellant but she had nevertheless gone on to look for some unique factor. It was submitted that she had 'latched on' to a five-year sentence.

33. It was submitted that *LG and CC* only cites terrorist threats and so forth as examples of the types of case where imperative grounds may apply.

Assessment and conclusions

34. There was no issue between the parties but that the EEA Regulations apply to this appeal.

35. The respondent's grounds very properly highlight the seriousness of the appellant's offending. However, there is no explicit suggestion in the grounds that Judge Robertson failed to recognise that seriousness, as indeed she plainly did.

36. We consider grounds 1 and 2 together. As regards the complaint in the grounds that Judge Robertson wrongly focused on the length of the sentence of imprisonment imposed on the appellant, and appeared to suggest that a five-year sentence was the minimum required for imperative grounds, we not that in *Hafeez* at para 47, the Court of Appeal said the following:

> "In *LG and CC*, Carnwath LJ set out the following guidance about the meaning of imperative grounds of public security, emphasising that the

focus must be on the individual's present and future risk to the public, rather than on the seriousness of the individual's offending:

> ‘110. ...[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… [T]here is no indication why the severity of the offence in itself is enough to make the 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". Terrorism offences or threats to national security are obvious examples, but not exclusive. Serial or targeted criminality of a sufficiently serious kind may also meet the test. However, there needs to be some threat to the public or a definable section of the public sufficiently serious to make expulsion "imperative" and not merely desirable as a matter of policy, in order to ensure the necessary differentiation from the second level.’ “

37. The respondent’s contention refers to a different manifestation of an approach that is said to be contrary to the above dicta, in that Judge Robertson approached the assessment of imperative grounds under the misapprehension that five years’ imprisonment was the yardstick by which imperative grounds should be measured. In *LG and CC* the discussion of a term of five years’ imprisonment arose because that was part of the Secretary of State’s then guidance on imperative grounds.

38. We do consider that Judge Robertson may have misinterpreted the dicta in *LG and CC* (which was in fact a panel decision of the Upper Tribunal) as suggesting that a sentence of five years’ imprisonment would usually be the starting point for the application of imperative grounds. This can be seen in particular from para 18 where she stated that Carnworth LJ “suggests a sentence of five years or more in his guidance about the meaning of imperative grounds” and at para 19 where she stated that the period of imprisonment imposed on this appellant of 24 months was “some way short of the minimum period of five years suggested by Carnworth LJ”.

39. However, we do not consider that this undermines her assessment of whether there are imperative grounds justifying the appellant’s deportation. She was entitled to take into account the length of sentence in her consideration of whether there are imperative grounds of public security, in so far as it informed her assessment of the questions of risk of reoffending and the harm that may eventuate if such offending occurred.

40. Contrary to what is argued on behalf of the respondent, we are satisfied that Judge Robertson did have in mind the seriousness of any future offending in terms of its impact on the public or a particular section of it. At para 18, in the reference to *LG and CC*, she quoted the judgment in terms of the need for “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’”, beyond the sentence itself. It is apparent from this that she was aware of the need to consider the impact that future offending of a like kind may have and that the sentence alone does not determine the issue.

41. We do not accept the contention that Judge Robertson failed to give adequate consideration to the issue of risk, or that her analysis of the OASys report is incomplete or flawed for want of an assessment of the risk factors identified within it. It is apparent from our summary of Judge Robertson’s decision that she gave detailed consideration to the contents of the OASys report. As can be seen from para 23 she resolved in favour of the respondent a conflict between the OASys report and the psychological report on the ‘fantasy/reality’ issue, accepting the respondent’s submissions on the point. Judge Robertson referred to risk in the context of the OASys report at paras 21, 23 and 25.

42. It will usually be possible to extract from the evidence, for example an OASys report, features that point more strongly in favour of one party than the other, in support of a contention that inadequate consideration was given to that evidence by the judge. However, we are not satisfied that there is any evident want of consideration of the OASys report by Judge Robertson, in term of risk factors or otherwise. She was entitled to accept the findings of the OASys report in terms of low risk of contact offending. The suggestion in the grounds that Judge Robertson should have taken into account that in sentencing it was found that there was an intention to meet an underage victim for sex ignores the fact that Judge Robertson resolved this issue in favour of the respondent at para 23. She considered that matter in the context of ‘risk’ in that paragraph.

43. As regards ground 3, we similarly do not accept that there is any error of law in Judge Robertson’s decision in terms of an assessment of whether the appellant represents a threat to one of the fundamental interests of society. An overall consideration of her decision reveals that she did have this issue in mind in her consideration of risk. There is no evident conflation of risk and proportionality.

44. The respondent’s grounds really only amount to an argument for a different outcome but do not reveal any error of law in Judge Robertson’s decision.

Decision

45. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to allow the appeal therefore stands.

A.M. Kopieczek

Upper Tribunal Judge Kopieczek 13/12/2023