

Making indecent photographs of children contrary to section 3(1)(a) of the Protection of Children (Bailiwick of Guernsey) Law, 1985, as amended and possession of indecent photographs of a child contrary to section 3A(1) of the 1985 Law.

[2021]GRC077

**ROYAL COURT
FULL COURT**

30 July 2021

**Before: Catherine Maureen Fooks, Judge of the Royal Court and Jurats:
Stephen Murray Jones OBE, Jonathan Grenfell Hooley, Steven John Morris,
David James Mortimer, David John Robilliard, Stuart Michael Crisp,
Marilyn Jasmine King, Felicity Jane Quevâtre-Malcic, Simon Ernest Bodkin.**

THE LAW OFFICERS OF THE CROWN

- v -

Carsten FISCHER

**Advocate J D McVeigh appeared for the Crown
Advocate S E Steel appeared for the Defendant**

JUDGE OF THE ROYAL COURT:

Background

Mr Fischer, you have pleaded guilty to 12 counts on one Indictment.

Counts 1 to 9 relate to making indecent photographs of children contrary to section 3(1)(a) of the Protection of Children (Bailiwick of Guernsey) Law, 1985, as amended. By way of explanation, this reference to “*making*” is used here in a technical sense, meaning downloading the images and storing them on your devices, and does not refer to taking or producing them. Each of the offences in these Counts is punishable by a maximum sentence of 10 years’ imprisonment. The final three Counts relate to possessing an indecent photograph of a child contrary to section 3A(1) of the 1985 Law, for which the maximum sentence is five years’ imprisonment.

These images are now grouped into three categories by reference to the Child Abuse Images Database. The most serious is Category A, which includes penetrative sexual activity, sadism or sexual activity between children and animals. Category B covers non-penetrative sexual activity and Category C covers all other indecent images not in the first two categories. The first nine Counts relating to making images cover each of these categories, where the numbers of still images, across Categories A to C, are 155, 84 and 2,511 respectively and video images 7, 2 and 40 respectively. The three possession Counts also cover each of these categories, where the numbers of still images are 5, 1 and 390 respectively.

The facts are that on 18th September 2020 police received information that on the 14th of August 2019, the user of one of your email addresses had uploaded 41 category C images of children to the Internet. Following further enquiries, the IP address was traced to your employer’s system and to you. You were arrested on the 10th of November 2020 and a category A image was found to be on your mobile telephone. Following a search of your home, a number of electronic devices, including USB sticks were seized. The analysis of those devices and your google account (to which you provided the password) has been set out by the Prosecution. In summary, you were accessing images/videos during working hours via your employer’s IT system and saving them onto your various devices. Some images had to be manually graded.

At interview you sought to distance yourself from the images with foolish and unconvincing explanations, but you have entered guilty pleas when the Indictment was first put to you.

You are a German national of 42 years of age who came to Guernsey in 2006. Prior to your arrest you were working in the finance sector and held other posts.

You are a single man with no dependents.

You are a person of previous good character.

You have been on bail since your arrest on 10th November, 2021.

Sentencing Considerations

In 2012, the Court of Appeal provided guidelines in relation to sentencing in indecent images cases in Guernsey and Wicks, Sharp and Towers is the case to which this Court has regard.

At that time, reference was made to five levels of seriousness. Levels 4 and 5 were the most serious and are now reflected by reference to Category A from CAID. Levels 2 and 3 have become Category B and level 1 corresponds to Category C.

The Court of Appeal in Wicks (at paragraph 39) sets out 5 categories of seriousness, to each of which an “initial figure” for sentence is assigned and we have adopted the same criteria. The first three Categories referred to in Wicks do not apply to you. Paragraph 24 explains that the guidance extends to the other limbs of section 3(1) and not just to making.

The first of the bands of sentences set out in paragraph 39 in Wicks to which we have regard, is Category 4, which now covers making an image within CAID (Child Abuse Image Database) of Category A, and so relates to Counts 1 and 4, where an initial figure in the region of 3 years’ imprisonment is indicated.

The second band is Category 5, in respect of images within Category B, and so relates to Counts 2 and 5, where an initial figure in the region of 18 months’ imprisonment is indicated.

The third band is Category 6, covering images within Category C, and so relates to Count 3 and Counts 6-9, where the guideline suggests “*a fine or community sentence preferably with a condition of treatment. If any relevant aggravating factor is present, the court may feel that the custody threshold is passed and may consider a sentence of up to 6 months’ imprisonment*”. However, this is of less relevance in your case where there are images in the more serious categories, and we are satisfied that the custody threshold is clearly passed here in relation to all your offending.

One of the aggravating factors mentioned in paragraph 40 of Wicks is present in your case. The number of images is large in accordance with the definition in Wicks, which says that “*any number of images above 100 [is regarded] as constituting a large number*”. This number of images indicates a high level of personal interest in such images and/or a significant period of time over which the images have been collected. This aggravating factor applies to Counts 1, 3, 6 and 7 in particular.

In terms of other aggravating factors, there are several. The offending has taken place over a long period using a number of devices, including one belonging to your employer. The inclusion of moving images, also the inclusion of sadism and animals which pushes the images to the top of the category. The age range of the children in the images of 2 to 12 years, is considered a significant aggravating factor. We note the need for manual grading of the images and the impact on those required to do so.

Having regard to the totality principle, we have started with the most serious of these offences; the making of Category A images and that starting point has been increased to take account of the other Counts of making images and the aggravating factors, which I have just outlined. In those circumstances, we are satisfied that it is appropriate to take as our starting point for Counts 1 and 4, 54

months' imprisonment, before considering mitigation. For Counts 2 and 5, we adopt a starting point of 18 months' imprisonment and for Counts 3 and 6-9, we use a starting point of 6 months' imprisonment.

In respect of the three possession Counts, noting the lower maximum sentence, we take starting points appropriately scaled down, but these are largely academic where the sentences are to be concurrent.

Before leaving *Wicks*, we have further noted the comment in paragraph 55, that the Court of Appeal did "*not consider it appropriate to treat holding for "personal use"*" as a mitigating factor. Nor was that advanced in your case.

Mitigation

The Court must first consider the impact of your guilty pleas on sentence. You had little choice, but we afford you full and meaningful credit for your guilty pleas to all the offences combined with your personal mitigation.

The Court gives you credit for providing the police with your passwords.

The Court has considered carefully the informative Probation Report prepared in respect of you.

We have also listened to the sensible submissions of your Advocate.

You are a mature man with an excellent work ethic and you have also worked for the benefit of the Community. This is completely at odds with your offending which is abhorrent and vile. You have been unable to explain to Probation or yourself how and why your offending started, but you have said that you are thankful that your arrest has stopped it as you have recognised that it was morally wrong and you want to stop. You were able to acknowledge that, whilst you say that you would not hurt a child, the ongoing demand for such images causes serious real harm to real children. That harm is immeasurable.

You have lost your job and shortly you will have no home in Guernsey.

You express remorse and embarrassment and to your credit appear motivated to undertake the work necessary to address your offending and those aspects of your personal history which have contributed to your offending. We note that you have sought support.

You are assessed as having a low likelihood of re-offending generally but an ongoing risk of sexual offending. The Probation officer expresses concern that you have been accessing indecent images of children over a significant time, knew that it was illicit to do so, yet were unable to desist.

Sentence

There can be no doubt that the custody threshold has been passed an element of deterrence is appropriate.

I repeat, that in sentencing you we have taken into account the totality principle.

Mr Fischer, you have come to Court today knowing that you would receive an immediate custodial sentence for your offending. You have accessed indecent images over a long period, thereby harming children. Your conduct is deplorable and inexcusable.

Taking into account all the above and applying the discount we can, the sentences will be as follows:

- Count 1, making Category A images – 36 months' imprisonment.
- Count 2, making Category B images – 12 months' imprisonment.

- Count 3, making Category C images – 4 months' imprisonment.
- Count 4, making Category A images – 36 months' imprisonment.
- Count 5, making Category B images – 12 months' imprisonment.
- Count 6 and Counts 7-9, making Category C images – 4 months' imprisonment.
- Count 10, possessing Category A images – 12 months' imprisonment.
- Count 11, possession of a Category B image – 6 months' imprisonment.
- Count 12, possession of Category C images – 2 months' imprisonment.
- All of these sentences are to run concurrently, meaning that in total the sentence will be **36 months' imprisonment**.

There are now a number of other matters which I have to read out.

Extended Sentence Licence

Having considered the recommendation in the Probation Report, with which this Court agrees, we consider that the usual period of supervision, if any, after sentence, would not be adequate for the purpose of preventing the commission of further offences and securing your rehabilitation. We note that you do not oppose an Extended Sentence and indeed welcome the monitoring and rehabilitation that the Extended Sentence and Notification will provide. Consequently, the Court is imposing an extended period of imprisonment. This has two elements – a custodial term, followed by an extension period after your release, throughout which you will be subject to an Extended Sentence Licence. The extension period shall be for the period recommended of 3 years, thereby enabling completion of the work begun whilst you are in prison, as well as monitoring and addressing your progress after release.

The custodial term passed is 3 years imprisonment.

The Extension Period shall be for 3 years.

If, upon release, you fail to comply with the conditions of the Extended Sentence Licence, or are convicted of further imprisonable offences, the Court sentencing you, or the Parole Review Committee, can revoke the licence, in which case you could be returned to custody for the remainder of the sentence.

The Extended Sentence Standard Conditions are as follows:

1. To be well behaved and not commit any offence and not to do anything which could undermine the purposes of your supervision, which are to protect the public, prevent you from reoffending and help you to resettle successfully into the community.
2. To keep in touch with your supervising officer in accordance with any instructions you may be given.
3. If required, to receive visits from your supervising officer at your home.
4. Permanently to reside at an address approved by your supervising officer and notify him or her in advance of any proposed change of address or any proposed stay (even for one night) away from that approved address.

5. To undertake only such work (including voluntary work) approved by your supervising officer and notify him or her in advance of any proposed change.
6. Not to travel outside Guernsey without the prior permission of your supervising officer (which will be given in exceptional circumstances only).

Additional conditions are added, as recommended in the Probation Report, which the Court, adopting guidance from the English case of Smith 2011 EWCA 1772, considers necessary, not oppressive and proportionate. Those conditions are as follows:

- a. To comply with any requirements specified by your Supervising Officer for the purpose of ensuring that you address your sexual offending behaviour problems.
- b. Not to possess or use any device capable of accessing the internet without the prior approval of your Supervising Officer.
- c. Not to interfere with or surpass the normal running of any computer or device monitoring software.
- d. Not to use or activate any software which prevents a computer or device from notifying and/or displaying the history of internet or messaging use.
- e. Not to use any “Cloud” or similar remote storage media capable of storing digital images or communications unless within 48 hours of the creation of an account for such storage you notify the Public Protection Unit and/or Probation Service of that activity and provide access to it.
- f. Not to possess any device capable of storing digital images or communications unless you provide access to such storage on request by the Guernsey Police or Probation Service.
- g. Not to install any encryption or wiping software on any device other than that which is intrinsic to the operation of the device.
- h. Not to have any contact directly or indirectly by any means with any child under the age of eighteen years without the prior permission of your Supervising Officer, other than such contact that is inadvertent and not reasonably avoidable in the course of lawful daily life.”

Notification

Having been convicted of a relevant offence under the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2013, you became subject to the notification requirements under Part II of that Law. We must now set the notification period.

We follow the recommendation of the Probation officer that the notification period should be 5 years, which runs from the date of your guilty pleas to those relevant offences on 10th June 2021. This period is a precaution against any risk you may pose and can be further extended. The requirements of your being a notifier were set out on 10th June and you will be given another written notice setting them out, but in summary they are:

- You are now required by Law to notify the Police within 24 hours of your name, any other names that you use, your address, your date of birth, your social security number, your passport details, your bank account details and your employment details. If asked to do so, for verification purposes, you must allow your fingerprints, photograph and/or a DNA sample to be taken.
- You must notify the Police of any change of name or home address at least 24 hours in advance of the change occurring, or within 24 hours if you had no prior knowledge of the change occurring.
- You must notify the Police of any address where you reside or stay for 7 days or longer. This means either 7 days at a time or a total of 7 days in any 12-month period.

- You must notify the Police of your details every 12 months, on the anniversary of your initial notification, even if there is no change in these details.
- You must notify the Police at least 7 days in advance of any plans to travel abroad.

Forfeiture of Items

The Crown’s application pursuant to section 3 of the Police Property and Forfeiture (Bailiwick of Guernsey) Law, 2006 in respect of the Samsung mobile phone, HUGERSTONE USB, USB3USB, HTC mobile phone and Apple Mac mini is also granted. The Court notes that this has not been resisted. The Court also notes that the Apple Mac mini belongs to the employer, but that no representations have been made. The Court is satisfied that these items were lawfully seized and that the analysis of them shows they have been used for the purpose of committing or facilitating the commission of offences, as evidenced by your pleas. The Court has, as required by subsection (5), had regard to the value of the property and the likely financial and other effects on you of making the order, before deciding to grant the Crown’s application.

Deportation

We are required to consider separately the question of whether or not to recommend that you be deported.

We emphasise, as we have to, that the Royal Court itself does not have the power to order deportation; its powers under the Immigration Act 1971, as extended to the Bailiwick of Guernsey, are confined to making a recommendation to His Excellency the Lieutenant-Governor.

Before making any recommendation for deportation, the Court must conduct a balancing exercise. The principles this Court must follow were established by the Court of Appeal in the case of *O’Dette* in 2007. It is necessary to consider in respect of you whether:

- (a) your continued presence is to the detriment of the jurisdiction;
- (b) the offence is serious enough to merit deportation; and
- (c) there is a risk of re-offending.

This Court, as a public authority, is also required to take into account the rights afforded to you by the European Convention on Human Rights and, in particular, by Article 8, conferring “the right to respect for family life, private life and your home”. Your Advocate made the point that Guernsey is your home of some 15 years which we acknowledge. On that basis we decline to make a recommendation and leave the matter to His Excellency.

Mr Fischer, in summary, the total sentence is:

- **36 months’ imprisonment from today**
- **there is an Extended Sentence of 3 years**
- **a Notification requirement of 5 years**
- **forfeiture of the items as listed**
- **no recommendation for deportation is made**

Catherine Maureen Fooks
Judge of the Royal Court

30 July 2021