



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-006329

First-tier Tribunal No: DA/00132/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 1 September 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

CDV
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr A Stedman, instructed by Deo Volente Solicitors LLP
For the Respondent: Mr E Terrell, Home Office Presenting Officer

Heard at Field House on 25 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or any member of his family. Failure to comply with this order could amount to a contempt of court.

Owing to the existence of teenage children and notwithstanding that no doubt the criminal trial was made public, I direct that there should be an anonymity direction, not least because the children are at school and as such the anonymity direction made in the First-tier Tribunal should be maintained.

DECISION AND REASONS

1. The appellant is an EEA Italian citizen born on 22 June 1961 and entered the United Kingdom in 1963 aged 2 and has been resident in the UK for the past 59 years. He lives in the United Kingdom in a separate residence but the same road as his wife of 21 years and two teenage children of 15 and 17 years. Prior to his offences in 2019 the appellant was a man of good character and has recently retired from his long-standing position as a university lecturer.
2. In 2019 the appellant was convicted of six offences of making indecent images of children (downloading onto his computer). The material was class A, reflecting the most serious level of the material viewed. A Crown Court judge sentenced the appellant to a term of 20 months' imprisonment. On 17 April 2020, the appellant was served with a decision to make a deportation order under Regulation 36 of the Immigration EEA Regulations 2016.
3. The appellant is entitled, and this is agreed between the parties, to the highest level of protection: imperative grounds of public security pursuant to Regulation 27(4) of the European Economic Area Immigration Regulations 2016 (the EEA Regulations).
4. The appellant's appeal against deportation on human rights grounds was dismissed by the First-tier Tribunal (FtT) in 2020 but that decision was set aside because of procedural unfairness (the appellant and his solicitors had not been notified of the hearing date and did not attend) and remitted to the FtT for a hearing de novo. A further decision was made but that decision was set aside because of procedural unfairness (the appellant and his solicitors had not been notified of the hearing date and did not attend) and remitted to the FtT for a hearing de novo. A further decision was made on 15 November 2022 but that order was set aside on 24th April 2023 for multiple errors which were interrelated. The FtT judge had decided the appeal by reference to the Immigration (European Economic Area) Regulations 2006 instead of the Immigration (European Economic Area) Regulations 2016, applied the wrong legal test contained in Regulation 27(4) and engaged the wrong level of protection, finding that the appellant

was only entitled to the lowest level of protection when in fact he was entitled to the highest.

5. It was accepted in the reasons for deportation letter from the Secretary of State that the appellant had permanent residence in the United Kingdom as he had arrived in this country in 1963 and, having been educated and having worked here, he was integrated. As a result, consideration was given to whether his deportation was justified on imperative grounds of public security. His offending was nonetheless considered to be extremely serious as it involved encouraging and perpetuating child sexual exploitation. His conduct was seen in the light of Schedule 1 of the EEA Regulations 2016 which provides a non-exhaustive list of the fundamental interests of society in the United Kingdom.

6. The refusal letter detailed that

'On 18 January 2018, as a result of information received, a search of your home took place. A Samsung mobile phone and an icute computer tower were seized. Both devices were forensically examined and found to contain the following: 520 still and moving Category A images of the vilest nature, 258 still and moving Category B images and 155 still and moving Category C images. You viewed and were in possession of indent images and videos involving male and female children from the ages of 6 months to 13 years old.

In addition to the period of imprisonment imposed upon you the sentencing judge also required you to register on the Sex Offenders Register for 10 years'.

7. The letter proceeded

'The children whose images you viewed/downloaded were victims of sexual assault, performed for the gratification of those who seek out such images, such as yourself. In addition to the potential for physical injury, the effects of this kind of abuse on children include depression, post-traumatic stress disorder, anxiety and a propensity towards further victimization in adulthood. The impact upon the young victims of such crimes is often a lifelong legacy of psychological harm'.

8. At the hearing before us Mr Terrell accepted that the level of protection under the Immigration (European Economic Area) Regulations 2016 was indeed imperative grounds. He nevertheless proceeded to cross examine the appellant and established that the appellant owned two houses in the same road, one in which he lived and one in which his wife and two children lived. His only source of income was his university pension of £26,000 per annum (he had not yet reached retirement age). His son was still at school in the UK and his daughter about to go to university. He had family in Italy but if deported would have to return alone. It was put to him that he did not tell the psychiatrist about the number of category A and C videos but the response from the appellant was that he was not asked. The appellant denied attempting to minimise the seriousness of the offending. He also confirmed to Mr Stedman that his mobile phone was inspected every 3 months and he was not allowed to delete anything.

9. Mr Terrell submitted that the offending reached the level of seriousness to warrant deportation on imperative grounds. He referred to the sentencing remarks which indicated the seriousness of the offending and submitted that the appellant had attempted to mislead the psychiatrist in the seriousness of his offending which involved a very high number of images. He appreciated that the appellant had been in the UK for a very long time but he did have financial resources and he could sell one of his houses. The deportation would be proportionate.
10. Mr Stedman submitted that the Tribunal might put limited weight on the expert report but it was a jump too far to suggest that the report indicated a lack of openness on the part of the appellant who did not write the report or initiate the questions. The appellant in Hafeez was sentenced to 7 years for a vicious rape and that was not the case here. The offence was entirely different and he accepted there may be harm but the court was entitled to draw a distinction when there was direct harm to a particular victim. The evidence was of a man who had admitted his crime and had insight and had undertaken course and probation had assessed him as a low risk. There were police measures in place to tackle future risk. This appellant would have been in a position to claim British citizenship owing to the length of time he had spent in the UK. Although initially Mr Stedman agreed that the only issue was whether he met the threshold he then proceeded to make submissions on the effect on the appellant's family life and section 55 considerations. His ties to this country had been established over time.

Conclusions

11. As we know from **Arranz (EEA Regulations - deportation - test)** [2017] UKUT 294 (IAC) the burden of proving that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society under Regulation 21(5)(c) of the EEA Regulations rests on the Secretary of State; it is for the Secretary of State to establish, on the balance of probabilities, that the threshold for deportation on imperative grounds under the Immigration (European Economic Area) Regulations 2016 has been reached.
12. Regulation 27(4) and (5) of the Immigration (European Economic Area) Regulations 2016 sets out as follows:
 - 27 (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(1).*
 - (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.

13. The meaning of imperative grounds is addressed in **Tsakouridis (European Citizenship)** [2010] EUECJ C145-09 and **Hafeez** [2020] EWCA Civ 406, which also gives some context to the type of cases in which deportation appeals fail on imperative grounds of public security when considering whether the appellant poses a 'genuine, present and sufficiently serious threat'. **Hafeez** in turn considered **LG and CC** [2009] UKATI 00024.

14. In **Tsakouridis** when considering the interpretation of 'imperative grounds of public security' and whether that meant that 'only irrefutable threats to the external or internal security of the Member State could justify an expulsion' the Council of Justice of the European Union ("CJEU") held at [40] and [41] as follows:

'40. It follows from the wording and scheme of Article 28 of Directive 2004/38, as explained in paragraphs 24 to 28 above, that by subjecting all expulsion measures in the cases referred to in Article 28(3) of that directive to the existence of 'imperative grounds' of public security, a concept which is considerably stricter than that of 'serious grounds' within the meaning of Article 28(2), the European Union legislature clearly intended to limit measures based on Article 28(3) to 'exceptional circumstances', as set out in recital 24 in the preamble to that directive.

41. The concept of 'imperative grounds of public security' presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words 'imperative reason.' [our underlining and emphasis]

15. It is clear, however, that the definition of 'imperative' grounds does not just encompass issues of national security or terrorism and that the net of

imperative grounds can be cast more widely because the court in **Tsakouridis** at [47] held

'47. Since drug addiction represents a serious evil for the individual and is fraught with social and economic danger to mankind... trafficking in narcotics as part of an organized group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of an organized group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it.'

16. We were helpfully directed to **Hafeez** [110] by Mr Terrell in which Bean LJ advanced this:

*"47. 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."

17. We accept that 'imperative grounds' is not necessarily determined by the length of a sentence which is only the starting point. That the appellant only received a sentence of 20 months is not decisive of whether there are 'imperative grounds' or not. When considering whether the threshold has been reached we consider the offence itself but also the concept of 'something more, in scale or kind' to justify whether the appellant poses a 'particularly serious risk to the safety of the public or section of the public'. Sufficiently serious criminality which threatens the public or a section of the public may reach the threshold.

18. We place limited weight on the report of Dr S Afzal, Consultant Forensic Psychiatrist who determined that the appellant was of low risk of reoffending. Mr Terrell pointed out, Dr Afzal had not been supplied with the appellant's sentencing remarks or OASys report and submitted that it was not clear that he had received the full picture in order to make the

judgment that the appellant posed no further risk. Although Mr Terrell submitted that this indicated that the appellant continued to pose a risk to children because he had ‘underplayed’ his description of the offences, we do not consider ourselves in a position to make that conclusion. Indeed, Dr Afzal was in possession of the certificate of conviction which is a clear indication of the level of offending. We simply place greater reliance on the other documents and evidence before us.

19. We accept that the appellant’s offences targeted children who are clearly a vulnerable section of society and that the sentencing remarks identified the number and scale of the images of sexually abused very young children (some infants) downloaded by the appellant. The sentencing remarks added that ‘because men like you do seek out these images, then in order to satisfy that need and desire on the part of men like you, children are abused’. The aggravating feature was noted as the age of the children, some of them babies. The seriousness of the offence is reflected in the sentence of immediate imprisonment. There was no question that the videos seen and downloaded would stir a deep sense of revulsion, but we are not re-sentencing the appellant, but assessing whether the Secretary of State had shown imperative grounds for his removal.
20. The OASys report dated 16th January 2020 identified that the appellant was convicted of possession of extreme pornographic images, his age at first conviction was 58 years and that he had no previous convictions. The report identified he had at that time a sexual pre-occupation and deviant sexual interests. He was previously a lecturer in marketing and product management at a university but took early retirement owing to his deteriorating health although there is a suggestion he was dismissed following his apprehension. There was risk to children identified as follows: OVP 1 Year % Score 2, OVP 2 Year % Score 3, OVP Risk of reoffending: Low. Although his daughter was previously registered with social services that was no longer the case. The risk to children however was deemed to be *‘Upon release. When Mr DV has uncensored access to the internet. Potentially during times of stress’*.
21. Lifestyle and associates, thinking and behaviour and attitudes were marked as areas of concern.
22. On the Offender Group Reconviction Scales the appellant had the following scores:

Predictor Scores % and Risk Category	1 Year %	2 Year %	Category
OGRS3 probability of proven reoffending Low		2	3
OGP probability of proven non-violent reoffending Low		4	7
23. There is clearly a threat to public security but it must be of a particularly high degree of seriousness, **Tskouridis** at [41].

24. We do not underestimate the seriousness of the offences as described. Although the appellant was recorded as low risk of reoffending this, we acknowledge, is not 'no risk'; even if there was a low risk of reoffending the risk of serious harm to children was recorded in the OASys report as high and we have considered both the likelihood of re-offending occurring and the seriousness of the consequence if it does, as per **Kamki** [2017] EWCA Civ 1715. The offences of which the appellant has been convicted are very serious but we are not satisfied in the light of the OASys report which we have studied with care and the overall circumstances, there is a *particularly* high degree of seriousness such that it falls into the category of 'imperative grounds'.
25. We have taken full note of the sentencing remarks but they still, in the light of the sentence do not, in our view, transport this offending into the extremely serious category envisaged by **Tsarkouridis** or **Hafeez**. The appellant was convicted alone and there was no indication that he was involved in distribution or gang organisation. There was no indication that he had been convicted of previous offences.
26. Although not convicted of a contact offence, we note the OASys report recorded a high risk of serious harm to children; but as **Hafeez** indicates we must concentrate on the present and future risk to the public.
27. We carefully considered the content of the OASys report dated 16th January 2020, which recorded that the appellant stated at the time of the offending he had emotional and relationship difficulties and an inability to continue working. Section 2.12 identified no pattern of offending and at 2.13 his offending was not seen as an escalation of offending. Despite the reference in the report to accommodation difficulties he had his own inherited property down the road from his wife and children. His problems identified in the report were emotional and relationship difficulties with his wife, lifestyle and associate problems, and thinking and behaviour linked to offending behaviour and attitude difficulties. He described his difficulties as in part stemming from his own sexual abuse as a child and adjusting to an inability to continue work. We note from the evidence that he has been undergoing therapy. Nonetheless at 2.6 of the report it was accepted that he recognised the impact and consequence of offending on his victims and albeit his deviant sexual interests posed a high risk to children, he was willing, and educationally clearly able, to engage with 'offence focused work'. Albeit the report noted risk taking at 11.2, it also assessed that he had no difficulties with impulsivity. He has no drug or alcohol misuse issues and no emotional problems save for suicidal thoughts (although this again appeared somewhat contradictory). Despite the problems of behaviour and thinking and attitude it was specifically recorded in the report at 13.4 that he understood the importance of completing programmes to address his offending.
28. In the OASys report the appellant was described as very motivated to address his offending and in terms of capacity to change and reduce offending very capable of doing so.
29. At the hearing before us the appellant confirmed that he was subject to internet surveillance by the police and that his mobile phone was also regularly checked.

30. In the OASys report reduction of the risk was said to constitute '*Offending behaviour work to challenge/address sexual interests, monitoring of internet use*'. We note that the appellant has been under licence since his release from prison (at least for the remainder of his sentence of 10 months) although this is relatively recent but moreover the appellant was identified by the OASys report as being subject to Public Protection Manual restrictions on communications. The appellant has been recommended for programmes and he was to be assessed for the Healthy Sex programmes, be 10 months on licence, subject to conditions and supervised/managed via probation and Police and subject to internet disclosure. As the OASys report recorded, the appellant attended the Lucy Faithful foundation after his offending was discovered. The appellant is on the Sex Offenders Register for 10 years which will monitor his whereabouts and activities. We consider his present threat or if it was genuine and "realistic one".
31. Despite the seriousness of the offence, and we do not ignore the risk to children being described as high, we conclude overall that although expulsion may be desirable in the interests of public security it is not imperative. We do not consider that the offending as reflected in the sentence or sentencing remarks or OASYS report 'reaches a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it'.
32. The reference to 'present' threat must be an assessment of conduct at the time of decision and date of the hearing and we conclude that the appellant has taken steps during and after conviction to reduce the present threat. The appellant confirmed in his witness statement that he himself enquired into and had every intention to attend courses prior to his release from prison but there is evidence within the bundle from the HM Prison and Probation Service dated March 2020 to the effect that Covid scuppered the running of the Horizon programme, and he was therefore not able to attend. We consider that had he been the threat asserted every effort would have been made to ensure that he would be included on any future course, but this does not appear to have occurred. He has however, self funded and completed, according to the letter dated 25th April 2019, of Ms Cristina Coque of the Lucy Faithful Foundation, a child protection charity, an individualised course entitled 'Inform Plus' which addressed 'understanding the offending behaviour', compulsive addictive behaviour, victim awareness empathy and relapse prevention. We accept that this demonstrates remorse and rehabilitation which in turn diminishes the prospect of reoffending. We conclude that the threat the appellant poses is not exceptional; he is not part of organised crime and nor is he accused of being a barrier to the fight against crime in connection with online child abuse. Although the harm from reoffending is said to be 'high' the courses offered (or lack of them) to the appellant do not bear reflect a 'threat to public security, that is a threat is of a particularly high degree of seriousness'.
33. We also note that the appellant has signed the sex register in the UK which assists the police in protecting the public and his internet use is monitored. Although this could indicate the risk from the appellant, we conclude that in fact it reduces the risk of threat from him. In all the circumstances although we have concentrated on present and future risk to the public, particularly a section of the public that is children, the

circumstances as we have outlined, cause this individual case, in our view, not to fall within the category of exceptional. As the appellant confirmed he has, since committing the offences, albeit before the OASys report, undergone therapy and his wife is fully supportive of his rehabilitation and she herself has attended the Lucy Faithfull Foundation course. We accept that her presence was not an inhibiting factor in relation to the offences themselves at the time, but she is now fully cognisant of the offending. The appellant has indicated remorse in relation to the impact that his offending has had, and it is evident that this had had a very considerable impact on his family life. In accordance with **HA (Iraq)** [202] EWCA Civ 1176, we are duly cautious about making findings on the risk of re-offending based on mere assertions or undertaking of prison course but as indicated above, the appellant himself appeared to organise, pay for and attend the course with the Lucy Faithfull Foundation.

34. At the hearing Mr Stedman initially acknowledged that should we find against the appellant on the first stage of whether he falls within the 'imperative grounds' the decision to remove the appellant from the United Kingdom would be proportionate save that in the light of Section 55 of the Borders and Nationality Act the best interests of the children should be considered. As we have found in the appellant's favour we have not ventured into a detailed consideration on proportionality suffice it to say the appellant lived in the UK since 1961, and for a very long time, his health is deteriorating and his family immediate family, his wife and children live here. According to their statements his wife and children are extremely attached to the appellant and reliant upon him, and from their statements it would appear to be in their best interests for him to remain in the United Kingdom, but we acknowledge in the circumstances their interests are not paramount.
35. In view of the above reasoning we allow the appeal of Mr CV under the Immigration (European Economic Area) Regulations 2016.

Helen Rimington

Judge of the Upper Tribunal Rimington
Immigration and Asylum Chamber