Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05566/2019

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On 4 October 2021 *via Teams*	**On 07 January 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

EA (ITALY)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z. Jafferji, Counsel
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to were primarily the materials that were before the First-tier Tribunal, the grounds of appeal, and additional written submissions from each party, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: they were content that the proceedings had been conducted fairly in their remote form.

1. This is an appeal against a decision of Resident Judge Zucker and First-tier Tribunal Judge Moxon ("the panel") promulgated on 20 March 2020 dismissing an appeal brought by the appellant against a decision of the Secretary of State to refuse him entry to the United Kingdom under regulation 23(1) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") on 20 September 2019.

2. Although the UK's withdrawal from the European Union is now complete and the implementation period has come to an end, it is common ground that the 2016 Regulations continue to have effect in these proceedings. See the saving provisions contained at paragraph 5 of Schedule 3 to the The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020. That is because the appeal was brought and not finally determined before the conclusion of the implementation period on 31 December 2020.

3. As this appeal involves a victim of child sexual abuse, I make an anonymity direction. While the victim of the appellant's crime is entitled to life long anonymity under the terms of the Sexual Offences (Amendment) Act 1992, out of an abundance of caution I make an anonymity order in respect of the appellant and his family, so as to ensure that there is no risk that this judgment could inadvertently lead to the identification of the victim of the appellant's crime.

Factual background

4. The appellant is a citizen of Italy, born in May 2000. On 19 September 2019, following an interview at Manchester Airport, he was refused admission on the grounds that he presented a genuine, present and sufficiently serious threat to the fundamental interests of society. That was the decision under appeal before the First-tier Tribunal.

5. The background to the impugned decision is as follows. In 2015, while living in Italy with his family, the appellant penetrated the mouth of his then six year old brother with his penis. The appellant had carried out the oral rape at the encouragement of a person he met on Facebook, who he thought to be a woman. The person was in fact male. Footage of the incident was found in that person's possession, and the appellant was traced by the Italian police.

6. In 2016, the appellant moved to the UK with his family. In October 2017, a European Arrest Warrant was issued by the Italian authorities and the appellant was surrendered to Italy on sexual assault charges and in connection with making images of the sexual abuse of a child. Under domestic law, namely section 5 of the Sexual Offences Act 2003, that conduct would amount to the rape of a child under 13, and that is the terminology the Secretary of State used in the decision, although the agreed terminology before the First-tier Tribunal was that the incident was as a generic "sexual offence" (see [3.b and c]). At the interview with the Secretary of State's official at Manchester Airport, the appellant is recorded as having volunteered that he had been charged with rape (question 3) and that he had committed the rape twice (question 6) against his brother (question 7).

7. Upon his surrender to Italy, before the *Judge's Office for Preliminary Investigations*, which is part of the Brescia juvenile court, the appellant made admissions which confirmed that he accepted his criminal liability for the

allegations. He was made subject to a form of rehabilitative order which he appeared to have engaged with to the satisfaction of the prosecutor and the court. At a hearing on 13 September 2019, an individual described in the translated court documents as the appellant's "social assistant" is recorded as having informed the court that the appellant's "path" had been very positive, and that his "stay" in Italy had helped him to "grow" (page 45, appellant's bundle). The social assistant also said that "British social services took charge of [the appellant's] brother's situation for a time and have already closed the operation…" The Public Prosecutor requested that judgment be entered recording a "positive outcome of the trial", and the court closed the "report".

8. A further document entitled *Explanatory Statement* is annexed to the court's order. It gives additional detail in the following terms:

> "Review and evaluation of the procedural findings…
>
> Noted that at the preliminary hearing of 02/09/2018 [the appellant] was admitted, at his request to the abbreviated trial;
>
> Noted that, by order of 27 April 2018, the college ordered the suspension of the trial until the 31/08/2019 and the trial of a minor pursuant to art. 28 of the Presidential Decree 448/88, in relation to the alleged crimes against him;
>
> Noted that, during the suspension period, the final report from US S M Brescia has been obtained and today's hearing was scheduled to result in which, the parties agreed on declaratory effect of extinction of the offences;
>
> Noted beforehand that, based on the sources of evidence emerging from the c.n.r and related Attachments, as well as admissions made by the defendant himself, it is possible to affirm the criminal liability of [the appellant] with regard to the offences charge;
>
> From the reports on the documents show that the defendant fulfilled its commitments during the probation period by demonstrating that he was aware of the negative value of the actions committed;
>
> Considered that, in the light of the young man's behaviour and the evaluation of his personality, Having assessed the path of reflection and maturation carried out, it must considered that the test had a positive outcome;
>
> Seen and applied the art. 442 and 529 C.P.P.
>
> P.Q.M
>
> Declare that he should not proceed against [the appellant' for the offences ascribed to him because they are extinct due to the positive outcome of the trial…"

See page 47 of the appellant's bundle.

9. I pause here to note that there was no expert evidence before the First-tier Tribunal as to the quoted provisions of the Italian criminal code and their purpose and effect, nor as to what was meant by the abbreviations throughout the translation, such as "c.n.r" or "P.Q.M".

10. The reasons given by the respondent for refusing to admit the appellant were that he posed a "genuine, present and serious threat to public safety." Addressing proportionality, the decision noted that the appellant had spent almost two years living apart from his family in Italy, and that he had worked to support himself while on probation there. He had not stated that his parents had supported him financially during that period, and by the time of the decision, the immigration officer noted, the appellant was an adult. It would not, therefore, be unreasonable for the appellant to return to Italy. The decision continued:

> "Further, I am satisfied that removing you from the United Kingdom would act as a preventative measure as you would be living in close proximity to the child who was the subject of your abuse."

The decision of the First-tier Tribunal

11. The panel heard evidence from the appellant's father, and considered a witness statement from the appellant, who was unable to attend, this being a refusal of admission appeal. At [12], the panel found that the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, a concept defined in Schedule 1 to the 2016 Regulations to include preventing social harm, protecting the public, and acting in the best interests of a child, as the panel had summarised at [5]. The panel rejected the explanation the appellant had given in his witness statement, namely that he did not know that what he was doing was wrong. It found that he had engaged in the activity in order to impress someone else, and should have been fully aware that what he was doing was wrong. Although he had completed his probation in Italy, "there is a significant lack of documentary evidence that shows any effort to rehabilitate, any remorse or any insight into the effect of his behaviour upon his victim."

12. The panel rejected the evidence of the appellant's father that the relevant social services team would be content, and to have unsupervised contact with his younger siblings, including the victim of his offence: see [13]. At the end of that paragraph, the panel stated:

> "We are left coming to the view that it has not been established, on the balance of probabilities, that social services are or would be content with the proposed arrangement. For the avoidance of doubt, wherever the burden lies we come to the same view."

13. The panel noted that there was no evidence from the family friend with whom the appellant had said he was going to live upon his return to the UK. In any event, the appellant's father confirmed that the friend had not been told about the appellant's sexual offending and so would not be able to offer sufficient supervision: see [14]. That led to the conclusion at [15] that the appellant posed a threat to the public in the form of sexual offending towards young boys, particularly his siblings.

14. At [16], the panel explained why it had concluded that the refusal of admission was proportionate. The appellant had lived in Italy without his family for almost two and a half years. He was a healthy young male of working age who spoke Italian. His family had provided him with some financial support, and there was no reason why that could not continue. In any event, he would be able to work.

He would be familiar with the culture and customs in Italy, in contrast to this country, where he had only lived for one to two years. There was only limited evidence of social and cultural integration in the United Kingdom, given his short period of residence here, and his father had confirmed that he, the appellant, did not speak English.

Grounds of appeal

15. There are five grounds of appeal:

    a. Ground 1: The panel failed properly to consider where the burden of proof rested regarding regulation 27(5)(c) of the 2016 Regulations, and failed to give reasons and determine the appeal under the framework established by the 2016 Regulations;

    b. Ground 2: The panel failed to determine the "constituent parts" of regulations 27(5)(c) of the Regulations;

    c. Ground 3: The panel failed properly to assess whether the appellant's refusal of admission was proportionate;

    d. Ground 4: The panel failed to take relevant matters into account, namely the views of the Italian court;

    e. Ground 5: failure properly to assess and consider the sponsor's evidence.

16. Permission to appeal was granted by Upper Tribunal Judge Coker on all grounds in the following terms:

> "…it is arguable that there was little evidence before the FtT to support the respondent's contention that the appellant was a genuine, present and sufficiently serious threat. It is arguable [that] the FtT failed to properly address the evidence before it in reaching is decision on proportionality given the evidence that was set out in the Italian documents."

Submissions

17. Although the grounds of appeal were wide-ranging, Mr Jafferji focussed his oral submissions around two key propositions. His primary submission was that the panel failed to have regard to the materials from the Italian legal proceedings. There was a unanimous decision in the Juvenile Court that resulted in the criminal proceedings in Italy against the appellant being brought to an end, based on the appellant's satisfactory completion of the probation process. The Italian court found that the appellant had accepted responsibility for his actions and, while that did not mean that the *only* finding open to the First-tier Tribunal was to reach similar findings, it was nevertheless incumbent upon the panel expressly to take the Italian evidence into account. It was simply incorrect for the panel to state at [12] that, "there is a significant lack of documentary evidence that shows any effort to rehabilitate, any remorse or insight into the effect of his behaviour upon his victim", for such evidence *did* exist, submits Mr Jafferji, in the form of the record of the Italian proceedings.

18. Mr Jafferji's secondary submission was that the panel treated the appellant as though *he* were subject to the burden of demonstrating that he was *not* a

genuine, present and sufficiently serious threat, rather than it being a matter for the Secretary of State to establish that he *was*. The panel did not direct itself as to where the burden lay, and adopted a casual, catch-all approach to burden of proof at paragraph [13] when it said, "wherever the burden lies, we come to the same view." An analysis of the operative reasoning adopted by the panel demonstrates that, in practice, it expected the appellant to demonstrate why he should be admitted, rather than requiring the respondent to demonstrate why he should not. The panel's criticism of the appellant's father's "failure" to provide documentary evidence from social services underlines this error. In any event, the Secretary of State would have been better placed to use her extensive resources to make enquiries of the relevant social services team.

19. Mr Jafferji also submitted that the panel erred when analysing the appellant's evidence; he was not able to attend the hearing (his application for temporary admission in order to do so had been unsuccessful), and it was unfair to ascribe significance to his lack of remorse on the basis of a witness statement alone, submitted Mr Jafferji. Finally, Mr Jafferji submitted that the panel's proportionality assessment at [16] was infected by its failure to take all relevant factors into account. The mere fact of a previous conviction is not, in and of itself, sufficient to justify exclusion under the Immigration (European Economic Area) Regulations 2016, submits Mr Jafferji. The panel failed to ascribe sufficient weight to the appellant's age at the time of the offence, and the fact that, as a child, he was not to be held responsible for his actions.

20. In response, Mr Melvin relied on his rule 24 notice dated 1 October 2020. While accepting that the legal burden under regulation 23(1) of the 2016 Regulations lies upon the respondent, Mr Melvin submitted that it was not the respondent's role to make enquires of the social services on behalf of the appellant. The nature of the offence, and the absence of any evidence from social services was itself a clear and cogent basis to find that the respondent had discharged the burden of proof to which she was subject. The victim of the offence was a factor of particular significance, submits Mr Melvin, and even if the relevant social services team had "closed the file" on the appellant, that fell well short of establishing that they have no concerns about the appellant's prospective return to the UK, and his potential unsupervised access to his brother, which was a factor they may not have been aware of.

21. Mr Melvin submitted that the proposed host for the appellant had no idea of his criminal past, thereby entitling the panel to conclude that the appellant's living arrangements would do nothing to mitigate the risk they legitimately found that he otherwise posed. The panel addressed proportionality; the appellant's criticisms of the panel's reasoning failed to take into account the nature of the appellant's underlying offending, the identity of his victim, and the prospects for committing further offences that his proposed living arrangements would provide. Ultimately, submitted Mr Melvin, the appellant's complaint was one of fact and weight, and did not demonstrate an error of law.

Legal framework

22. Regulation 27 of the Immigration (European Economic Area) Regulations 2016 provides:

> "27.— Decisions taken on grounds of public policy, public security and public health

(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 a right of permanent residence under regulation 15 and who 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 19892.

(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.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person (“P”)

> 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

Discussion

23. As held in *Arranz (EEA Regulations - deportation - test)* [2017] UKUT 294 (IAC), the Secretary of State bears the *legal burden* of demonstrating that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. An individual subject to an exclusion decision is not subject to the legal burden to demonstrate that they are *not* such a risk; the Secretary of State must demonstrate, to the balance of probabilities standard, that they are a risk. However, the evidential burden is capable of shifting to an individual to respond to the case against them and provide evidence to demonstrate why they are *not* such a risk.

24. In *Arranz*, this tribunal applied the approach taken by the Court of Appeal in *Rosa v Secretary of State for the Home Department* [2016] EWCA Civ 14 to determining whether a marriage is one of convenience to decisions to exclude a person from the UK under the Immigration (European Economic Area Regulations) 2006 ("the 2006 Regulations"). In *Rosa*, the Court of Appeal held at [29] that while the *legal* burden to demonstrate that a relationship was one of convenience lay on the Secretary of State throughout, the *evidential* burden to prove that a marriage was *not* one of convenience shifts to an applicant where the Secretary of State had demonstrated that there was a case to answer. Against that background, at [43] of *Arranz*, this tribunal held:

> "We consider that, logically, the reasoning of the Court of Appeal in *Rosa*, which was concerned with a decision which would require the removal of the Appellant from the United Kingdom, extends to exclusion and removal decisions made under Regulation 19 [of the 2006 Regulations]. We can identify nothing in the Directive, the Regulations or in principle impelling to a different assessment. It follows that the legal burden rested on the Secretary of State of establishing, on the balance of probabilities, that the removal of the Appellant from the United Kingdom was justified on public policy grounds."

Regulation 19 of the 2006 Regulations, dealing with exclusion and removal from the United Kingdom, corresponds to regulation 23 of the 2016 Regulations: see the *Table of Equivalences* in Scheduled 7 to the 2016 Regulations. Similarly, regulation 21 of the 2006 Regulations, concerning decisions taken on grounds of public policy, public security and public health, corresponds to regulation 27 of the 2016 Regulations.

25. In *Arranz*, the tribunal rejected a submission advanced by counsel for the Secretary of State that the First-tier Tribunal in those proceedings had legitimately treated the evidential burden as having shifted to the appellant. At [24] of the First-tier Tribunal's decision in *Arranz* (quoted at [29] of the Upper Tribunal's decision) the reasoning is expressed in terms of the appellant having failed to demonstrate that he was not a risk. The judge in *Arranz* highlighted the

absence of evidence from the appellant in those proceedings addressing his underlying attitude to the terrorism offences for which he faced deportation as a factor demonstrating he continued to pose a risk. The *Arranz* judge failed to identify that it was the Secretary of State who was subject to the legal burden. By contrast, the judge had expressly treated the *appellant* as being subject to the burden of proof: see [38]. It was against that background that the Secretary of State's unsuccessful attempt to rationalise the judge's approach to reversing the burden of proof was recorded in these terms, at [42]:

> "Ms Anderson accepted that the legal burden of proof rested on the Secretary of State. She suggested, faintly, that [24] of the FtT's decision is to be rationalised on the basis that the judge, in effect, was stating that an evidential burden had transferred to the Appellant. She further submitted that in substance and read as a whole, there had been no misdirection by the FtT on this issue."

26. Mr Jafferji relied upon the above unsuccessful submission of the Secretary of State in *Arranz* to support his submission that it was improper for the panel in the present matter to have expected any form of explanation from the appellant. In Mr Jafferji's submission, the consequence of the legal burden resting on the Secretary of State is that where an appellant proffers an unsatisfactory explanation, that is not to be held against him or her. The Secretary of State bears the legal burden throughout, and she must make the case against the putative deportee, not the other way round.

27. In my judgment, properly understood, the tribunal in *Arranz* did not hold that the *evidential burden* is incapable of shifting to an appellant in a public policy or public security removal or non-admission case: such a finding would have been at odds with the shifting evidential burden which lies at the heart of determining whether a marriage is one of convenience, which was precisely the approach which the tribunal in *Arranz* held mapped over to regulation 19 (now regulation 23) cases. This tribunal in *Arranz* held that the First-tier Tribunal judge in those proceedings had not identified that the legal burden lay with the Secretary of State; indeed, the judge had stated that the burden lay with the appellant. As such, the First-tier Tribunal in *Arranz* had impermissibly treated the appellant as being subject to a *legal* burden to demonstrate that he was not a risk, rather than the other way round. The question of whether the evidential burden had shifted did not arise, for the judge had treated the appellant as being subject to the a legal burden throughout.

28. Mr Jafferji is right to submit that the panel did not identify in express terms that the Secretary of State bore the legal burden to demonstrate that the requirements of regulation 27 of the 2016 Regulations were met. Nor did the panel address the shifting evidential burden. The panel's only reference to the burden of proof is that which features at the end of [13] ("w*herever the burden lies we come to the same view*").

29. There are a number of constructions of that sentence. It could mean that the panel was not sure where the burden lay, and was not prepared or able to resolve the issue. Alternatively, it could convey a "belt and braces" approach; that the panel considered the case against the appellant to be so strong that, regardless of whether one addressed the issue from the perspective of the Secretary of State's legal burden, or the appellant's evidential burden when answering the

case advanced by the Secretary of State, the findings concerning the risk posed by the appellant would have been the same.

30. In order to resolve this ambiguity, it is necessary to address the broader reasoning of the panel, and its approach to the evidence before it, including the materials from the Italian proceedings.

31. The decision under appeal stated that the decision maker was:

> "…satisfied that the offence you have committed poses a genuine, present and serious threat to public safety… I am satisfied that removing you from the United Kingdom would act as a preventative ,measure as you would be living in close proximity to the child who was the subject of your abuse…"

32. The appellant's underlying conduct was very serious. The nature of the offence and its circumstances, in addition to the fact of the appellant having accepted liability for the offence, was a strong basis for the panel to expect the appellant to answer the case made out by the Secretary of State. The panel's analysis of the remaining evidence in the case must be viewed against that background. On the evidence before it, it would have been irrational for the panel *not* to have treated the evidential burden as having shifted to the appellant. There was no other rational response open to the panel.

33. The panel found that the appellant had not expressed any remorse, or conveyed any understanding or insight into the effect of his behaviour upon his victim. Those conclusions must have been taken, at least in part, from the appellant's statement. At [4], the appellant states that the Facebook person instructed me to "*let my junior brother suck my penis*". Immediately it will be seen that by describing his role as passive, and the role of his six year old brother as active, the appellant has minimised his responsibility for the offence. The act of oral rape involves the offender penetrating the mouth of the victim with his penis: the language of "letting" the *six year old victim* engage in the activity wholly minimises the appellant's active role and responsibility for what took place in circumstances that amounted to a grotesque abuse of trust against a very young child. In effect, the appellant's explanation sought to blame the victim, and ascribe to the victim the role of instigator. Mr Jafferji submitted that the appellant was himself misled by his interlocutor on Facebook, having been misled as to his gender. In my judgment, that is nothing to the point; if anything, it is a further attempt by this appellant to minimise his responsibility for the offence. It matters not that the appellant would not have engaged in the act had he known the true gender of the person concerned.

34. At [7] of his statement, the appellant wrote that "I never rape [sic] my junior brother and never told anybody that I committed an act of rape as alleged in the notice of decision"; that account is at odds with the answers he gave to the immigration officer at Manchester Airport, where the appellant is recorded as having said that he *did* rape his brother, twice. The questions were open and non-leading. That the appellant sought to distance himself from the answers he gave, and the seriousness of the offence, is significant. The panel was entitled to conclude that this was further evidence of the appellant minimising his responsibility for the incidents. Similarly, the panel was entitled to conclude that a 15 year old boy should have known that what he was doing was wrong; the

attack on his younger brother entailed a considerable breach of trust, all in order to impress somebody he met online.

35. Mr Jafferji submitted that the appellant should not be penalised from misunderstanding the concept of rape as defined under the Sexual Offences Act 2003. I agree that it would be unfair to expect the appellant fully to understand the equivalent domestic legal framework which would have governed his offending, had it been committed in the jurisdiction of England and Wales. However, the fact remains that the appellant is recorded as having used the terminology of "rape" during his interview with an immigration officer at Manchester Airport. It was entirely open to the panel to conclude that, rather than accept the gravity of his conduct, the appellant had sought to minimise his responsibility for it, distancing himself from terminology he had previously adopted himself. It was open to this panel to conclude that an offender such as this appellant who minimises their responsibility for their conduct is likely to pose a risk.

36. I reject Mr Jafferji's submission that it was inappropriate for the panel to ascribe significance to the contents of the appellant's statement, given he was absent. The appellant was legally represented, and provided a witness statement which was supported by a statement of truth. It was not part of the appellant's case before the First-tier Tribunal that it was unfair to proceed in his absence, or rely on his statement, and Mr Jafferji specifically confirmed to me that he did not mount a procedural fairness challenge. Paragraph 9.a of Mr Jafferji's grounds of appeal dated 15 April 2020 accept that the appellant's statement was relevant to appeal. It plainly was relevant. It was not irrational, procedurally unfair or otherwise inappropriate for the panel to make findings based on its contents. In any event, regulation 41 of the 2016 Regulations only permits temporary admission to submit a case in person following a removal decision under regulation 23(6)(b); the procedure is not engaged by refusals of admission at the border under regulation 23(1).

37. Turning to the Italian documents, while the panel's treatment of those materials was brief, it is clear that they were given full consideration. At [8], the panel stated that they did not intend to repeat the evidence they had heard back to the parties. That was an approach open to it; indeed, many decisions of the First-tier Tribunal involve unnecessarily lengthy repetition of the evidence as it is repeated back to the parties. As Mr Justice Haddon-Cave (as he then was) said in *Budhathoki (reasons for decisions*) [2014] UKUT 00341 (IAC) at [14]:

> "…it is generally unnecessary, unhelpful and unhealthy for First-tier Tribunal judgments to seek to rehearse every detail or issue raised in the case…."

The panel avoided such repetition here. At [12], the panel addressed the import of the Italian materials, stating:

> "Whilst we take into account that he has satisfactorily completed his probation, there is a significant lack of documentary evidence that shows any effort to rehabilitate, any remorse or any insight into the effect of his behaviour upon his victim."

38. By referring to the fact that the appellant had satisfactorily completed his Italian probation, the panel recognised the fact that the Italian court ascribed

significance to that feature of his case. What the panel did not have, however, were details of the documents relating to the appellant's case before the Italian courts, or any expert evidence concerning the process or assessment of his probation: hence the reference to a "significant lack of documentary evidence". The panel's comments at [12] were open to the panel to make, on the basis of the materials that were before the panel.

39. The panel was not bound to reach the same conclusion as the Italian court, as Mr Jafferji realistically accepted. The panel had the benefit of the appellant's written evidence and the oral evidence of his father from which to arrive at a contemporary assessment of the appellant's circumstances and risk profile. Those are materials of which the Italian court did not have the benefit and which, as set out above, give rise to considerable concern about the appellant's attitude to his offending, and his understanding of and insight into his conduct. The impression the appellant gave to the Italian court appears to have been at odds with that he conveyed in his evidence to the panel; whereas the Italian court was satisfied that the appellant had demonstrated awareness of the negative value of the actions, and the "path of reflection and maturation", this panel had before it evidence which entitled it to make findings that the appellant had not accepted responsibility for his actions, nor displayed any remorse, and had minimised his responsibility.

40. The panel considered the evidence of the appellant's father. His evidence had been that the relevant social services team were content for the appellant to return to the family home, to resume living with his brother. The panel had legitimate concerns about the absence of supporting evidence of the sort that would readily be available concerning the approach of social services, and ascribed less weight to the evidence of the father accordingly. It was entitled to adopt that approach, which was a conventional credibility analysis conducted by first instance judges who had the benefit of reviewing the entire sea of evidence in the case. It was also open to the panel to ascribe significance of the willingness of the father to allow unsupervised contact between the appellant and his victim. Again, this was not a reversal of the burden of proof, but an exercise in reaching legitimate findings of fact, based on the evidence before the tribunal.

41. Against that background, I return to Mr Jafferji's submission that the panel reversed the burden of proof. In my judgment, the operative analysis of the panel related to the shifting evidential burden of proof. It would not have been rationally open to the panel to conclude that the Secretary of State had not made a case for the appellant to answer. The nature of the offence and its circumstances were such that the only approach rationally open to the panel was to treat the evidential burden as having shifted to the appellant. That being so, it was legitimate for the panel to expect the appellant to answer the allegations, and to satisfy them that he was not a risk to public policy or public security. The analysis that features throughout the decision entails precisely that assessment being undertaken. While the decision was brief, the panel was entitled, for the reasons given above, to reject the appellant's case, and prefer the case advanced by the Secretary of State, and accept that she had discharged the legal burden to which she was subject throughout.

42. By concluding [13] with the words, "For the avoidance of doubt, wherever the burden lies we come to the same view" the panel injected a degree of ambiguity into its otherwise clear decision. That was unhelpful language, and it would have been better had the panel clearly addressed the fact that the legal burden was

borne by the Secretary of State throughout, and that it merely expected the appellant to respond to the shifting evidential burden. But in an important sense the final sentence of [13] is correct; whether addressed from the perspective of the Secretary of State's legal burden, or the evidential burden that had temporarily shifted to the appellant – wherever the burden lay – the outcome would be the same. The panel reached legitimate findings of fact that the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and gave sufficient reasons for reaching that conclusion.

43. It follows that the panel's approach to the two main areas of criticism advanced by Mr Jafferji did not involve the making of errors of law such that the decision must be set aside. The panel adopted an approach commensurate with the shifting evidential burden of proof, which was consistent with the Secretary of State bearing the overall legal burden throughout. In doing so, the panel took the Italian documents into account, and gave sufficient reasons for concluding that they did not militate in favour of a different approach.

44. The second ground of appeal contends that the panel failed to deal with the constituent elements of regulation 27(5)(c) of the 2016 Regulations, in the process of determining whether the appellant represented 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.*" Mr Jafferji did not pursue this submission with any vigour. The panel dealt with the term as a composite concept connotating the risk presented by the appellant. In my judgment, that was precisely that right approach to take. The term is taken directly from Directive 2004/38EC: see Article 27(2). It is not "black letter law" and is not to be construed as one would, for example, interpret an Act of Parliament dealing with, say, a complex regulatory framework. Mr Jafferji did not take me to any EU or domestic authority to support this submission. I consider this submission in this respect to be one of form and not substance; if a threat is "genuine", then it is difficult to see how it could not be "present", especially given the threat "does not need to be imminent" (regulation 27(5)(c)). Similarly, if a threat is "sufficiently serious", then it will be "genuine". Attempting to distinguish between the components would have unnecessarily complicated the panel's assessment. The panel correctly dealt with the term as requiring the presence of a certain level of risk to the "fundamental interests of society", as defined in Schedule 1. As set out above, the panel correctly identified the relevant provisions in Schedule 1, paragraph 7: preventing social harm, protecting the public, and acting in the best interests of the child.

45. In relation to ground 3, Mr Jafferji's criticism of the panel's proportionality assessment at [16] does not disclose an error on a point of law. The panel took into account all relevant factors. The appellant had been apart from his family for two and a half years. Prior to that he had lived here with his family for less than two years. He was of working age, familiar with Italy, and fluent in Italian. There was limited cultural integration here, and his father did not list English as one of the languages he spoke.

46. Concerning ground 4, I reject Mr Jafferji's submission that the panel should have focussed more on the positive outcome of the Italian proceedings; that is a question of weight and disagreement, rather than an error of law. The panel was fully aware of the outcome of the Italian proceedings, and ascribed the weight to

it that it considered to be appropriate, in light of the further evidence prepared for these proceedings, of which the Italian courts did not have the benefit.

47. Finally, considering ground 5, the panel's approach to the sponsor's evidence does not disclose an error of law. I reject the submission that the panel failed to make a finding of fact concerning the sponsor's evidence. The panel made sufficient findings to reach its decision and give reasons for its findings: see the analysis at paragraph 40, above.

48. In conclusion, I find that the decision of the panel did not involve the making of an error on a point of law such that the decision need be set aside.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision need be set aside.

This appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Stephen H Smith Date 21 December 2021

Upper Tribunal Judge Stephen Smith