Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00405/2019

THE IMMIGRATION ACTS

Heard in George House, Edinburgh
On 27 April 2022

Decision & Reasons Promulgated
On 26 July 2022

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR ION MIHAIL RUSU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Caskie, instructed by SJK Solicitors
For the Respondent: Mr J Mullen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal promulgated on 11 December 2019. Permission to appeal from the First-tier Tribunal was sought but was finally refused on 5 March 2020. That decision was in turn reduced by order of Lady Poole sitting in the Outer House of the Court of Session. Subsequent to that, the application for permission came before me; and, after an oral hearing on 18 March 2021, permission to appeal was granted on limited grounds.

2. Although it was envisaged that any remaking would follow directly upon any decision that the decision of the First-tier Tribunal involved the making

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of an error of law, it was not possible to reconvene the hearing as difficulties arose for both parties in obtaining any further particulars of the appellant's convictions in Romania in 1997. Those convictions had come to light only shortly before the hearing on 18 March 2021.

3. The appellant is a citizen of Romania who is a former policeman. He arrived in the United Kingdom on 19 April 2015 and has lived here since. He was employed from July 2015 as a self-employed delivery driver until 2016 and after that worked for various delivery companies and undertook work for various different agencies. He was married in Romania, had a daughter who is 13 years old but that marriage ended in divorce in January 2014 and there has been no contact with the former wife and daughter since. He maintains also that he came to the adverse attention of a gang in Romania who abducted and tortured him. This was the reason why he did not wish to return.

4. On 23 October 2017 the appellant was convicted of causing death by dangerous driving at the High Court of Justiciary in Glasgow, an offence for which he was sentenced to four years' imprisonment upon a guilty plea. On 8 August 2019 the Secretary of State made a deportation order against the appellant on the basis that the appellant's removal was justified on grounds of public policy, public security and public health pursuant to Regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

5. The respondent considered that the appellant had not acquired permanent residence, concluding, having had regard to the principles set out in Regulation 27(5) and Schedule 1 of the 2016 Regulations (f) and (g), taking the view that the serious harm which would be caused by a result of any similar instances of offending was such that it was not considered reasonable to leave the public vulnerable to the potential to re-offend although all the available evidence indicated that although his risk assessment was low there was still a risk justifying his deportation. The respondent considered also that his deportation was justified in Article 8 terms.

6. On appeal, the judge heard evidence from the appellant and two further witnesses, the Teams Manager, Social Work at HMP Low Moss and a social worker. It appears also that in his submissions the Presenting Officer relied on R v Bouchereau [1978] QB 732 in that there was nothing to outweigh the public interest in removing the appellant. The judge concluded that although it had not been shown that the appellant had a propensity to act in the same way in the future (that is, the index offence), the appellant's offence engaged the Bouchereau exception for the reasons set out at paragraph [48]. The judge also concluded that the appellant's past conduct would cause public revulsion as it caused the death of a wholly innocent road user in the circumstances described. He stated: "It is reasonable to conclude that the public would be horrified and deeply alarmed by his wholly irresponsible behaviour."

7. The judge concluded that it had been shown that the appellant's past conduct alone did represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society including the removal of an EEA national with a conviction where the conduct of that person has caused public offence and maintaining public confidence in the ability of the relevant authorities to take such action. On that basis he concluded that the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society [50] and that removal would be proportionate, the appellant's offence being a very serious one, there being little evidence of sufficient integration, he has no family life in the United Kingdom and his deportation was proportionate in terms of the EEA Regulations and Article 8.

8. Permission was granted on the basis that the First-tier Tribunal Judge had erred (1) in relying on Bouchereau and (2) in effect that the judge had erred in not having proper regard to how the Immigration (European Economic Area) Regulations ought to be interpreted, applying a purposive construction of the Regulations.

The Hearing

9. Mr Caskie submitted that as a preliminary issue, the PNC printout should not be admitted at this stage of considering whether the decision of the First-tier Tribunal involved the making of an error of law. He submitted further that in any event it should not be admitted pursuant to Rule 15(2A) of the Tribunal Procedure Rules. Mr Caskie submitted, relying on his note of argument, that the appellant's offence in this case simply did not come within the rubric of Bouchereau, given what was said about the seriousness of such an offence in SSHD v Robinson [2018] EWCA Civ 85. He submitted further that the judge had misconstrued paragraph 7(1)(f) of Schedule 1 to the 2016 Regulations in a manner which was not consistent with the Directive. He submitted that there had been an error of law and given the lack of re-offending and the low risk the appellant provided, that the decision should be substituted allowing the appeal.

10. Mr Mullen accepted that he could not make a sensible argument to show that driving whilst tired was so heinous as to engage **Bouchereau**. He accepted that it was difficult to see a connection with the offending in 1997 and the current circumstances, given that it appears that the convictions in 1997 were for robbery.

11. Mr Mullen submitted that the public interest in this case was met and that the decision to deport was balanced and proportionate. He accepted it may well have been harsh but it was a decision open to the judge.

12. In response, Mr Caskie accepted that I should remake the decision on the papers if I were to find an error of law, that he had nothing further to say other than was set out in his notes of argument and that the appellant did not wish to give him further evidence.

Decision on error of law

Ground 1

13. I consider that the judge was wrong to conclude that this case fell within the terms of Bouchereau as indeed Mr Mullen has conceded.

14. Commenting on **Bouchereau**, the Court of Appeal in **Robinson** said as follows:

> 85. However, with all of that said, I am also of the view that the sort of case that the ECJ had in mind in *Bouchereau*, when it referred to past conduct alone as potentially being sufficient, was not the present sort of case but one whose facts are very extreme. It is neither necessary nor helpful to attempt an exhaustive definition but the sort of case that the court was thinking of was where, for example, a person has committed grave offences of sexual abuse or violence against young children.
>
> 86. I would not wish to belittle the seriousness of the offence in the present case but it is not the sort of offence in which public revulsion at a past offence alone will be sufficient. I note that, in *Straszewski*, Moore-Bick LJ referred to "the most heinous of crimes" at para. 17. That gives an indication of the sort of offence the ECJ had in mind when it said that a past offence alone might suffice. I also note that, in *ex p. Marchon*, the defendant was convicted of an offence of conspiracy to import 4½ kg of a Class A drug (heroin); he was a doctor; and he was sentenced to 11 years' imprisonment. As Moore-Bick LJ observed in commenting on that case in *Straszewski*, at para. 18, the offence had been described by this Court in *ex p. Marchon* as being "especially horrifying" and "repugnant to the public" because it had been committed by a doctor. In contrast, as the UT noted at para. 28 of its judgment in the present case, the sentence of 30 months' imprisonment that was imposed on this Respondent was at the lower end of the scale for offences of supplying Class A drugs.

15. The offence in this case was undoubtedly serious. That much is clear from the sentencing remarks and material relating to the incidents in which the appellant, through driving whilst tired, caused death to one person and injury to others. The seriousness is reflected also in the sentence of four years' imprisonment on a guilty plea. But it does not, on any proper basis, reach the high threshold of seriousness or heinousness referred to by the Court of Appeal.

16. For that reason, I consider that ground 1 is made out. Further, it is evident from the First-tier Tribunal's decision that the finding that Bouchereau was engaged formed a large part of the reasoning with regard to the

assessment in the alternative at paragraph [49]. There is insufficient material relating to the analysis of whether paragraph 7(1)(f) should apply nor is there any engagement with the Directive. Accordingly, for these reasons, I consider that grounds 1 and 2 are made out and it falls then for the decision to be remade.

Remaking the Decision

The Law

17. It is for the respondent to demonstrate that deportation is justified.

18. The EEA Regs provided as follows, so far as they are relevant.

> 27. (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.
>
> (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security
>
> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—
>
> (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
>
> (b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(17).
>
> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—
>
> (a) the decision must comply with the principle of proportionality;
>
> (b) the decision must be based exclusively on the personal conduct of the person concerned;
>
> (c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
>
> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

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

(7) ...

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

19. Schedule 1 of the EEA Regulations provided as follows, so far as is relevant:

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as—

(a) the commission of a criminal offence;

(b) an act otherwise affecting the fundamental interests of society;

(c) the EEA national or family member of an EEA national was in custody.

> 5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.
>
> …
>
> 7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—
>
> (a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;
>
> (b) maintaining public order;
>
> (c) preventing social harm;
>
> (d) preventing the evasion of taxes and duties;
>
> (e) protecting public services;
>
> (f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;
>
> …
>
> (j) protecting the public;

20. Although the EEA Regulations were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, many of its provisions are preserved for the purpose of appeals pending as at 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309), ("the EEA Transitional Regulations").

21. The effect of the amendments is that the sole ground of appeal is now, in effect, whether the decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.

22. Thus, the issue is not whether the decision is in accordance with the EEA Regulations, but whether the decision is in accordance with the appellant's Treaty Rights as expressed through the Directive.

23. Ordinarily, in considering a piece of legislation designed to implement European law, a purposive construction should be adopted as set out in

Marleasing S.A v LA Commercial Internacional de Alimentacion S.A. [1992] 1 CMLR 305.

24. In British Gas Trading Ltd v Lock and Anor [2016] EWCA Civ 983 the Court of Appeal reviewed the case law on 'conforming interpretation' of EU and human rights law and considered the core principles outlined in Marleasing, Ghaidan v Godin-Mendoza [2004] UKHL 30, Vodafone 2 v Revenue and Customs Commissioners [2009] EWCA Civ 446 and Swift (trading as A Swift Move) v Robertson [2014] 1 WLFR 3438. The Court endorsed the approach taken in Vodafone 2 where the court approved the summary of the principles of conforming interpretation prepared by counsel for the HMRC.

> "37. …
>
> "In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular: (a) it is not constrained by conventional rules of construction (per Lord Oliver of Aylmerton in the *Pickstone* case, at p. 126B); (b) it does not require ambiguity in the legislative language (per Lord Oliver in the *Pickstone* case, at p. 126B and Lord Nicholls of Birkenhead in *Ghaidan's* case, at para 32); (c) it is not an exercise in semantics or linguistics (per Lord Nicholls in *Ghaidan's* case, at paras 31 and 35; per Lord Steyn, at paras 48–49; per Lord Rodger of Earlsferry, at paras 110–115); (d) it permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in the *Litster* case, at p 577A; per Lord Nicholls in *Ghaidan's case,* at para 31); (e) it permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the *Pickstone* case, at pp 120H–121A; per Lord Oliver in the *Litster* case, at p 577A); and (f) the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the *Pickstone* case, at p 112D; per Lord Rodger in *Ghaidan's* case, at para 122; per Arden LJ in the *IDT Card Services* case, at para 114)
>
> …
>
> "The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should 'go with the grain of the legislation' and be compatible with the underlying thrust of the legislation being construed': see per Lord Nicholls in *Ghaidan v. Godin-Medoza* [2004] 2 AC 557, para 53; Dyson LJ in *Revenue and Customs v. EB Central Services Ltd* [2008] STC 2209, para 81. An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment (see per Lord Nicholls, at para 33, Lord Rodger, at paras 110–113 in *Ghaidan's* case; per Arden LJ in *R (IDT Card Services Ireland Ltd) v. Customs and Excise Comrs* [2006] STC 1252, paras 82 and 113); and (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate: see the *Ghaidan* case, per Lord Nicholls, at para 33; per Lord Rodger, at para 115; per Arden LJ in the *IDT Card Services* case, at para 113.'"]

25. These principles apply to construing reg 27 and Schedule 1 of the EEA Regulations. Regard must also be had to Orfanopoulos [2004] ECR 1-5257 where the CJEU observed [67]:

> While it is true that a Member State may 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, the public policy exception must, however, be interpreted restrictively, with the result that the existence of a previous criminal conviction can justify an 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, in particular, Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 22 to 24).

26. In Straszewski v SSHD [2015] EWCA Civ 1245 the Moore-Bick LJ held:

> 13. Given the fundamental difference between the position of an alien and that of an EEA national, one would expect that interference with the permanent right of residence would be subject to more stringent restrictions than those which govern the deportation of nationals of other states. Moreover, since the right of free movement is regarded as a fundamental aspect of the Union, it is not surprising that the Court of Justice has held that exceptions to that right based on public policy are to be construed restrictively: see, for example *Van Duyn v Home Office* (Case 41/71) [1975] 1 C.M.L.R. 1 and *Bonsignore v Oberstadtdirektor der Stadt Köln* (Case 67/74) [1975] 1 C.M.L.R. 472.
>
> 14. Regulations 21(5)(b) and (d) provide that a decision to remove an EEA national who enjoys a permanent right of residence must be based exclusively on the personal conduct of the person concerned and that matters that do not directly relate to the particular case or which relate to considerations of general prevention do not justify a decision to remove him. On the face of it, therefore, deterrence, in the sense of measures designed to deter others from committing similar offences, has of itself no part to play in a decision to remove the individual offender. Similarly, it is difficult to see how a desire to reflect public revulsion at the particular offence can properly have any part to play, save, perhaps, in exceptionally serious cases. As far as deterrence is concerned, the CJEU has held as much in *Bonsignore v Oberstadtdirektor der Stadt Köln*.
>
> 15. Nonetheless, there have been instances in which deterrence and public revulsion have played a part in the decision. In *R v Bouchereau* (Case 30/77) [1978] 1 Q.B. 732 the defendant, a French national working in England, was convicted for a second time of possessing dangerous drugs (small quantities of amphetamine, cannabis and LSD). The magistrate was minded to recommend him for deportation, but he argued that it would be unlawful to deport him as he was a migrant worker exercising Treaty rights. The magistrate referred a number of questions to the European Court, the second of which was whether the provision that previous convictions do not in themselves justify a decision to deport, now to be found in regulation 21(5)(e), meant that such convictions were relevant only as demonstrating a propensity to offend in the future.

16. In his Opinion Advocate-General J-P Warner agreed with a submission of the UK government that, in exceptional cases where the personal conduct of an alien has been such that, while not necessarily evincing a clear propensity on his part to re-offend, it has caused such deep public revulsion that public policy requires his removal. The court dealt with the question as follows:

> "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."

17. In my view the clear emphasis of that passage is on the fundamental nature of the principle of free movement and the need to identify a present threat to the requirements of public policy, while recognising that there may be cases in which past conduct alone may suffice. However, paragraph 29 must be read and understood in the context of the court's answer to the third question, namely, whether "public policy" includes reasons of state in circumstances where no breach of the peace or public order is threatened. The court recognised that public policy may vary from country to country and may differ under different circumstances and at different times. National authorities must be allowed a degree of discretion in how they apply it within the limits imposed by the Treaty. The court then concluded with an endorsement of the underlying principles in these terms:

> "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."

18. This seems to me to emphasise the need to look to the future rather than the past in all but the most exceptional cases and to emphasise the importance of the right of free movement. I agree with Mr. Drabble Q.C. that one can detect in the decision an understandable element of pragmatism in the recognition of the right to deport those who have committed the most heinous of crimes which is at odds with the principles of the Directive.

27. That decision relates to the previous EEA Regulations, but there has been no change in the underlying Directive. And, while the individual in Straszewski had acquired permanent residence, that does not alter the fact that the right of free movement is fundamental right, even for those EEA nationals who had not acquired permanent residence.

28. In her answers to the appellant's petition to the Court of Session at [13], the Secretary of State accepted that the law applicable where she wishes to deport an EU national is very different from that applicable to non-EU nationals and that it is "an essential precondition of deportation that the EEA national's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". While meeting that test is condition precedent to the power to deport, "sufficiently" still requires a balancing of the threat against the public policy in question against the right of free movement.

29. Reg 27 (5) sets out the relevant principles derived from the Directive. Unlike sections 117B and C of the Nationality, Immigration and Asylum Act 2002, there are no presumptions as to the weight to be accorded to factors that have to be taken into account. Schedule 1 does, however, seek to do so at paragraphs 2 to 5 in setting out considerations that a judge must take into account when assessing the threat an individual presents to the fundamental interests of society.

30. Turning then to how those are defined in paragraph 7 of Schedule 1, Paragraphs 7(1)(f) and (g) of Schedule 1 to the EEA Regulations fall to be interpreted in the light of these principles, and in the light of the Bouchereau exception. Paragraph 7 (1)(f) encompasses that exception; if a case fell within the exception, it would clearly fall within the parameters set out therein. The paragraph appears to go wider, as does paragraph 7 (1)(f) indicating a broader spectrum that falls within its scope.

31. How broad that spectrum is, and the extent to which weight can or should be attached, is subject to the proviso that restrictions on free movement must be narrowly construed when considering whether a person presents a genuine, present and sufficiently serious threat to public policy to justify the interference with the right of free movement which flows from deportation. "Sufficiently" in this context implies a balancing exercise must be undertaken; that flows naturally from the structure of Article 31 of the Directive which places the "genuine, present and sufficiently serious" test within the overall context of a proportionality test.

32. In all the circumstances of this case, I consider it appropriate to attach some weight to the nature of the offence in assessing the seriousness of the threat the appellant poses, but it is far from determinative.

33. In remaking the decision, I have admitted in evidence the PNC printout showing that the appellant was convicted of offences in Romania for which he was sentenced to five years' imprisonment. These offences were not disclosed by the appellant, and whilst I accept that extensive searches on

the part of Social Work and the Scottish courts did not reveal them. That is confirmed by the letter from the Criminal Social Work Team in its letter of 1 November 2019 referring to two separate searches having been made.

34. In deciding whether to admit the evidence, I note that the appellant has had an extensive length of time to address the issue and if so advised to make an additional witness statement or to give evidence regarding these convictions. He has chosen not to do so. And, in all the circumstances of this case, I am satisfied that it is in the interests of justice to permit the respondent to adduce them.

35. The offences were not previously disclosed on a PNC check. Nonetheless, there appears no good reason not to find that this evidence is reliable. Those checks which were carried out show that the appellant was linked to the offences by his National Identity card and name. I find insufficient evidence to show that the offences were recorded against the appellant's name by mistake. But, although it seems odd that he was then able to serve as a police officer despite those convictions, no submissions have been made on that. And, viewing the evidence as a whole, I find on the balance of probabilities that the respondent has shown that the appellant did commit these offences.

36. That said, as Mr Mullen accepted, the offences are different in character from the offence for which the appellant was sentenced, robbery as opposed to causing death by dangerous driving and the offences were committed well over twenty years ago. They are not offences on which I put evidential weight in assessing the threat posed by the appellant. There is no indication that the appellant has committed robbery or any similar offence since. There was no submission from Mr Mullen that I should, in the circumstances, attach less weight to the material from the Social Workers or Parole Board.

37. In assessing whether the appellant presents a genuine, present and sufficiently serious threat to public policy, I bear in mind the principles set out above and I take fully into account schedule 1 to the EEA Regulations.

38. In this case, the appellant was referred to the Parole Board by the Scottish Minister. The Board heard evidence from a Prison Based Social Worker, Mr Gardiner. His evidenced [23] was that the appellant is not a risk to the public in the UK. The Board also heard evidence from the appellant. The Board acknowledged also that the risks the appellant presented could be managed in the community.

39. The report from Mr Gardiner post Parole Hearing, indicates that there is a low risk of the appellant committing another offence. That said, given his conviction and the driving ban, it is unlikely that he would be employed in a position where he could commit another similar offence.

40. The Secretary of State submits that, nonetheless, the risk remains, even if it is small, and seeks to rely primarily on paragraph 7 (1)(f) of Schedule 1. I accept that it is open to the United Kingdom to exercise its discretion to define its own standards of public policy and public security, but that discretion must be exercised within limits as noted in Orfanopoulos.

41. Reliance is also placed [29] on paragraph 7(g). But, as with paragraph 7(g) that is subject to the proviso that restrictions on free movement must be narrowly construed when considering whether a person presents a genuine, present and sufficiently serious threat to public policy to justify the interference with the right of free movement which flows from deportation (see [30] to [31] above). Further, insofar as this is a factor not related to the appellant personally or his conduct, it is not a factor to which weight can properly be given weight if it does not relate exclusively to his conduct.

42. This is not a case in which there is no risk of reoffending. But, the Criminal Justice Social Work report states that there is no risk of serious harm. That said, the letter is expressly based on the lack of prior convictions as indeed is the Parole Board Report.

43. In addition, in her report of 13 November 2019, the appellant's Social Worker who supervised his parole opined that on the basis of the appellant' risk factors and index offence, he is not a threat to the public. It is also recorded that he has engaged with offence-focussed work and in relating to the index offence in terms of victim empathy and decision-making.

44. Having considered all the material for myself, and in light of the submission made by Mr Mullen, I am not satisfied that the appellant's earlier convictions materially affect the assessment of risk given their age.

45. The appellant has no family ties to the United Kingdom, and although he has worked hear for a number of years, and does speak English, these are factors which attract relatively limited weight.

46. Taking all of these factors into account, taking into account Schedule 1 to the EEA Regulations and viewing the evidence in the round, I find that the appellant does not present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and that in all the circumstances, bearing in mind the extent to which his right to free movement would have been impaired, it would not be proportionate.

47. I therefore allow the appeal on the grounds that the decision was contrary to the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside

2. I remake the appeal by allowing it on EU Treaties grounds

3. No anonymity order is made.

Signed Date: 25 July 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul