IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT WINCHESTER

HHJ JANE MILLER KC T20237003

CASE NO 202304203/A1

Neutral Citation Number: [2025] EWCA Crim 558

Royal Courts of Justice
Strand
London
WC2A 2LL
Thursday, 10 April 2025

Before:

LORD JUSTICE JEREMY BAKER
MR JUSTICE GARNHAM
HIS HONOUR JUDGE TIMOTHY SPENCER KC
(Sitting as a Judge of the CACD)

REX
V
MALAKAI WHEELER

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR E FITZGERALD KC and MR R KHERBANE appeared on behalf of the Applicant
MR B WEAVER appeared on behalf of the Crown

J U D G M E N T

MR JUSTICE GARNHAM:

Introduction

1. On 14 September 2023 in the Crown Court at Winchester, the applicant, who was then aged 18, was convicted of possessing information, contrary to section 58(1)(b) of the Terrorism Act 2000 (counts 1, 2 and 3) and dissemination of terrorist publications, contrary to section 2(1) and 2(2)(e) of the Terrorism Act 2006 (counts 4, 5 and 6).

2. On 3 November 2023, before Her Honour Judge Jane Miller KC, the applicant was sentenced to an extended determinate sentence of detention in a young offender institution, pursuant to section 266 of the Sentencing Act 2020, comprising a custodial term of six years and an extended licence period of one year. Having been convicted of an offence listed in Part 4 of the Counter Terrorism Act 2008, the applicant was required to comply with the notification requirements for a period of 15 years.

3. He now renews his application for leave to appeal against sentence following a refusal by the single judge. He also seeks leave, pursuant to section 23 of the Criminal Appeal Act 1968 to introduce fresh evidence, namely a report dated 30 April 2024 from Dr Samuel Yates, Consultant Psychiatrist, and an addendum report from Dr Robert Halsey, dated 5 April 2025 in support of his fourth ground of appeal as set out in an amended application and grounds of appeal which were not considered by the single judge.

The facts

4. The case concerned the applicant's activities on the online app, Telegram, through which he shared documents and other materials that provided instructions for the manufacture of

explosives and an improvised firearm.

5. The prosecution case was that the applicant had developed a deep-seated and sustained interest in National Socialism and extreme ideologies, particularly Nazism and Neo Nazis, and also with the use of significant violence. Aged 15, he joined the Telegram group and adopted the user name "Hengest". The Telegram group's self-professed purpose was to act as an online meeting place for white nationalists and their expressed messaging was of racial hatred, anti-Semitism and a desire to engage in violence in order to promote the shared goals of its members.

6. The applicant (who was then aged 16) created a large library of extreme right wing material on Telegram, calling it the "Library of Mal Alexandria", uploading over 100 documents to it and giving it a Nazi-related black sun logo. The library's contents included the Manifesto of Anders Breivik (Breivik committed the mass murders in Norway), the Manifesto of Brenton Tarrant (Tarrant committed the Christchurch mosque attack in New Zealand) and of others who had committed large-scale killings and atrocities. It also included a variety of documents relating to the making of explosives and other weaponry.

7. The Prosecution relied on three documents as being broadly representative of the content in the library: the Terrorist's Handbook, Homemade Denotators, and The Anarchist's Cookbook (counts 1, 2 and 3) to demonstrate that each was designed to provide details of methods of using violence against others.

8. On 25 January 2021, the applicant joined the Oaken Hearth Chat group, an extreme right wing channel on Telegram, and transmitted electronically to the group a terrorist publication, namely 92 documents and 35 images, all dealing with extreme right wing violence, weapons and insurrection (count 4).

9. On 6 March 2021 the applicant further uploaded to the Oaken Hearth Chat group, a number of terrorist publications, namely three instructional images and a video relating to the making and using of slap guns (count 5). (A slap gun weapon was used in the Halle Synagogue shooting in Germany in 2019).

10. On 29 April 2021 the applicant also re-uploaded on the Oaken Hearth Chat group an instructional document on how to make smoke grenades, a document that had originally been uploaded on 25 January 2021 (count 6).

11. The prosecution's case was that the material and video had a clear purpose, namely the encouragement of terrorism. The evidence of the explosives expert was that within the material referred to in counts 1, 2, 3, 5 and 6 and the vast majority of the 35 images in count 4, were viable instructions which, if followed, could make the weapon or explosive intended. Some of them would have made a substance that is unstable and therefore highly dangerous.

12. Upon his arrest the applicant gave the police access to his phone and laptop. A number of additional videos of shootings, lynchings and executions were found there. In his police interview the applicant did not answer questions of any importance.

13. The applicant gave evidence at trial. He denied that he was a racist or a white supremacist. He stated that the activity of the Oaken Hearth Chat group was not something that he endorsed. He explained that he was just "morbidly curious" about extreme violence.

Sentencing

14. In sentencing the applicant the judge noted that he was aged 16 when the offences were committed and 18 years at trial and sentence. She held that all of the 35 images in count 4 would be useful to a would-be terrorist. The content of the Oaken Hearth chat group, and the fact that the applicant had posted a huge quantity of material useful to those seeking to engage in terrorist activity, was significant. As regards counts 4 to 6, his actions went well beyond recklessness into a positive intention to encourage terrorism. The intentional collecting of extreme right wing material showed a sustained and committed interest in Neo-Nazi activities and a wide range of recent terrorist atrocities. The applicant had, by his own admission, started reading Mein Kampf as a child and had set up his first right wing Telegram channel when aged 15. The judge said that all of this suggested that the applicant's behaviour was not simply reckless or misguided but that he had an intention to commit each offence.

15. The judge indicated that she had read the report dated 26 August 2023 of Dr R F Halsey, Clinical and Forensic Neuro Psychologist, which ruled out any mood disorders, psychotic illnesses or ADHD and said, significantly, that although the applicant might show traits of autism, he did not do so at a level that met the diagnosis criteria for the disorder. The

applicant's only vulnerability was said to be his age with possible social difficulties due to autistic traits.

16. A pre-sentence report was prepared for the court. The applicant was assessed to present a high risk of re-conviction. The offences had been committed during covid lockdown. The applicant had undertaken his A levels. The court had a reference from the applicant's older brother, grandmother and a letter from a counsellor. The court also had a letter from the applicant. He had throughout maintained his denial of guilt.

17. As to counts 4 to 6, the judge said culpability was Category A. The applicant was found to have intended to encourage others to engage in terrorist activity or to provide assistance to others to engage in such activity. Harm was Category 2 - the publications provided non-specific contact, encouraged support for terrorist activity, endangering life. The aggravating factors were that the offences were motivated by, or demonstrated, hostility towards others on the basis of race and religion. There had been communication with known extremists. A significant volume of terrorist publications were disseminated. There was a deliberate use of an encrypted site and the use of a pseudonym.

18. The mitigating factors identified were the fact that the applicant had no previous convictions, was aged only 16 at the time and the fact that there had been delay in the case from arrest to charge.

19. As to counts 1 to 3, culpability was Category B. The applicant had collected information

likely to be useful to a person committing or preparing acts of terrorism and he had terrorism connections or motivations. Harm was Category 2 - the material provided instructions for specific terrorist activity, to the manufacture of explosives and improvised explosive devices which, if followed, would mean life would be endangered. Aggravating and mitigating factors were the same as regards the other counts.

20. The judge stated that she did take into account the applicant's age at the time the offences were committed and that he had no other convictions before or since. There was, she said, nothing or very little by way of evidence of immaturity that caused his risk-taking behaviour. The cases of Gafoor [2002] EWCA Crim 1857, Bowker [2007] EWCA Crim 1608 and ZA [2023] EWCA Crim 516 were considered.

21. The author of the PSR assessed that the applicant was engaging with extremist activity prior to joining the Oakham Hearth Telegram group. The applicant was assessed to pose a high risk of re-conviction and a risk of serious harm to the public of any age. The circumstances of the current offences suggest that this was very likely to involve the Jewish community or other targets in line with white supremacist views.

22. The judge determined that the applicant did still pose a significant risk of causing serious harm to the public. He had come across in evidence, she said, as cold and calculating and he had shown no remorse. Given his youth and offending history a life sentence was not required but a determinate sentence did not fully address the risk he currently presented.

Grounds of appeal against sentence and response

23. In its original form, the applicant's grounds advanced three grounds of appeal. First, it was said that the judge gave an insufficient reduction from the appropriate adult sentence to reflect the applicant's young age at the time of the offences. Given that he was aged only 16 at the time, whether considered alone or taken together with other features of the case, a full reduction of one-third should have been considered and ultimately given. The judge did not specifically refer to the sentencing children and young people guideline.

24. Second, the judge was wrong to characterise the applicant's offending in count 4 as intentional rather than reckless. The judge wrongly averted to motivation. The judge's express focus should have been on the circumstances of the dissemination.

25. Third, the judge paid insufficient regard to the delay in the applicant being charged and tried. Had the applicant been prosecuted and convicted before he crossed the significant age threshold of 18, his sentencing would have been limited to the Magistrates' Youth Court powers of sentence.

26. After the papers were sent to the single judge, trial counsel lodged amended grounds of appeal dated 29 July 2024 containing an additional fourth ground of appeal and fresh evidence in the form of a report dated 30 April 2024 from Dr Samuel Yates, Consultant Psychiatrist.

27. Following the single judge's decision, the applicant's solicitors informed the Criminal

Appeal Office that the renewed application for leave to appeal against sentence was being pursued by fresh counsel. Ground 4 was based on the report of Dr Yates prepared over a two-month period following sentencing. It was submitted that the applicant had now been diagnosed with a high functioning autism spectrum condition and that had the judge had the opportunity to receive and consider that report the sentence would have been reduced, applying the relevant guidelines on offenders with mental disorders.

28. The prosecution lodged a Respondent's Notice and grounds of opposition in which they submitted as follows. As to ground 1, having presided over the trial and having seen the applicant give evidence the judge was well placed to make a determination both as to culpability of the applicant and the level of reduction that would be appropriate to reflect age at the time of these offences. The reduction of 25 per cent to the overall sentence imposed was entirely appropriate. The judge referred to the relevant over-arching guidelines in both written and oral submissions on behalf of the prosecution and the defence.

29. As to ground 2, the judge was entitled to consider both the nature and content of the material uploaded by the applicant, together with the nature of the group into which it had been uploaded, when determining whether the applicant had acted intentionally or recklessly at the relevant time in relation to count 4. The judge was correct, it was said, in concluding that he had acted intentionally.

30. As to ground 3, the Crown argued that the judge properly took account of the delay arising in the case when determining the appropriate level of sentence. Further, the

charges faced by the applicant amounted to "grave crimes". Given their number and coupled with the relevant sentencing guidelines, the case would have been sent to the Crown Court for trial in any event or, had the Youth Court retained jurisdiction, the applicant would have been committed for sentence following conviction.

31. The grounds of opposition include a response to the applicant's additional fourth ground of appeal, which was not before the single judge. It was said that at the time of sentencing the judge had been provided with a copy of the expert psychologist report of Dr Halsey dated 26 August 2023. The judge had noted that Dr Halsey had found traits of autism but certainly not at a level that met the diagnostic criteria for the disorder. It is submitted that the recent report of Dr Yates would not have materially affected the judge's approach so as to lead to any or any significant reduction in the overall sentence imposed. It is submitted that given the nature and circumstances of these offences the sentences imposed on the applicant by the judge were not wrong in principle, nor were they manifestly excessive.

The arguments

32. Before us, Mr Fitzgerald KC on behalf of the applicant, relied heavily on the new report from Dr Yates and the very recent supplementary report of Dr Halsey. He argued that the judge was not aware of Dr Yates' diagnosis when she passed sentence. The diagnosis was not made at the time, and nor was Dr Yates' extended diagnostic assessment available. The judge should have applied, but due to the lack of an available diagnosis was unable to apply, a reduction in sentence to reflect the impact of the applicant's neurological limitations. As set out in Dr Halsey's addendum report, the

applicant's limitations are directly linked to his offences committed when he was 16 years old. I particular Mr Fitzgerald pointed to his organising of documents, repetitive or replicated behaviours, an appearance of transient or intense interests (without necessarily an ideological commitment) and his presentation at trial. All this, it was argued, was part and parcel of his ASD presentation.

33. Mr Fitzgerald argues that the judge reduced the sentence of imprisonment based on the adult sentencing guidelines from eight years' imprisonment to just six years' imprisonment to account for both delay and the fact that the applicant was, as it was put, "a child of good character" when he offended. This was a reduction of only 25 per cent. The judge justified this minimised reduction on the basis of the applicant's presentation as "cold" when he gave evidence.

34. On the applicable authorities and the guidelines for children and young people, argued Mr Fitzgerald, the judge should have given a reduction of at least 33 to 50 per cent of the sentence that would have been applied on the adult sentencing guidelines. This is in addition to, and separate from, the additional reduction for the applicant's diagnosed ASD and its relevance to the offences concerned.

35. Furthermore, the judge assessed the applicant's maturity with reference to his age at the time he gave evidence (at least 32 months after the offending). This was a material error. The applicant's maturity should have been assessed with reference to his age at the time of the offence having just turned 16.

36. In addition, the judge should have further reduced the sentence to reflect, first that the applicant was of previous good character, and second, the unexplained delay in the case.

37. As to dangerousness, Mr Fitzgerald argues that the judge justified her findings that the applicant posed a significant risk of serious harm to members of the public with reference again to his presentation at trial. It is said that in the absence of the judge's misinterpretation of the applicant's ASD and his presentation, and allowing sufficient weight for the factors identified above, there was no reasonable basis to find that, at the date of the sentence, the applicant posed a significant risk to members of the public of serious harm.

38. Furthermore, it is said an extended sentence was unnecessary in light of the special sentence for certain offenders of particular concern that applied, the SCPO imposed and the automatic notification requirements. The sentence should have been adjusted accordingly to recognise the neurological and developmental limitation that the applicant was born with and which had affected his conduct when he was only 16.

39. In response, Mr Brett Weaver on behalf of the Crown very properly did not dispute that the statutory conditions for the receipt of fresh evidence set out in s23 of the Criminal Appeal Act 1968 are met. But it is contended that the diagnosis of Autism Spectrum Disorder does not lead to a conclusion that the sentence imposed upon the applicant was either wrong in principle or manifestly excessive. In particular, it is contended that the sentencing judge was entitled to reach the conclusions she did, given the nature and extent of the offending behaviour on the part of the applicant and the circumstances of

that behaviour.

40. Having heard all the evidence presented at trial, including evidence from the applicant, the judge, it is said, was well placed to reach a determination as to culpability of the applicant and the appropriate sentence. It is said that although the judge did not have the diagnosis of ASD before her at the time of sentence, the fact of that disorder would not have had a significant impact on the sentencing exercise.

41. Mr Weaver argued that the sentencing judge was entitled to reach the conclusion she did as to the appropriate reduction in sentence to reflect the age of the applicant at the time of these offences. It is said that the judge properly approached her determination of the appropriate sentence by reference to all the relevant sentencing guidelines in the case.

42. It is contended that the judge properly considered the aggravating and mitigating factors, including the applicant's age, previous good character and the delay in this case. Considering the nature and extent of the offences in this case, it is contended that the judge was entitled to apply a reduction in sentence of only 25 per cent based upon the evidence at trial and the period of time covered by the evidence and the offending. It is argued that although the judge referred to how the applicant presented at the time of his giving evidence, this was only part of her overall consideration as to the appropriate reduction. In particular, the judge found that when the applicant committed the offences there was no real immaturity that caused his risk-taking behaviour, and nor was he affected by inexperience, emotional volatility or by negative influences. Importantly, it is said, the judge found that if there was any susceptibility to external influences that was

by the applicant's own choice. It is said that the diagnosis of ASD would not have materially affected them. Although the diagnosis may have been of relevance to the manner in which the applicant presented, this was only one factor that the judge considered when assessing the overall seriousness of these offences.

43. It is contended by the Crown that the judge was entitled to conclude that the applicant was dangerous and to impose an extended sentence of detention. Having conducted the trial, the judge was well placed to reach a determination as to whether the applicant met the statutory criteria or not. The judge acknowledged that the applicant had no previous convictions and had not offended since the offences in question. She took account of how the applicant had presented in evidence but this was not the only factor to be considered. As well as the nature and extent of the offending itself, the judge had the benefit of a detailed pre-sentence report written by an experienced probation officer. In particular, it was contended that the judge's findings that "anyone who can encourage acts of violence has to be a very obvious danger to the public" was one that she was entitled to reach in the circumstances of the case and this would not have been materially affected by the diagnosis of ASD.

Discussion

44. In our judgment it is impossible to criticise the sentencing judge or the sentences she imposed given the material available before her. She reached conclusions that were properly open to her on the evidence available. In our judgment the single judge's observations on the original grounds of appeal are fair and accurate and if there was no other relevant evidence we would simply have adopted and endorsed his conclusions.

45. However, there is fresh material which we must consider, namely the report of Dr Yates dated 13 May 2024 and Dr Halsey's addendum report of 7 April 2025. The respondent properly recognises that the statutory conditions for the receipt of fresh evidence in s23 of the Criminal Appeal Act 1968 are met: the fresh evidence appears to be capable of belief, it may afford a ground for allowing the appeal, it would have been admissible in the original proceedings and there was a reasonable explanation for the failure to adduce the evidence in those proceedings.

46. In those circumstances, we give leave for the admission of the evidence and in the light of it we give leave to appeal.

47. In our judgment, much of the judge's analysis is untouched by this new evidence. A diagnosis of ASD does not lead inevitably to an alteration in the sentence imposed. We agree with the Crown that the judge was able to consider the overall evidential picture in this case, which included not just how the applicant gave evidence but also his conduct and actions at the material times which was of direct relevance to his culpability. The addendum report of Dr Halsey seeks to address the explanations given by the applicant as to his collecting, organising and storing the material from the viewpoint of the ASD diagnosis, but the wider evidence in the case allowed the judge to consider the proper context in which the actions of the applicant were taking place and thereby to assess his culpability. In our judgment it is plain from the evidence that the applicant was well aware of the nature of the material that he had in his possession, as is the basis upon which he sought to disseminate it to others.

48. We accept the respondent's submissions that the evidential picture demonstrated not only the length of time that the applicant was engaging with extremist right wing material, but importantly his intentions and motivations at the relevant times. His conduct was not borne out of any transient or intense interest in preparing or organising data, but from his clear mindset in support of right wing extremism and, in our view, he understood the consequences of what he was doing.

49. However, the reduction to the sentence applicable to adults was based, at least in part, on the judge's perception that when the applicant gave evidence he "came across as mature and I could not see any emotional vulnerability in you. (He) gave (his) evidence coldly and calmly". The judge did not have the benefit of Dr Yates and Dr Halsey's most recent reports as to the effect that ASD may have on a person's presentation, in particular the lack of emotion in that presentation and the effect that may have on any assessment of maturity. The judge regarded the applicant's inability to express emotion as a form of "cold" or "calculating" maturity. As convincingly explained by both Dr Yates and Dr Halsey, this may in fact be due to specific neurological deficits in how the applicant's brain processes social and emotional engagement. A "flat" or "cold" presentation may well not be an indication of being cold or calculating but instead reflect a difficulty with emotional recognition and expression, a core feature of the applicant's ASD.

50. In our judgment, had this evidence been available the judge would have been bound to approach the reduction for the applicant's age more generously. The judge's starting point of eight years cannot be faulted but, absent her observations about his cold presentation, and properly reflecting his age, his lack of previous convictions and any

further offending after the index events and the delay between offending and sentence, in our judgment the judge, had she been properly seized of the evidence which was not available until now, would properly have allowed a total discount of three years and fixed on a sentence of five rather than six years' detention.

51. The judge's views on the applicant's presentation also played a significant part in her decision as to his dangerousness. She said: " ... at present, I simply have to say that you are dangerous. As I have said you came across in evidence as cold and calculating and you have no remorse that I could see." In our judgment that conclusion would not fairly have been open to the judge if she had had the benefit of the latest reports of Drs Yates and Halsey.

52. As Mr Fitzgerald points out, relevant to the assessment of dangerousness was the fact that at the time of the offending the applicant was only 16 years old and his offending lasted for a relatively short period of time - January to April 2021. The applicant was of previous good character and has neither offended nor shown any interest in terrorist material since his arrest. Furthermore, there were signs of the applicant demonstrating genuine insight and improved, more social, attitudes now that he has reached the age of 18, including in his letter of October 2023 to the court. Absent a conclusion that his presentation in evidence was cold and emotionless, it seems to us unlikely in the extreme that the judge would have reached the decision she did on dangerousness. We note that of the applicant's co-defendants who were at least as much involved as was the applicant in this offending, none was found to be dangerous.

53. In those circumstances we allow this appeal. We substitute for the sentence of six years' detention in a young offender institution, a term of five years and we rescind the extended licence period of one year. The notification requirements remain as they were previously.