Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01106/2012

THE IMMIGRATION ACTS

Heard at Glasgow
On 11 July 2013 **On 16th June 2014**
And 22 January 2014

Before
UPPER TRIBUNAL JUDGE JORDAN
UPPER TRIBUNAL JUDGE DEANS
UPPER TRIBUNAL JUDGE MACLEMAN

Between

The Secretary Of State For The Home Department

Appellant

and

Andrzej Stankiewicz

Respondent

Representation:
For the Secretary of State: On 11 July 2013 Mr Rhoderick McIlvride, Advocate, instructed by the Solicitor to the Advocate General for Scotland; and on 22 January 2014 Mr Miles Matthews, Senior Presenting Officer
For the Respondent: Mr Mark Templeton of Quinn Martin & Langan, Solicitors

DETERMINATION

Introduction

1. The central issue in this appeal concerns the correct approach to the application of public policy considerations to the removal of a Union citizen by reason of criminal wrongdoing. This has to be addressed in the context of legislative provisions which place limits on the power of a member state to remove or expel a national of another member state who has committed a criminal offence in the host member state. These limits reflect the significance attached in European law to the principle of free movement. In this appeal it is contended on Mr Stankiewicz's behalf that public policy is confined to a consideration of the risk of

re-offending. The Secretary of State contends that there is a wider public interest which may reflect the sense of public disquiet which arises from serious wrongdoing.

2. At the first hearing on 11 July 2013 we were addressed on the law relating to this issue with a view to deciding whether the First-tier Tribunal made an error of law in its determination. Having reserved our decision on this question following the hearing on 11 July 2013 we did not thereafter issue a decision. Upon consideration we decided that the appropriate course was to complete the hearing of the appeal before issuing a determination in a single document. Directions dated 13 November 2013 were issued informing the parties that the Tribunal wished to consider evidence going to the substance of the appeal before determining the questions before it. The directions allowed for the submission of new evidence and also directed Mr Stankiewicz to provide evidence from the prison authorities as to whether he had addressed his offending or, alternatively, that he was not required to do so.

3. The appeal to the Upper Tribunal is by the Secretary of State against the determination of the First-tier Tribunal (Judge of the First-tier Tribunal Juliet Grant-Hutchison and Mrs E. Morton) promulgated on 15 January 2013 allowing Mr Stankiewicz's appeal under the Immigration (European Economic Area) Regulations 2006 (2006 No 1003) against the decision made on 3 December 2012 to remove him pursuant to reg. 24 (3) as if he were a person liable for deportation.

4. For the sake of continuity, we shall refer to Mr Stankiewicz as the appellant as he was in the First-tier Tribunal.

5. The appellant was born on 1 December 1967. He is 46 years old. He entered the United Kingdom on 13 June 2006. Between 2006 and June 2010, some four years later when he was remanded in custody, he worked as a tailor satisfying the conditions as a qualified person under the 2006 Regulations. On 8 September 2010, he was convicted of causing death by careless driving when under the influence of drink. On 6 October 2010, he was sentenced to 5 years imprisonment. He remained in detention at the date of the FtT hearing. He had been refused parole in circumstances over which the panel were unable to reach a concluded view.

6. On the evening of 11 June 2010, on the first day of his holiday, the appellant consumed a quantity of alcohol. On 12 June 2010 he recommenced drinking that morning. By early afternoon, he went to collect his partner from her work. In the course of driving, he killed the driver of the car driving in the oncoming direction.

7. In sentencing the appellant, the Judge said:

> "…at 3.4 8 pm, approximately 2 hours after the collision in which you were involved, you were three times over the legal limit for driving. Secondly, you deliberately drove for some distance in the knowledge not only that you had been drinking heavily the

night before, but that you had gone on to drink further on the day of its accident. I of course accept that this charge is that you drove without due care and attention, however it seems to me that the standard of driving at the relevant time must come at the top end of the range. You were driving at a higher rate of speed, apparently out of control and weaving about on both sides of the carriageway. You then crossed the carriageway and collided with the deceased.

Lastly, I have taken into account that your actions caused the death of Mr Tourlas and what that must firstly mean to his partner, who of course witnessed this incident which must have been wholly horrific for her given the whole circumstances of it, and given the position in which Mr Tourlas ended up. And not only would this have been devastating for her, I have been given victim impact statements from his family in Greece and it is quite apparent from these that the effect on them could properly be described as utterly devastating."

8. The panel accepted that the appellant was genuinely remorseful. It noted that he told them he would never drink and drive again and that he had "*no issues*" with controlling his consumption of alcohol and was an occasional drinker. He accepted, however, that there was an occasion in Poland, before he came to the United Kingdom, when he had been drinking and drove his car. He denied, however, that he had ever taken an alcoholic drink and then driven a vehicle in the United Kingdom, except on the date of the offence.

9. The panel was clearly influenced by the evidence of the appellant's girlfriend who joined him in the United Kingdom in 2008, although they were university friends. She told the panel that she had never known the appellant to be a heavy drinker and that, on the day of the offence, this was a "*one-off*" situation.

10. A report before the panel recorded that it was impulsivity and the appellant's choice to drive whilst under the influence of alcohol but that there was no indication he would not work with the Criminal Justice services on his release. On risk assessment the appellant was recorded by the panel as representing a high risk of future harmful behaviour but a low risk of re-offending. If the appellant continued to be supported by his partner, if he had stable accommodation and employment and explored his impulsivity and poor decision making, this would reduce any future harmful behaviour. However, if his relationship should break down; his accommodation become unstable; were he to fall into unemployment or to increase his alcohol use or become socially isolated, this would increase the risk of reoffending. The Tribunal went on:

"In the particular circumstances of this appeal we do not find there is any likelihood of the appellant drinking and driving again for the following reasons… we find that this offence represents a tragic one-off offence which is highly unlikely to be repeated by the appellant in the future. As such we do not find that it is proportionate to remove the appellant from United Kingdom on the grounds of public policy or public security."

11. It is clearly impossible for a panel to reach the categorical decision that there is no risk of the appellant ever drinking and driving again. As the report made clear, if the appellant's circumstances substantially change as a result of outside forces -

difficulties with relationships, social life, employment, accommodation, money - the support mechanisms that the appellant is likely to enjoy on release may not be in place. Furthermore, consumption of alcohol impairs judgment and, taken in sufficient quantity, may operate to reduce the inhibition against drinking more. Hence, by its very nature, outcomes are uncertain. However, there is no evidence that the appellant is an alcoholic. He does not have a series of convictions for drink-driving. It was open to the panel to conclude that this was a one-off offence and that it was unlikely the appellant would ever cause another's death by his driving. This is not normally the type of offence where there is a risk of recidivism. Consequently, it was open to the panel to conclude that the appellant did not pose a significant risk upon release of re-offending. We are bound to say that it would have been better if the Tribunal had had before it some evidence from an independent source that he had addressed the risk of re-offending. However genuine the view of his girlfriend might be that he would 'never drink and drive again', it may lack objectivity. Nevertheless, we do not propose to go behind the Tribunal's overall assessment of the risk of re-offending.

Legal context

12. The offence was to be assessed by reference to the exclusionary powers vested in the Secretary of State contained in reg. 19 and the constraints imposed upon her in exercising them contained in reg. 21.

Exclusion and removal from the United Kingdom

19. —…

(3) Subject to paragraphs (4) and (5), a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if—…

(b) he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

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

(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. [Our emphasis]

(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.

13. In *R. v Bouchereau* [1978] 1 QB 732, the European Court of Justice considered three questions of which only questions 2 and 3 are material for our purposes:

The second question

25 The second question asks 'whether the wording of article 3 (2) of Directive no 64/221/EEC, (the predecessor to 2004/38), namely that previous criminal convictions shall not 'in themselves' constitute grounds for the taking of measures based on public policy or public security means that previous criminal convictions are solely relevant in so far as they manifest a present or future propensity to act in a manner contrary to public policy or public security; alternatively, the meaning to be attached to the expression ' in themselves ' in article 3 (2) of Directive no 64/221/EEC'.

26 According to the terms of the order referring the case to the court , that question seeks to discover whether, as the defendant maintained before the national court, 'previous criminal convictions are solely relevant in so far as they manifest a present or future intention to act in a manner contrary to public policy or public security' or , on the other hand , whether , as counsel for the prosecution sought to argue, although 'the court cannot make a recommendation for deportation on grounds of public policy based on the fact alone of a previous conviction' it 'is entitled to take into account the past conduct of the defendant which resulted in the previous conviction'.

27 The terms of article 3 (2) of the Directive, which states that 'previous criminal convictions shall not in themselves constitute grounds for the taking of such measures' must be understood as requiring the national authorities to carry out a specific appraisal from the point of view of the interests inherent in protecting the requirements of public policy, which does not necessarily coincide with the appraisals which formed the basis of the criminal conviction.

28 The existence of a previous criminal conviction can, therefore, only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy.

29 Although, in general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy.

30 It is for the authorities and, where appropriate, for the national courts, to consider that question in each individual case in the light of the particular legal position of persons subject to community law and of the fundamental nature of the principle of the free movement of persons.

The third question

31 The third question asks whether the words ' public policy ' in article 48 (3) are to be interpreted as including reasons of state even where no breach of the public peace or order is threatened or in a narrower sense in which is incorporated the concept of some threatened breach of the public peace, order or security, or in some other wider sense.

32 Apart from the various questions of terminology, this question seeks to obtain a definition of the interpretation to be given to the concept of 'public policy' referred to in article 48.

33 In its judgment of 4 December 1974 (case 41/74) , *Van Duyn v Home Office*, (1974) ECR 1337, at p.1350, the court emphasized that the concept of public policy in the context of the community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each member state without being subject to control by the institutions of the community.

34 Nevertheless, it is stated in the same judgment that the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the treaty and the provisions adopted for its implementation.

35 In so far as it may justify certain restrictions on the free movement of persons subject to community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.

In answer…the Court…hereby rules:

(2) Article 3 (2) of Directive no 64/221/EEC, according to which previous criminal convictions do not in themselves constitute grounds for the imposition of the restrictions on free movement authorized by article 48 of the treaty on grounds of public policy and public security , must be interpreted to mean that previous criminal convictions are relevant only in so far as the circumstances which gave rise to them are evidence of personal conduct constituting a present threat to the requirements of public policy .

(3) In so far as it may justify certain restrictions on the free movement of persons subject to community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

14. This is a clear indication that public interest may extend beyond the risk of re-offending.

15. In *Tsakouridis (European citizenship)* [2010] EUECJ C-145/09 (23 November 2010) the Court of Justice was considering Directive 2004/38 (popularly known as the 'Citizens' Directive') transposed into domestic law by the 2006 EEA Regulations. The Court said:

> 50 In the application of Directive 2004/38, a balance must be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision is to be made (see, inter alia, Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraphs 77 to 79), by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity, and, if appropriate, the risk of reoffending (see, to that effect, inter alia, Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 29), on the one hand, and, on the other hand, the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which, as the Advocate General observes in point 95 of his Opinion, is not only in his interest but also in that of the European Union in general.

16. As Mr McIlvride remarked, in this recent restatement of the public interest, the threat to public security by the individual's conduct and the other factors noted above take linguistic priority over the risk of re-offending which is then only given a provisional place, that is, '*if appropriate*'. Furthermore, the Court went on to re-affirm the continuing applicability of *Bouchereau* notwithstanding the change in the legal landscape introduced by the later Directive. The Court continued:

> 51 The sentence passed must be taken into account as one element in that complex of factors. A sentence of five years' imprisonment cannot lead to an expulsion decision, as provided for in national law, without the factors described in the preceding paragraph being taken into account, which is for the national court to verify.
> 54 In any event, since the Court has held that a Member State may, in the interests of public policy, consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs (see Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 22, and *Orfanopoulos and Oliveri*, paragraph 67), it must follow that dealing in narcotics as part of an organised group is *a fortiori* covered by the concept of 'public policy' for the purposes of Article 28(2) of Directive 2004/38.

17. *Tsakouridis* must be seen as a re-affirmation of the *Bouchereau* principles which we have identified above and which survive the 2006 Regulations. In *Schmelz v IAT* [2004] EWCA Civ 29 (Buxton and Thomas LLJ and Park J) Buxton LJ (with whom the others agreed), considered a claimant who was a citizen of the Federal Republic of Germany. He was born in 1950, was then in his 50s. He had come to Britain in 1979 and claimed to have worked thereafter in business with his uncle although there was no evidence of the payment of income tax or national insurance. He was granted indefinite leave to remain in 1985. The Secretary of

State proposed to withdraw his leave because he was convicted of conspiracy to rob. He was the prime organiser of the crime which involved at least six others in the highjacking of an armoured Securicor van. One of the hijackers had been employed by Securicor, and had delayed activation of the alarm system after his fellow Securicor driver, who was not involved, received a planned phone call claiming that there was bomb underneath the van which would be detonated if the van did not follow the highjackers' car. The robbery was abandoned after a fire was caused by the thermal cutting rods which were used to get into the van. Schmelz pleaded not guilty and continued to assert his innocence.

18. The Secretary of State sought to exclude Schmelz from the United Kingdom on the grounds that his presence was contrary to the public interest as amounting to a serious threat to one of the fundamental interests of society. The adjudicator accepted that the likelihood of re-conviction, like the risk of reoffending, was not high. It was also plain from he did not find that the sentence of 12 years, in itself and without further consideration, justified the deportation. Buxton LJ continued:

> "However, even if he had taken that view, he would, in my judgment, have been justified in so finding. That is established by the case in this court of *Marchon v IAT* [1993] Imm AR 384, to which he referred. The headnote, which was accepted by Mr Juss properly to state the law, read as follows:
>
> > "There were some exceptional cases in which past criminal conduct itself justified deportation of an EC citizen. The present case fell into that category." "

19. The Court of Appeal roundly rejected the suggestion that it was not open to the adjudicator to treat this case, with all its aggravating features, as being one that fell within the ambit of the jurisprudence set out by the court in *Marchon*.

Contra-indications:

20. In *Essa* (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC) (Blake J, President, and UTJ Warr), the Tribunal was concerned with evaluating the prospects of rehabilitation when assessing whether the appellant should be removed. The conduct of the appeal was hampered by the failure of the Secretary of State to comply with directions leading the Tribunal to benefit from a properly formulated case by the respondent with the result that it was *'very likely to lead to less weight being given to the Secretary of State's case than it otherwise might have been.'* The appeal focussed on the existence of reasonable prospects of rehabilitation which were capable of being a substantial relevant factor in the proportionality balance of whether deportation was justified. The case summary reads:

> *If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may very well be disproportionate to proceed to deportation.*

21. The appellant had been in the UK for approximately 12 years thereby engaging the highest level of protection in the three-fold hierarchy set out in Reg. 21,

'imperative grounds of public security'. The prospects of rehabilitation, however, the Court accepted were only one factor and not a determinative consideration.

> "We observe that for any deportation of an EEA national or family member of such national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This *tends to mean*, in case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending. In such a case, if there is acceptable evidence of rehabilitation, the prospects of future rehabilitation do not enter the balance, save possibly as future protective factors to ensure that the rehabilitation remains durable.
> "If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation."

22. We have italicised the expression '*tends to mean*' as demonstrating that no bright line was intended. The words do not exclude other elements of the public interest. The case was not concerned about the wider elements of public policy and was focussed upon the interplay between the risk of re-offending and the role played by rehabilitation in reducing both the risk and the public interest *against* removal where this would jeopardise rehabilitation. As appears from the judgment, the respondent had not properly engaged with the appeal process and it is not, therefore, surprising that wider concepts of public policy were not explored.

23. Although *MG and VC (EEA Regulations 2006; "conducive" deportation) Ireland* [2006] UKAIT 00053 (Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal; Senior Immigration Judges Freeman and Jordan), appears on its face to have been heard on 23 May 2005, this is misdated as the decision refers to the operation of the Immigration (European Economic Area) Regulations 2006 which were made on 30 March 2006 and came into operation on 30 April 2006, three weeks before the date of the hearing. It was the first occasion on which the Tribunal expressed a view about the 2006 Regulations. The principal appellant had been convicted of robbery in 23 January 2001 for which he had been sentenced to 4½ years imprisonment. During cross-examination the Appellant acknowledged that all his problems were due to excessive drinking. The appellant fell into the second level of protection against removal, 'serious grounds of public policy or public security'. The Immigration Judge had allowed the appeal under the 2000 Regulations.

24. The panel referred to *Monsignore v Oberstadtdirektor der Stadt Köln* (Case 67/74) [1975] ECR 297 in which the German authorities sought to deport an Italian worker who had accidentally killed his brother whilst handling a gun which he had obtained apparently illegally. There was no suggestion that he would commit a similar offence again and the intention was that he be deported as a general deterrent to others. The European Court of Justice held that Article 3(2)

of Directive 64/221/EEC prohibited deportation of an EEC national for that reason (as do Directive 2004/38 and the 2006 Regulations).

25. The panel also referred to *R v Bouchereau* (above) relying on the following:

> "Although, in general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy."

26. The panel continued:

> 12. Subsequent UK cases, in particular *R v SSHD ex p Marchon* [1993] Imm AR 384, have held that particularly disgraceful criminal conduct may of itself merit the reaction of deportation of an EEA national without reference to propensity to re-offend: but *Nazli v Stadt Nürnberg*, (Case C-340/97), [2000] ECR I-957, suggests clearly that those views were unsound as a matter of Community law.
>
> …
>
> 29. The Immigration Judge thus allowed the appeal under the 2000 Regulations. In our view he was entirely right to do so. Removal of an EEA national is not to be based on past conduct but on future risk, and, given his findings as to the risk of re-offending and the intention to keep away from alcohol any decision to the contrary would probably have been perverse.
>
> 30. In this reconsideration we apply the 2006 Regulations, under which the Immigration Judge's decision is, if anything, even less subject to challenge. Applying the principles set out in regulation 21(5) it would be impossible to say that the appellant's deportation is justified on "serious grounds of public policy or public security".
>
> 33. The Secretary of State's grounds for reconsideration cite *Bouchereau* and *Marchon* and assert that the severity of the offence was sufficient to warrant a deportation order, particularly because it was an offence related to drugs. We have to say that we should have had some concerns about the Immigration Judge's decision if it had not been for the coming into force of the new Regulations.

27. The Tribunal's express reference to *Nazli* requires us to re-examine its effect. The case of *Nazli & Ors (External relations)* [2000] EUECJ C-340/97 (10 February 2000) arose in proceedings brought by Mr Nazli against the decision of Stadt Nürnberg (Municipality of Nuremberg) refusing to extend Mr Nazli's German residence permit and ordering his expulsion from Germany. The Court of Justice decided that a Turkish national with the benefit of the Association Agreement between the European Economic Community and Turkey could only be denied a right of residence if it was justified because his personal conduct indicates a specific risk of new and serious prejudice to the requirements of public policy. In 1992 Mr Nazli was implicated in a case of drug trafficking in Germany for which the Regional Court, Hamburg sentenced Mr Nazli to a suspended term of

imprisonment of 21 months for his part in trafficking of 1.5k of heroin. The Court decided:

> 57. In the context of Community law and, in particular, of Article 48(3) of the Treaty, it has been consistently held that the concept of public policy presupposes, in addition to the disturbance of the social order which any infringement of the law involves, the existence of a genuine and sufficiently serious threat to one of the fundamental interests of society (see, for example, Case 30/77 *Regina* v *Bouchereau* [1977] ECR 1999, paragraph 35).
> 58. While a Member State may consider that the use of drugs constitutes a danger for society such as to justify, in order to maintain public order, special measures against aliens who contravene its laws on drugs, the public policy exception, like all derogations from a fundamental principle of the Treaty, must nevertheless be interpreted restrictively, so that the existence of a criminal conviction can justify expulsion only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy (see, most recently, Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 22, 23 and 24).
> 59. The Court has thus concluded that Community law precludes the expulsion of a national of a Member State on general preventive grounds, that is to say an expulsion ordered for the purpose of deterring other aliens (see, in particular, Case 67/74 *Bonsignore* v *Stadt Köln* [1975] ECR 297, paragraph 7), especially where that measure has automatically followed a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that conduct represents for the requirements of public policy (*Calfa*, cited above, paragraph 27).

28. The Court concluded that expulsion was justifiable when the individual's personal conduct established a specific risk of new and serious prejudice to the requirements of public policy, but the national court justified expulsion only on the basis of general preventive grounds having the sole objective of deterring other aliens. This was incompatible with Mr Nazli's community rights. It is plain from the decision that the decision to expel Nazli expressed in terms of deterrence was unlawful. The case does not, however, exclude other facets of public policy not expressly excluded from the Directive or the transposing Regulations.

29. Mr Templeton submitted that *Boucherau* pre-dates the Citizens' Directive and the 2006 Regulations and does not survive their introduction. The terms of the Regulations, speaking of a decision being based exclusively on *the personal conduct* of the person concerned representing a genuine, present and sufficiently serious *threat* affecting one of the *fundamental interests of society*, permit no margin for the introduction of a wider public interest. The threat has to be an actual risk of the individual re-offending and, as the previous criminal conviction does not in itself justify the decision, there is no room for a principle of public policy to operate to justify removal based upon it. As there is no risk of the appellant causing death by careless driving, there can be no threat. The threat (or the absence of it) places a primacy upon the risk of re-offending which is fundamental to the assessment and, without it, there is no threat at all. He relied on the decision in the Court of Appeal in *BF (Portugal)v SSHD* [2009] EWCA Civ 923 (Jacob, Sullivan and Patten LJJ) in which Sullivan LJ spoke in paragraphs 11 and 12 of the necessity of the

Tribunal reaching a clear conclusion on '*whether or not the serious threat which was clearly present at the time of the offence, was still present at the time of the hearing'* so as to remain '*a continuing threat for the purposes of reg. 21(5)(c)'*. This was the case of a Portuguese national who had been sentenced to 3½ years imprisonment for battery. In the context of that appeal, there was a live issue as to whether there was a risk of the appellant re-offending. It was, therefore, inevitable that the Tribunal had to assess that risk in order to assess the threat. The Court of Appeal was not, however, concerned about the wider ramifications of public policy given the immediate necessity of assessing the likelihood of a repetition of the appellant's conduct.

30. We have no doubt that the offence itself cannot be determinative of removal both in logic and by reason of the words in reg. 21(5)(e). It would, however, be perverse to construe the expression '*a person's previous criminal convictions do not in themselves justify the decision*' as meaning they should have no part to play in the decision. If that were the case, an appellant with numerous criminal convictions would stand in the same position as one with none. The meaning of reg. 21(5)(e) is to be found in the words '*in themselves*' as indicating there can never be a lawful removal decision if the decision-maker does no more than recite the past offence or offences and direct removal without engaging in the personal circumstances of the offender.

31. Mr Templeton's primary submission was that the gravity of the offence could not justify removal but, even if it did, the panel reached a sustainable conclusion. We do not accept that analysis. Whilst an intention to cause the death is not present in an offence of causing death by careless driving under the influence of drink, the criminality lies in the fact that the appellant permitted himself to become so drunk that this happened and it was this that merited such a substantial period of imprisonment. Society is damaged by criminality, even absent a risk of re-offending. In paragraph 7.141 of *Macdonald's Immigration Law and Practice* (8th edition), the editors suggest, relying on the decision in *Nazli*, that '*criminal convictions even for the most heinous crimes will, we suggest, never be enough by themselves*'. For the reasons we have given, we agree that convictions alone, divorced from the personal conduct of the appellant, will not justify removal. Insofar as the passage suggests there is no room for a wider public interest in removal, we disagree with it.

Public policy/public good/public interest in UK jurisprudence

32. Both Mr McIlvride and Mr Templeton accepted that there were no decisions in the Court of Session that shed greater light on what is contained within the concept of public policy. It may therefore be useful to consider cases in the Court of Appeal of England and Wales which have considered the concept of public policy. It is apparent that a clear warning must be applied in relation to these cases because of the terms of Reg. 21(5) expressly omitting from consideration the role of deterrence ("matters isolated from the particulars of the case or which relate to considerations of general prevention") and confining consideration to one based "exclusively on the personal conduct of the person concerned as

representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" so as to avoid reliance upon matters isolated from the particulars of the case or which relate to considerations of general prevention or which rely solely on a person's previous criminal convictions to justify removal.

33. Nevertheless, whilst those specific limitations are imposed, there is no attempt to impose other limitations to the wide-ranging concept of public policy and none should be inferred. As the Courts in England and Wales, as well as the Tribunal, have repeatedly stated, where the offence is serious enough, deportation will be a proportionate response notwithstanding the fact that this will have the effect of destroying the family life that exists between a parent and his minor children or a husband and his wife, see for example, *Sanade and others v SSHD* (British children - *Zambrano* - *Dereci*) [2012] UKUT 00048(IAC). Sedley LJ said as much in paragraph 27 of *Lee v SSHD* [2011] EWCA Civ 348:

> The tragic consequence is that this family, short lived as it has been, will be broken up forever because of the appellant's bad behaviour. That is what deportation does. Sometimes the balance between its justification and its consequences falls the other way, but whether it does so is a question for an immigration judge.

34. This demonstrates the potential power of public interest or public policy. The nature of the public interest engaged in a deportation case was described by Judge LJ (as he then was) in paragraph 83 of *N (Kenya) v SSHD* [2004] EWCA Civ 1094:

> The "public good" and the "public interest" are wide ranging but undefined concepts. In my judgment (whether expressly referred to in any decision letter or not), broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged. They include an element of deterrence, to non-British citizens who are already here, even if they are genuine refugees and to those minded to come, so as to ensure that they clearly understand that whatever the circumstances, one of the consequences of serious crime may well be deportation …

35. Whilst deterrence must, of course, be excluded in an EEA case, this does not exclude the other elements. At paragraphs 64 and 65, May LJ said:

> Where a person who is not a British citizen commits a number of very serious crimes, the public interest side of the balance will include importantly, although not exclusively, the public policy need to deter and to express society's revulsion at the seriousness of the criminality. It is for the adjudicator in the exercise of his discretion to weigh all relevant factors, but an individual adjudicator is no better able to judge the critical public interest factor than is the court. In the first instance, that is a matter for the Secretary of State. The adjudicator should then take proper account of the Secretary of State's public interest view.
>
> The risk of re-offending is a factor in the balance, but, for very serious crimes, a low risk of re-offending is not the most important public interest factor. In my view, the

> adjudicator's decision was over-influenced in the present case by his assessment of the risk of re-offending to the exclusion, or near exclusion, of the other more weighty public interest considerations characterised by the seriousness of the appellant's offences. This was an unbalanced decision and one which in my view was plainly wrong. There are, it is true, references to the offences and their seriousness. But these are in the main incidental or part of the narrative. I consider that a proper reading of the determination as a whole does not support the submission that the adjudicator took properly into account the public interest considerations.

36. *OH (Serbia) v SSHD* [2008] EWCA Civ 694 concerned a decision made under the pre-2007 Act framework. Paragraph 364 of the Immigration Rules applied. OH had committed an offence of wounding with intent to do grievous bodily harm contrary to s.18 of the Offences against the Person Act 1861. The Tribunal allowed the appeal against deportation. The respondent sought and obtained reconsideration on the grounds that the Tribunal had failed to apply the public interest considerations described by the court in *N (Kenya).* The decision was subsequently reversed. The issue for the Court of Appeal was whether the original Tribunal had made an error of law. At paragraph 16 of his judgment (with which Maurice Kay and Pill LJJ agreed), Wilson LJ (as he then was) said:

> I am quite unable, notwithstanding numerous attempts, to bring out of the determination of [the tribunal] a lawful despatch of the appeal. In their concluding paragraphs there is of course a reference to the seriousness of the offence and a finding, accepted to be amply founded, that there was a low risk of the appellant's reoffending. But such was only one facet of the public interest engaged by this street stabbing on the part of a teenager armed with a knife. There was no reference in terms … to the public interest even though such was the matter against which the compassionate circumstances fell to be balanced. There was no reference to the significance of a deportation order as a deterrent. There was no reference to its role as an expression of public revulsion or in the building of public confidence. I am unable to subscribe to the argument … that from the introductory paragraphs of the determination … we can infer that [the tribunal] took account of these matters; indeed not even there are they squarely addressed. I have paused for thought about the fact that, in his written reasons for deportation, the respondent had himself not referred specifically to those features. He had, however, referred to the need to protect the public from serious crime, of which the deterrence of persons other than the appellant is … an obvious component. A complaint often made is that in this court appeals can be determined upon points not made or not clearly made at trial. I am conscious of the fact that we do not know whether the presenting officer cast the respondent's case even in part by reference to these facets of the public interest; indeed, in the light of the summary … of the presenting officer's submissions, it seems that he may well not have done so. But … such, however, cannot affect the existence or otherwise or an error of law in a determination. And it follows that, in the light of their failure to address those important facets of public interest [the tribunal] never proceeded to weigh the approach to them adopted by the respondent in the context of the facts of the case.

37. Thus, even where the public interest is not fully articulated in the grounds of appeal by the Secretary of State or by the Home Office decision-maker or by the Presenting Officer, the Tribunal remains obliged to consider it fully.

38. In *AM v SSHD* [2012] EWCA Civ 1634, the Court of Appeal examined the case of an appellant aged 43 who arrived from Turkey in December 1993 and whose asylum claim was refused but who subsequently obtained indefinite leave to remain. The appellant was convicted with others of a drug trafficking offence and was sentenced, on appeal, to 12 years imprisonment. He was subject to automatic deportation pursuant to s. 32 of the UK Borders Act 2007 The appellant had established a family life in the United Kingdom with his wife and two sons, aged 13 and 8. Pitchford LJ having searched the decision letter of 23 November 2010 and the First-tier Tribunal's determination, could find no reference to the wider public interest considerations to which the domestic decisions of the Court have made repeated reference in recent years, (see above), and continued in paragraph 31:

> While the landscape for qualification for deportation has changed in consequence of the 2007 Act by the creation of "automatic deportation" of "foreign criminals", it seems to me…inevitable that in measuring proportionality the public interest in deterrence is a material and necessary consideration. The public interest is an important component of the balancing exercise required to test proportionality (for the purpose of section 33(2)(a)) whether or not the Secretary of State expressly says so in her decision letter or in the presenting officer's submissions to a tribunal. It is an indelible feature of the balancing exercise that the decision maker weighs the consequences of deportation against the full import of the legitimate aim to be achieved. Mr Saeed, with some skill, sought to persuade the court that we could infer from the express language used by the FTT that it had well in mind the public interest which the domestic cases identify. I accept that this court should not readily conclude that a specialist tribunal erred in law but also "that it is for the Tribunal to demonstrate that it has applied the correct test when striking that balance" (per Pill LJ in *OH (Serbia)* at paragraphs 27 and 32). With some regret I must conclude that no such inference is available. The only expression of the legitimate aim which appears in the FTT's determination (see paragraph 27 above) is that which Article 8(2) expressly identifies. The emphasis in the FTT's self-direction of law is upon the harsh consequences of separating a family which may follow an immigration decision. It drew no distinction between the public interest considerations arising in immigration decisions (to which Lord Bingham was referring in *Razgar* and *EB (Kosovo)*) and in deportation decisions following the commission of serious crime. As Richards LJ held in *JO (Uganda)* different considerations apply when the balance is to be struck against a separate and more powerful public interest. For this reason I am unable to conclude that the FTT did have in mind both the existence and the breadth of the legitimate aim which the deportation order was pursuing.

39. The public interest is a complex animal but relies upon social cohesion and public confidence in the administration of the control exercised over non-British citizens who enter and remain in the United Kingdom. In the case of non-Union citizens it legitimately includes an element of deterrence but it does not need to and it incorporates other elements which may include the expression of society's revulsion at the seriousness of the criminality or, if revulsion is too strong an expression, its disapproval of wrongdoing. Proper account should be taken of the Secretary of State's view of the public interest as *SS (Nigeria) v SSHD* [2013] EWCA Civ 550 reveals.

***SS (Nigeria) v SSHD* [2013] EWCA Civ 550**

40. There is a discernible movement towards attaching greater weight to the public interest, at least where the public interest is articulated in a detailed way in executive policy or Parliamentary legislation. Thus, while in *MF* [2012] UKUT 393 the Upper Tribunal identified the weight to be attached to the Secretary of State's view of the public interest articulated in the form of the new Immigration Rules, the Court of Appeal in *SS (Nigeria) v SSHD* (22 May 2013) stated, with reference to the automatic deportation provisions in s.32 of the 2007 Act, that the Tribunal had missed the point. By saying in paragraph 42 of its determination that "in deportation cases involving foreign criminals s.32 of the 2007 Act gave clear parliamentary expression to the particular importance the Secretary of State attached to their deportation", the Court of Appeal stated it was not the Secretary of State's executive view that was significant; rather, it was that Parliament itself had identified the public interest and the weight to be attributed to it.

> 38…But the true innovation effected by proportionality is the introduction into judicial review and like forms of process of a principle which might be a child of the common law itself: it may be (and often has been) called the principle of minimal interference. It is that every intrusion by the State upon the freedom of the individual stands in need of justification. Accordingly, any interference which is greater than required for the State's proper purpose cannot be justified. This is at the core of proportionality; it articulates the discipline which proportionality imposes on decision-makers.

Eschewing the existence of a rule of exceptionality, however, Laws LJ continued:

> "…the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail"

The operation of s.32 of the UK Borders Act 2007

41. Under paragraph 24(3) of the EEA Regulations, where a decision is taken to remove a person under regulation 19(3)(b), the person is to be treated as if he were a person liable to deportation. Under the UK Borders Act 2007 Act, s. 32(1) a foreign criminal (as defined) is subject to automatic deportation provisions. Exceptions are found in s.33, where s.33(4) provides:

> "Exception 3 is where the removal of the foreign criminal from the United Kingdom in pursuance of a deportation order would breach rights of the foreign criminal under the Community treaties" (now "EU treaties" pursuant to the Treaty of Lisbon (Changes in Terminology) Order 2011 (SI 2011/1043) in force 22 April 2011)

42. Thus the deportation provisions in s.32 must accord with rights conferred by the 2006 EEA Regulations. In the context of this appeal the relationship between s.32 and the EEA Regulations is not crucial to our decision and the point was not argued before us. Further, the decision letter itself, whilst making reference to the 2006 Regulations and to deportation and to the direct application of s.3(5)(a) of the Immigration Act 1971, makes no reference to s.32 of the 2007 Act. The

principles of UK law which we have set out above may legitimately inform decision-making provided their application does not conflict with the provisions of reg.21(5) of the EEA Regulations. Subject to this qualification we consider that the weighing of proportionality is subject to similar considerations to those identified by Laws LJ at paragraph 38 of *SS (Nigeria).*

The Resumed Hearing

43. Following the issuing of the directions of 13 November 2013, to which reference is made at paragraph 2 above, a letter dated 13 December 2013 was received from the appellant's solicitors asking for some further guidance on whether the Tribunal had made a decision in respect of whether an error of law had been found and seeking to lodge further evidence. The Tribunal replied that the panel had not yet reached a final decision as to whether there was an error of law which made a material difference to the outcome of the appeal. The panel would only do this after hearing all of the evidence on the Article 8 issues.

44. At the same time the Tribunal gave permission for the admission of further evidence. The additional evidence comprised supplementary statements from the appellant and from his partner, Ms Maria Wuwer. There was also a letter from Ms Wuwer's employer and a payslip for the appellant. In relation to the direction requiring evidence of whether the appellant had addressed his offending, the appellant relied on documents already lodged, namely a report to the Parole Board and a Home Background Report by a community-based social worker.

45. At the resumed hearing on 22 January 2014 we heard submissions in relation to the substance of the appeal. At the beginning of the hearing Judge Jordan explained to the parties that if the decision of the Upper Tribunal was that the appellant could not be removed in terms of the EEA Regulations then this would be a significant factor in deciding whether the First-tier Tribunal made an error of law. It was the panel's view that the issue of the risk of re-offending was not necessarily the only issue relevant to a decision under the EEA Regulations in considering whether removal was justified on the ground of public policy.

46. At the resumed hearing Mr Miles Matthews appeared on behalf of the respondent. He described the offence committed by the appellant as one of culpable homicide and emphasised its seriousness. The appellant had driven his car knowing he was under the influence of alcohol and, as recorded by the First-tier Tribunal, he had previously done this on one occasion in Poland. The appellant was considerably over the alcohol limit and had shown a disregard for the safety of others. It was in the fundamental interests of society to prevent and discourage such action. The fundamental interests of society were governed by the laws of the country in question. This was seen in the case of *GW* (EEA reg 21: 'fundamental interests') Netherlands [2009] UKAIT 00050, in terms of which if an act was not an offence then fundamental interests were not threatened. The commission of the offence showed non-compliance with the rules of the host member state and this was something to be taken into account in accordance with the cases of *SSHD v MG* (Case C-400/12) CJEU, 16 January 2014, and *Onuekwere v*

SSHD (Case C-378/12) CJEU, 16 January 20-14. Deportation could be lawful even where there was no realistic risk of re-offending, as discussed in *Bouchereau*, *Marchon* and *Tsakouridis*, where this was justified by the seriousness of the offence. There could be no more serious offence than one involving the loss of life.

47. It was pointed out to Mr Matthews that the offence of which the appellant was convicted did not require any intention to take a life. Its seriousness lay in driving while under the influence of alcohol. Mr Matthews continued that in terms of Regulation 21(5) a propensity to re-offend was not conclusive as to the fundamental interests of society. In accordance with *Tsakouridis* the risk was to be assessed with regard to the possible penalties and the sentence imposed. This appellant had a substantial prison sentence imposed upon him and but for his guilty plea this would have been considerably longer. The risk of re-offending might be low but the risk of harm was high should similar conduct re-occur. The lack of a risk of re-offending was not fatal to the respondent's case particularly where the potential consequences of a similar offence might be catastrophic. Other factors to be taken into account included whether the appellant was genuinely integrated into the UK and what the effect on rehabilitation might be. The appellant had a partner in the UK but no other family.

48. It was pointed out that the appellant has been in the UK for 7½ years, of which he had spent 3 years and 4 months in prison. He had spent 4 years in the UK prior to going to prison and it was 2 months since his release.

49. Mr Matthews continued that the appellant's father and children were all in Poland and he had maintained contact with them while in prison. Despite having been in the UK for seven years he still required an interpreter for the purpose of his appeal hearing. He owned no property in the UK and he had no business interests here. He was employed. He had a business in Poland at one time. To his credit he quickly secured employment following his release and this level of resourcefulness would stand him in good stead in Poland. He was not receiving any further treatment for alcohol abuse. This was in his favour but removal would not cause any interference with rehabilitation. His witness statements showed attempts to integrate into life in Scotland but this was not so developed or substantial as to render his deportation disproportionate. Evidence in respect of the appellant's partner showed that she was valued by her employer but it was a matter of her choice whether to return to Poland with the appellant. A family might be broken up as a proportionate consequence of deportation. The risk of further offending by the appellant could not be excluded. The seriousness of the offence outweighed all other factors.

50. It was pointed out that according to the First-tier Tribunal the offence was very unlikely to be repeated by the appellant. Mr Matthews responded that he accepted this finding but he wanted to cover all aspects of the appeal.

51. For the appellant, Mr Templeton submitted that the respondent had not shown that the personal conduct of the appellant represented a genuine, present and

sufficiently serious threat affecting one of the fundamental interests of society. The evidence suggested this was an isolated incident and was not indicative of the appellant's conduct in the UK. The appellant had led a law-abiding and useful life in this country.

52. Mr Templeton was asked how he viewed the offence in terms of Regulation 21 having regard to its seriousness. Mr Templeton replied that this was a legal issue and he relied on his submissions at the previous hearing. He submitted that it was necessary to look at the present and future risk. Mr Templeton was asked if there was room in the Regulations for the expression of moral disapproval or public outrage. In response Mr Templeton re-iterated that Regulation 21(5)(c) required the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. This assessment must be made according to the circumstances at the date of decision. The question was whether the appellant's presence in the host member's state constituted a current threat.

53. It was put to Mr Templeton that the notion of personal conduct took account of what had happened in the past. Mr Templeton acknowledged that this was so but the question was whether a person with the appellant's history constituted a genuine, present and sufficiently serious threat. This was not established on the evidence in this appeal. Mr Templeton did not concede that a past offence could establish such a threat in itself. There had to be a risk of re-offending. In support of this Mr Templeton referred to *Essa*, at paragraph 32, where it was said that a propensity to, or a high risk of, re-offending was required. Mr Templeton referred to the possibility of a further question arising as to whether the appellant's offending and his presence created such public revulsion as to constitute a threat by reason of him being in our midst. In this regard Mr Templeton acknowledged that the death of another person was extremely serious. The question of intent had already been identified as significant. Clearly there was an element of wilful recklessness in careless driving. Would this cause such revulsion that the person should not be allowed to stay? This was a difficult conclusion to reach. It was necessary to have regard to the conduct as well as to the length of the sentence. Would the fundamental interests of society be threatened by such revulsion? This depended on the nature of the offence rather than the length of the sentence and would require a rare and unusual offence for such a threat to arise.

54. It was pointed out that the sentence appeared to be at the extreme end of the possible sentence for causing death by careless driving. Mr Templeton responded that this was an offence the nature of which was unusual and there was no intention to cause death.

55. Mr Templeton concluded by saying that he would not address us separately under Article 8 as no separate issues arose in this regard.

Application to this appeal

56. We do not rule out the possibility of a case arising where the nature of the offence was such as to establish a threat to the fundamental interests of society even where there was no propensity to re-offend. Such a case would seem to require a considerable degree of affront or insult upon the values and interests of society. This is not such a case.

57. The First-tier Tribunal pointed out that the death of the victim of the appellant's crime was a tragedy which the victim's partner, family and friends would have to live with for the rest of their lives. The appellant has served a prison sentence but has been able to continue his life, which the victim has not.

58. The First-tier Tribunal considered the appellant's risk of re-offending and risk of harm in the future, having regard, in particular, to the evidence of the appellant and Ms Wuwer and to a Home Background Report compiled by the Criminal Justice Social Work Service of West Lothian Council. In relation to risk assessment the appellant was seen by the Home Background Report as having a high risk to future harmful behaviour and a low risk of general re-offending. As already noted, if he continued to be supported by his partner, had stable accommodation and employment and explored his impulsivity and poor decision making this would reduce any future harmful behaviour. If his relationship were to break down and his accommodation become unstable, and if he failed to find employment and increased his alcohol use and was socially isolated, this would increase the risk of re-offending. The assessment of the high risk of harm was due to loss of life as a result of the appellant's conduct. The First-tier Tribunal was satisfied nevertheless that there was no likelihood of the appellant drinking and driving again and gave detailed reasons for this finding. The Tribunal found it difficult to see how the appellant would repeat or commit such an offence in the future so as to cause a threat to the public. The offence was a tragic "one-off" which was highly unlikely to be repeated. It was not proportionate to remove the appellant from the UK and the evidence did not show that he represented a serious threat to the fundamental interests of society.

59. We consider that on the evidence before the First-tier Tribunal these were conclusions they were entitled to reach. In the circumstances of this appeal it was not necessary for them to proceed to consider whether the nature of the offence was one giving rise to such general outrage or revulsion that the past conduct of the appellant and his continued presence represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In the absence of a risk of re-offending, it is difficult to show that such a sufficiently serious threat exists. It was not a material factor in the circumstances of this appeal and the First-tier Tribunal did not err by not having regard to it.

60. As stated by the First-tier Tribunal, this does not reduce the seriousness of the appellant's offence or show any disrespect to his victim or the victim's partner or family. The question of whether the appellant should be removed on the basis of his offence depends upon the application of the provisions of European law, as

set out in the EEA Regulations. Even where, as in this appeal, the appellant does not benefit from the enhanced protection from removal for a person with a permanent right of residence or residence for a continuous period of at least ten years, the regulations lay down a high threshold as to when the removal will be justified of an EEA national from a host member state in which an offence has been committed. In the circumstances of this appeal the First-tier Tribunal did not err in law in finding for the reasons given in its determination that this threshold was not met.

Conclusions

61. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

62. We do not set aside the decision.

Signed Date

Upper Tribunal Judge Deans