Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00006/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 November 2018	**On 22 November 2018**

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE McWILLIAM

Between

MR MUSTAFA ER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Harding, Counsel, instructed by Fortwell Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Turkey. His date of birth is 5 January 1972. He was made subject to a deportation order on 20 December 2016 under Regulation 19(3)(b) of the Immigration (European Economic Area) 2006 Regulations ("the 2006 Regulations") following a conviction for a sexual assault on a child on 20 October 2016. The Appellant appealed against the deportation order. His appeal was allowed by the First-tier Tribunal (the "FTT").

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2. The Secretary of State was granted permission to appeal against the decision of the FTT. We found that the judge materially erred for the reasons we set out in our decision of 21 August 2018. They read as follows:-

> 14. The evidence before Judge Andrew was scant. There was no PSR or OASys report. The OASys report before us post-dates the hearing before Judge Andrew. What reports were in existence and why they were not before the judge is not entirely clear to us. In any event, there was evidence, albeit brief, in the letter of 21 March 2017 from Mr Joels that two dimensions of risk had been evaluated by the Probation Service. The judge recorded this and acknowledged that should the Appellant re-offend this would pose a medium risk of harm to children and members of the public. However, the judge in our view, did not grapple with this assessment of harm and how it affected the overall risk. The decision was based on the evaluation of risk of re-offending which was low without regard to the assessment of harm (the risk of harm is to teenage girls and the nature of the harm is sexual assault including touching and grooming as identified in the OASys report).
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> 15. We acknowledge that the facts in *Kamki* [2017] EWCA Civ1715 are distinguishable. The Appellant in that case was convicted of rape and did not accept responsibility. We proceed on the basis that a judge should look at both likelihood of re-offending and the seriousness of consequences if it does. We accept that this was a concession made by both parties in *Kamki* and did not form part of the core decision of the Court of Appeal. However, it was not advanced by Mr Harding that this was not the correct approach.
>
> 16. We do not accept that the only available challenge to this decision is on perversity grounds. It is clear to us that the judge failed to consider a material matter; namely the assessment of serious harm when considering the threat posed by the Appellant. It is our view that she failed to grapple with the evaluation by the probation service, the implications of it and the possible risk factors which impact on risk generally. Whilst it is possible that having considered the combination of evaluative assessments, a judge may reach the overall conclusion that risk of re-offending was low, there is a need to engage with the whole assessment and reach a reasoned conclusion. The judge did not adopt this approach.
>
> 17. The error is material. We set aside the decision to allow the appeal under the EEA Regulations. It was clear to us that we needed up to date evidence to properly assess the threat posed by the Appellant. We adjourned the hearing with a view to remaking the decision.
>
> 18. The judge accepted that the marriage was not one of convenience. There was no challenge to this by the Secretary of State in the grounds. At the hearing before us, Mr Melvin did not seek to undermine this finding. The finding is maintained.

3. The matter came before us on 6 November 2018 for a substantive hearing during which we heard evidence from the Appellant and his wife, Mrs Aija Berezanina, a citizen of Latvia. Both gave evidence through interpreters, Mr Er through a Turkish interpreter and his wife Russian.

4. The Appellant's immigration history is that he entered the UK unlawfully. He was apprehended on 29 December 1999. He lodged an application for asylum in 2000 which was refused in 2001. His appeal against this decision was dismissed. He became appeal rights exhausted on 18 February 2003. He did not leave the UK. He was detained as an overstayer on 3 May 2010 and removed to Turkey on 18 May 2010.

5. On 30 September 2010 he married Mrs Berezanina in Turkey and he returned to the UK with her as her non-EEA national spouse. It is not clear the date he returned; however, he lodged an application for a residence card as a non-EEA national spouse on 26 April 2011. This was granted on 12 July 2011, expiring on 12 July 2016.

6. On 20 October 2016 the Appellant was sentenced for an offence of sexually assaulting a 13- year old girl. It was as a result of this offence that the Respondent decided to make a deportation order. The offence was committed on 21 November 2013. The Appellant pleaded guilty on 20 May 2014. He was sentenced to three years imprisonment on 20 October 2016. The judge made a sexual harm prevention order ("SHPO") prohibiting the Appellant from contacting either directly or indirectly the victim and ordering that he must not have any supervised contact with any young person under 16 except in the presence of that child's parent or guardian or other appropriate adult who has knowledge of his sexual offending. The duration of the SHPO is five years. It expires on 20 October 2021. The Appellant must register his name and address on the Sex Offender Register as required under the Sexual Offences Act 2003 for an indefinite period. The Appellant's licence expired on 19 April 2018.

7. The judge's sentencing comments are as follows:-

> "It was a chance meeting in the park. You were drinking vodka. You gave vodka to the children and you then sexually assaulted [Y]. The impact of that upon her I don't need to elaborate on. It's obviously something that affects her significantly.
>
> I've read a presentence report and I accept that this was an opportunistic offence. You had [Y] telephone number on you, your mobile. You have been in contact with her because you worked in the area where she lived and there is an element, therefore, of you knowing her prior to this incident but I repeat that there appears to be no planning involved.
>
> In those circumstances, it is agreed that this is a category 3A offence on the guidelines. That gives a starting point of four years which is aggravated by your use of drink and the vulnerability of that child to four and a half years.
>
> So far as credit is concerned, the forensic evidence was served at a very late stage of the case and you immediately notified a guilty plea. I'm therefore going to give you full credit, which means … the sentence is three years' imprisonment)."

8. We do not have a copy of the indictment or certificate of conviction. However, it is clear to us that the offence was one contrary to Section 9 of the Sexual Offences Act 2003 which is sexual activity with a child. This offence was triable only on indictment as a result of the circumstances of the allegation against the Appellant, namely, that he penetrated the complainant's vagina with his fingers and as a result of the aggravating feature of penetration the maximum sentence was 14 years' imprisonment on indictment. The Appellant was released immediately on 20 October 2016 having served his sentence. He remained in immigration custody until 18 January 2017.

9. There was before the sentencing judge a presentence report (PSR). Regrettably it was not before us. We had an OASys Report (the "report") which was prepared by a probation officer, Katie Breeden on 19 July 2018. The parties relied on the report in submissions. It is necessary for us to go through it in some detail. Ms Breeden had before her the PSR and CPS papers. The report draws a comparison between the Appellant's attitude earlier in the criminal proceedings with those on "termination," which we understand to mean when she met with him to prepare the report of 19 July 2018 after the expiry of his licence.

10. The details of the offence are set out at paragraph 2.1 of the report. They are taken from CPS documents. The Appellant with intent sexually penetrated the vagina of a girl aged 13 with his fingers. He had been drinking a bottle of vodka in the park alone to celebrate a job offer. He was joined by the victim and her friend. He knew the girls due to them being customers in the chip shop where he worked in King's Lynn. The girls drank vodka with him and the victim became inebriated and it was at this time the offence occurred.

11. At 2.4 of the report the following is stated when considering the victim perpetrator relationship:-

> "Grooming took place over a significant period of time, which led to the victim feeling that Mr Er was someone who she could trust … victim was under age and may have been intoxicated through drinking from Mr Er's vodka bottle. It could also be said that there was some degree of trust as the girl knew Mr Er as she was a regular customer at the chip shop in the borough of King's Lynn where he worked on the counter."

12. At 2.5 of the report the impact of the offence on the victim is described as follows:-

> "The victim was taken to hospital with hyperthermia and intoxication after the offence and she would have been emotionally distressed. It must be noted that the offence may have psychological impact on the victim which could affect her future behaviour/ability to form relationships/attachments."

13. At 2.6 in answer to the question "does the offender recognise the impact and consequences of offending on victim, community/wider society?", the answer is in the negative. At 2.8 the question is asked why did it happen – evidence of motivation and triggers and the following is stated in response:-

> "There was grooming involved and Mr Er was sexually attracted to the victim. He used the alcohol as an disinhibitor to carry out possible sexual fantasies. In addition there may have been some planning if he knew the victim frequented the park. Mr Er abused his position of trust as an adult that had developed a social relationship with the victim."

14. At 2.11 the question posed is whether the offender accepts responsibility for the current offence and the answer given is in the positive. The next question posed is how much responsibility does he acknowledge and does he blame others or minimise the extent of his offending? In answer to this the following is stated; "Mr Er accepts partial responsibility as he attempts to minimise his actions by stating that the victim had stated she was older." On termination the position is recorded as follows:- "Mr Er now accepts full responsibility for the offence. He does not seek to minimise his behaviour and recognises that the impact for the victim would have been significant".

15. At 2.14 of the assessment under the box which asks for identification of offence analysis issues contributing to risks of offending and harm the following is stated:-

> "Although this Mr Er's first conviction, there is a serious offence committed against a 13 year old girl. Mr Er was heavily intoxicated at the time of the offence which may have acted as a dishibiting factor. However, the fact that he had the victim's telephone number and that he would call her suggests he had some sort of interest in her and this may have been of a sexual nature. Mr Er denies this and stated he had no sexual interest in his victim. This will be explored further during supervision sessions."

16. The report considered whether certain issues were linked to offending behaviour and concluded that accommodation, education, training, financial issues, lifestyle and association, emotional well-being were not linked to offending behaviour. However, within this part of the report it is stated that, "When the Appellant was employed as a part-time chef in a fish and chips kebab shop this is where the grooming occurred.

17. At section 6 of the report relationships are considered. It is stated that there are some problems with the Appellant's current relationship and some problems with previous experience of close relationships and the following is stated at 6.9:-

> "The current offence did involve an association/friendship with the victim. Whilst nothing specifically untoward happened during that friendship, given their respective ages, the fact that the victim was under age, that Mr Er was a married man, in my assessment Mr Er did experience some attraction towards the victim; Mr Er has accepted that it was wrong for him to keep her mobile phone number. In this respect it could be said he formed an inappropriate association/friendship with a minor which contributed significantly to the offence.
>
> Mr Er was previously married but divorced; he has two children (14 and 17) from that marriage and they live with the mother in Turkey. He has been married to his current wife since 2010 and they have been together for nine

years in total. Mr Er has denied there being problems in his marriage, although he does admit he has not told his wife the full details of the offence. He gave his explanation for this as because he was ashamed of his actions. This will be explored further during supervision."

18. It is concluded that relationship issues are linked to the Appellant's risk of serious harm, risks to individuals and others and that relationship issues are linked to his offending behaviour. However, it is noted on termination that he disclosed the offence in full to his wife and she remained supportive and the conclusion is that relationship issues are linked to the risk of serious harm and to offending behaviour.

19. There was no drug misuse reported. At section 9 of the report alcohol misuse is considered and in respect of that the following is stated at paragraph 9.3:-

> "Mr Er's intoxication was a significant factor in this offence. It affected his judgment in allowing the under-age girls to drink but also – in my view – disinhibited his romantic/sexual feelings towards [the victim].
>
> The writer of the PSR stated Mr Er had disclosed a drink dependency (vodka) from about six-seven years ago when he was capable of drinking a bottle of vodka in a day. During supervision, Mr Er has denied making the statement and he is insistent that the interpreter had translated incorrectly at that time. He stated he used to drank occasionally and had stopped drinking since the offence occurred. It must be noted that the PSR writer is a very experienced member of staff and it is very unlikely that the interpreter misheard. Mr Er was challenged at length, but he continued to maintain his version of events. This will be explored further during supervision sessions.
>
> It is my opinion, Mr Er did have a ongoing relationship with alcohol which was a contributing factor in the commissioning of this offence. He clearly does not think he has a problem, otherwise why would he be sitting in a park drinking alcohol? It may be that he is a binge drinker.
>
> Therefore, alcohol misuse issues are linked to Mr Er's risk of serious harm, risks to the individual and other risks. Alcohol misuse issues are also linked to his offending behaviour."

20. On termination it is recorded that the Appellant now abstains from alcohol and that intervention has been completed to address it and there is no evidence to suggest otherwise. It is also stated that the Appellant is aware that consuming alcohol impacted his thinking and behaviour and appears motivated to avoid drinking. The overall conclusion is therefore that alcohol misuse is not linked to the risk of serious harm or offending behaviour.

21. In respect of thinking and behaviour this is considered at section 11 and it is recorded that the offence was not impulsive and that the Appellant has "tentative romantic/sexual feelings towards [the victim] which might explain why he had her mobile number".

22. On termination it was stated that he had engaged well with intervention to address his offending and that he could now identify why it had happened and did not seek to minimise his behaviour. When challenged about the offence he is now able to recognise that the impact of the victim would have been significant and that his behaviour was wrong. It is stated that he shows motivation to avoid any further antisocial behaviour.

23. The risk of reoffending was assessed as low (see page 27 of the report) however the risk of serious harm was assessed as medium. The report identifies at R10.1 teenage girls being at risk and that the nature of the risk is sexual assault, touching and grooming. It is stated that risk is likely to be greatest "long-term and more so when Mr Er is under the influence of alcohol. Also when unsupervised around children". The report concludes that intoxication and developing friendships with girls under the age of 16 predominantly teenagers are circumstances which are likely to increase the risk and factors that are likely to reduce the risk are abstinence from alcohol, not developing friendships with girls, awareness of the dangers and supervised contact with children. The Appellant was assessed as posing a medium risk of serious harm to children and the public.

24. A medium risk of serious harm is defined in the report at page 32 as :-

> "There are identifiable indicators of 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, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse."

25. We had before us the Appellant's bundle prepared for the hearing which contained the original witness statements that were before the FTT. There was an e-mail from Katie Breeden (page 79 of the Appellant's bundle). She responded to an e-mail from the Appellant's solicitors asking whether the position as outlined in the OASys Report remained the same. Her response was as follows:- "low risk of reoffending. Medium risk of harm to public and that won't ever change unless he reoffends". The Appellant also relied on the letters from the National Probation Service which were before the FTT.

26. The Appellant gave oral evidence. He adopted his witness statement. The Appellant's evidence is that he has complied with the orders made by the Crown Court Judge.

27. In oral evidence the Appellant gave some details about the offence. He described drinking vodka in the park and he gave evidence that one of the girls started kissing him and that he kissed her back. She received a call on her mobile phone and he was hit and lost consciousness. When he came round he saw police officers and he was taken to the police station. He expressed his embarrassment and apologised for the incident. He regretted what happened, stating that it had ruined his family life and he would never do it again.

28. In cross-examination he was asked more questions about the offence. He stated that he thought the girls were over 18 because that is what they told him. Had he known that the girl was 13 he would not have got involved. He confirmed that he knew the girl from his work in the fish and chip shop. He stated that they would come in and he would buy things and he also knew them from the park.

29. In questions from the panel he stated that he had known the victim for about a year or two years before the incident and that he knew her brother and had known him for about three years. He was not sure how old her brother was at the time but he thought he was aged 21. He confirmed that he had the victim's telephone number in his phone but that he had deleted it. He said he had it in his phone in order to see an older girl. He had obtained it when he was sitting with the victim. She asked for his number and she gave him hers. They were friends. He would not have been friends had he known her age. He confirmed that he was 41 at the time. He made a big mistake that day. He regrets it.

30. In cross-examination he stated that he wanted to explain something and was given the opportunity to do so. He then told us that he did not really accept the accusation and had only done so because of his lawyer. His lawyer had advised him to plead guilty, telling him that he would only receive a minor punishment but if he did not plead guilty he could receive up to twelve years' imprisonment. He was then asked whether he accepted that he committed a sexual offence against a 13- year old girl and in answer to that question he stated again that had he known the girls' age he would not have approached them and that he did not force anyone to do anything. He pleaded guilty on the advice of his lawyer. He confirmed that he told the probation officer that he had taken responsibility for his actions. He stated that he had to plead guilty but if he had known the girl's age he would not have approached her. She looked mature and did not tell him her age. He said that he did not force her to do anything against her wishes. Had he known she was 13 he would accept responsibility for the offence.

31. The Appellant lives in a shared house with his wife. They occupy a room. The house belongs to a relative.

32. The Appellant's wife Mrs Aija Berezanina gave evidence. She adopted her witness statement of 4 April 2017 as her evidence-in-chief. Her date of birth is 3 April 1969. She is employed and currently exercising treaty rights. In her witness statement her evidence is that her husband accepts that he made a mistake and he regrets what he has done. Their marriage has had ups and downs but she decided to carry on with it and forgive him bearing in mind their marriage vows.

33. In oral evidence she confirmed that her relationship with her husband is the same as it has always been. She does not think he is a sexual predator. The incident took place in a park and was more to do with alcohol consumption than anything else. She was asked whether she knew that her husband knew the victim and her brother prior to the offence and she stated that she had never seen these people and could

not even imagine what they looked like. She would not go to Turkey should he be deported

34. We heard submissions from both parties. In oral submissions Mr Melvin relied on the Reasons for Refusal Letter and the written submissions. The Appellant was only released from prison in January 2017. His licence expired as recently as 19 April 2018. It is maintained that the Appellant is a danger to the public, particularly young girls and given his previous behaviour there is a clear future medium risk of harm if his relationship is in difficulties or he reverts back to having alcohol problems to children and the public. It is submitted that the Appellant represents a present and sufficiently serious threat that affects one of the fundamental interests of society. It is clear from the evidence that he groomed the child, giving her alcohol and then assaulted her, leaving her to need hospital treatment.
35. Mr Melvin relied on the Home Office policy entitled EEA Decisions on Grounds of Public Policy and Public Security Version 3.0 (published for Home Office staff on 14 December 2017). The SHPO is in force till October 2021. These are imposed when the court concludes that there a risk given the offence committed. It is difficult to see how the Appellant could believe that the victim was five years older than her age. It is difficult to see how he could have accepted his responsibility when his evidence is that he pleaded guilty on the advice of his lawyer. The Respondent takes the view that serious sexual offences against children are serious and warrant deportation proceedings in this instance. There is little evidence of integration aside from his marriage and his employment in a fish and chip shop. He spent 26 years of his life in Turkey. He has cultural links to the country and family members there, including an ex-wife and sons. The Appellant entered the UK illegally. He has not shown a degree of social or cultural integration and has little regard for the law.There is no evidence of health problems, either physical or mental.

36. Mr Harding made oral submissions. He referred to a website relating to the assessment of risk of harm with reference to medium. After the hearing he provided the printout. It contains information which is within the OASys Report and which we have taken note of in terms of the definition of medium risk of harm. It is guidance from the NOMS website and indicates that an assessor seeking evidence on which to make judgments about the level of risk posed by an individual offender drawing on an accurate appraisal of all the relevant risk factors and analysis of how likely something is to occur and in what circumstances, the potential impact and how that impact will be affected by particular circumstances and how imminently the act is likely to occur. It defines medium risk of harm and repeats what is in the OASys Report and what we have set out above.

37. The applicable legal framework is Regulation 21 of the 2006 Regulations

Decisions taken on public policy, public security and public health grounds

21.— (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 permanent right of residence under regulation 15 except on serious grounds of public policy or 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 necessary in his best interests, 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 [F1] .

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation F2 or is not a disease [F3 listed in Schedule 1 to the Health Protection (Notification) Regulations 2010] shall not constitute grounds for the decision; and

(b) if the person concerned is in the United Kingdom, diseases occurring after the three month period beginning on the date on which he arrived in the United Kingdom shall not constitute grounds for the decision.

38. Mr Melvin relied on the guidance and that he relied on the guidance with specific reference to page 15 of 43 which is entitled, genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and reads as follows:-

"The threat they pose must be a genuine, present and sufficiently serious one affecting one of the fundamental interests of society. These factors are considered in turn in this section.

Genuine: the threat must be a realistic one.

Present: the threat must exist but it does not need to be imminent. An indication of a present threat may include intelligence or any precautionary measures which have been imposed on the individual for example a licence condition imposed because there is a genuine and present risk. Even a low risk can constitute a present threat, especially where the consequences of any offence could be serious. An argument by the individual that they pose a low risk of offending should not be determined automatically in their favour when making a public policy decision for the purpose of determining whether a person is a present threat while they are detained, the fact that they are detained should not be taken into account. The threat does not need to be imminent at the point of release.

Sufficiently serious: the threat must be serious enough to affect one of the fundamental interests of society but does not need to be a serious threat.

It is also not necessary to demonstrate that an individual is likely to commit a specific type of offence.

When considering whether an individual poses a threat, you may also consider the following factors.

Nature of the offence: in deportation cases the Government's view is that certain types of offences weigh in favour of deportation. Those offences typically result in a custodial sentence or a requirement to sign the Violent and Sex Offenders Register (ViSOR). This includes, violence, sexual harm, a gun and drug related offences.

Length of sentence: in most cases, the length of sentence will provide a strong indication of the severity of the offence, although each case must be considered on its individual merits. A period of imprisonment, especially a life sentence with a particularly long tariff is confirmation from the sentencing court as to the danger posed by the individual. Where the individual is held as the highest category of prisoner (a position which is reviewed annually) and assessments of their risk are such that the person requires the most secure accommodation on the prisoner state, this is on the basis of the risk posed to society if they escaped.

Rehabilitation: the duration of any rehabilitative efforts will be relevant to the public policy decision. Where such efforts are in their infancy (for example a few weeks in the community, or a few weeks undertaken) these should not be considered to be determinative of the question of a risk of recidivism. Where an individual relies on rehabilitative prospects in their country of origin compared to the UK, any differences in rehabilitative provisions will be minor, unless there is strong evidence to the contrary."

39. Mr Harding submitted that in the absence of any legal analysis or case law relating to the standard of proof required to establish Regulation 21(5), the burden of proof in his view, should be on the balance of probabilities. The issue is whether on the balance of probabilities, there will be a change in circumstances which would cause the Appellant to reoffend. He also submitted that an SHPO can be imposed for less serious offences such as voyeurism and exposure and does not indicate that there is a risk of reoffending. The point of them is to prevent risk and the imposition of the order limits risk factors.

40. Mr Harding referred to the judge's sentencing remarks and the terms of the SHPO with which the Appellant has complied. Whilst it was a very serious offence the Appellant as recorded in the OASys Report at 2.11 accepted full responsibility. The Secretary of State cannot on the facts of this case establish that the Appellant's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Mr Harding accepted that should the appeal fail on that basis and the Tribunal has to proportionality he would not be able to persuade us that the Appellant could come within S.117C of the 2002 Act. We understood from this that he conceded that the Appellant could not come within exceptions 1 or 2 or s.117 C (6) of the 2002 Act.

Conclusions

41. The Appellant in this case committed a very serious offence aggravated by the use of alcohol and further aggravated by the fact he supplied alcohol to the victim. It appears that the assault took place in the presence of the child victim's friend in a public park. She was aged 13 and he was aged 41. His own evidence is that he knew the victim for a year or two. It is very difficult to accept that he believed that she was 18 bearing in mind his own evidence that he was acquainted with the family for some time and hence must have known the victim from the age of 11/12.

42. The independent evidence before us relied on by the Appellant to support his case that he presents a low risk of re-offending was wholly undermined by the Appellant's evidence at the hearing. We conclude that the Appellant was not truthful to Ms Breeden. Had he told her what he told us, it is in our view very unlikely that she would have reached the conclusions she arrived at in respect of risk. It is likely she would have concluded that there had been very little change on expiry of the Appellant's licence. For this reason, we attached limited weight to the conclusions in the OASys report.

43. We were not impressed by the Appellant's evidence. We found him not credible. We accepted his wife's evidence, but she, like the probation officer, has taken at face value, what the Appellant has told her. We accept that the Appellant is sorry for his conduct. Having considered his oral evidence, it is clear to us that he is sorry to have been arrested for the offence and to have served a custodial sentence. He is sorry for the disruption to his life and for the considerable embarrassment the incident has caused him. We are not satisfied that he feels remorse for the impact on the victim in this case. It simply was not apparent from his oral evidence. His oral evidence before us was not consistent with what was recorded by the probation officer in the OASys assessment. The Appellant did not in evidence before us accept responsibility for the offence. His account was that he thought that the victim was an adult and that she told him that she was aged 18.

44. The Appellant's oral evidence significantly undermined the conclusions in the OASys report specifically those about remorse, and responsibility. Whilst we accept that whatever the Appellant genuinely thought about the victim's age could never provide him with a defence and a child could never consent to sex, there is no suggestion that he pleaded to the offence on the basis that had any reasonable cause to believe the victim was aged 18. There is no evidence before us that he was sentenced on this basis or that he entered a guilty plea on this basis. His own evidence before us does not support that he did not know the child's age. We do not accept that the Appellant was even reckless as to her age. Based on what he told us, we conclude that he was wholly aware that the victim was a child. His evidence before us discloses a denial of essential elements of the offence, a lack of honesty and an ability to effectively hoodwink the probation officer.

45. The probation officer had a copy of the evidence from the CPS and the PSR from which conclusions were reached about grooming. The Appellant's evidence before us also conveniently ignored that the offence was aggravated by an element of grooming and that he was sexually interested in a 13-year old child. Whilst we accept and assess risk on the basis of the sentencing comments of the judge which make it clear that there was no planning involved in so far as the meeting in the park is concerned and the commission of this offence, the evidence was that there was an element of grooming in so far as the Appellant had struck up a friendship with a 13 year old girl and had her number in his mobile phone. The Appellant's evidence before us failed to engage with this and again is at odds with his oral evidence that he thought he victim was an adult.

46. Whilst it is true that the Appellant since his release has not committed any further offences it must also be borne in mind that he was not released until 18 January 2017 and since then a deportation order has been hanging over him. Equally, we take into account that this is the first offence committed by the Appellant.

47. The probation officer was satisfied that the Appellant was no longer drinking and that was his evidence before us. His offending behaviour is linked to alcohol. The probation officer accepted what the Appellant told her. We approach this evidence with caution having already concluded that the Appellant has been less than candid with the probation officer and this reduces the weight we can attach to the conclusions in the report and his evidence. There was no reliable evidence supporting the Appellant having given up alcohol. In this respect we note the what was stated in the PSR and recorded in the report by Ms Breeden regarding the Appellant's denial that he had disclosed drink dependency to the author of the PSR.

48. We were not satisfied that the Appellant fully disclosed the details of the offence to his wife, contrary to what he told the probation officer because of her response to the question from Mr Melvin whether she was aware that the Appellant had known the victim. This is an aggravating factor of the offence which the Appellant in our view failed to disclose to his wife. Whilst the Appellant has the support of his wife and it was clear from her evidence that the relationship is still ongoing we are not satisfied that the relationship is sufficient to have a meaningful impact on risk of reoffending. It did not prevent the offence in 2013. There is nothing that has arguably changed since then other than the Appellant's evidence that he no longer consumes alcohol. The risk of offending and risk of serious harm is affected by alcohol misuse. There is no independent reliable evidence to support that the Appellant has given up alcohol and is unlikely to relapse. In respect of the Appellant's wife's evidence, we do not believe that she has intended to mislead us in any way, but it is clear from what she said that she is motivated by a desire not to be left alone.

49. We know from Arranz (EEA Regulations Deportation test [2017] UKUT 294 that the Respondent carries the burden and has to establish on the balance of probabilities that the Appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

50. The ancillary orders made by the judge establish in our view that the sentencing judge was of the view that he posed a risk to young girls and equally we accept that the imposition of the orders potentially reduces risk. However, the only independent evidence before us about risk is the report which we believe for the reasons given should be given limited weight. We do not feel able to adopt the assessment of risk of re-offending or harm identified in the report. We conclude that the risk is far greater than that assessed by Ms Breeden, worryingly so, having considered what the Appellant told us in oral evidence. The Appellant's evidence establishes that he is in denial about key aspects of the offence. He blames the child victim for having told him she was an adult, which is not credible in any event. He

has not accepted the element of grooming which took place and his sexual attraction to a 13 year old child. He has a problem with alcohol. It is our view that a relapse would lead to a high risk of re-offending. We are not satisfied that the evidence establishes a commitment to abstinence. We are not satisfied that a change in circumstances is anywhere near as remote or unlikely as the Appellant was able to persuade the probation officer to be the case.

51. If there is an additional burden on the Respondent at this stage as posited by Mr Harding, which we very much doubt, to establish on the balance of probabilities that there will be a change in circumstances, it has been discharged. We find that the evidence before us, especially the Appellant's own oral evidence is such that he represents a genuine, present and sufficiently serious threat to the safety of children and the rights of children to be safe from sexual attack and grooming. The Respondent has discharged the burden of proof.

52. Mr Harding conceded that he could not persuade us that if the appeal turned on proportionality, the Appellant could succeed under s.117C of the 2002 Act. We agree with him. It would not be unduly harsh for the Appellant and his wife to be separated. There are no properly identifiable circumstances that would be capable of amounting to very compelling circumstances with reference to s.117C (6). However, we assess proportionality on basis that this is a deportation under the EEA Regulations. Taking into account all factors mentioned at Reg 21 (6), there is no factor properly identified either on its own or cumulatively capable of establishing that deportation would not be proportionate in the context of an appeal under the EEA Regulations 2006. The evidence establishes that the Appellant is integrated to a limited extent is so far as he has worked here in a fish and chip shop prior to his arrest. There is no further evidence before us of integration. He has family in Turkey. He was there until 2011 and it can be reasonably inferred that he has connections there. It will be difficult for the Appellant's wife to cope with separation from her husband, but it is open to her to join him in Turkey if she wants. However, in the light of the risk he poses to young girls, deportation is proportionate.

Notice of Decision

The appeal is dismissed under the 2006 EEA Regulations.

No anonymity direction is made.

Signed *Joanna McWilliam* Date 15 November 2018

Upper Tribunal Judge McWilliam