



Neutral Citation Number: [2024] EWCA Civ 23

Case No: CA-2022-002228

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
UTJ GRUBB
EA/04590/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 January 2024

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE SNOWDEN

Between:

**THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT**

Appellant

-and-

HENRY CHIGOZIE OKAFOR

Respondent

Jonathan Lewis (instructed by **Government Legal Department**) for the **Appellant**
Zainul Jafferji and Arif Rehman (instructed by **Riverway Law**) for the **Respondent**

Hearing date: 14 December 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 23 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Stuart-Smith:

1. The Secretary of State for the Home Department [“SSHD”] appeals against the decision of the Upper Tribunal [“UT”] dated 17 June 2022. By that decision, UT Judge Grubb [“the Judge”] allowed Mr Okafor’s appeal, which he had brought under the preserved provisions of the Immigration (European Economic Area) Regulations 2016 [“the EEA Regulations”], against the SSHD’s decision dated 17 September 2020 refusing him admission to the United Kingdom and cancelling his leave.
2. There is one permitted ground of appeal, namely that:

“The UT erred in law in failing to consider the cumulative effect of the Respondent’s behaviour and whether his drug offending, considered in conjunction with this repeated recent deception, fell within the scope of the *Bouchereau* exception.”

It is common ground that the burden of satisfying the Tribunal that Mr Okafor’s conduct brings the case within the *Bouchereau* exception (*R v Bouchereau* (Case 30-77) [1978] QB 732 (ECJ)) rested on the SSHD, the standard of proof being the civil standard. The SSHD accepts that the burden on him was “to demonstrate, on the balance of probabilities, that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society under regulation 27(5)(c) of the EEA Regulations.”

3. On the hearing of the Appeal, the SSHD was represented by Mr Lewis and Mr Okafor by Mr Jafferji. We are grateful to both counsel for clear and focussed submissions. We are particularly grateful to Mr Lewis, who was instructed at short notice when an emergency prevented his predecessor from attending.
4. For the reasons set out below, I would dismiss the appeal.

The factual and procedural background

5. I adopt the background as set out at [3]-[12] of the UT’s judgment:

“3. The appellant is a citizen of Nigeria who was born on 1 June 1965. He is married to a Swedish (and therefore EEA) national whom he married in Nigeria on 15 October 2019.

4. The appellant’s spouse, ... was granted indefinite leave to remain on 11 March 2019.

5. On 30 July 2020, the appellant was granted entry clearance under the EU Settlement Scheme.

6. On 17 September 2020, the appellant arrived at Heathrow Airport with an EUSS family permit. However, he was refused admission on the grounds of public policy and his family permit was revoked under regs 23 and 24 of the Immigration (EEA) Regulations 2016 (SI 1052/2016 as amended) (“the EEA Regulations”). In addition, his leave to enter was cancelled on the same basis under para 321B of the Immigration Rules (HC

395 as amended). Although the decisions were initially taken and served on 17 September 2020, the cancellation of leave, which it was acknowledged had been served on an incorrect form, was reissued on 22 September 2020.

7. The basis of the public policy decision under the EEA Regulations was that in 1994 the appellant had been convicted in the USA of the offence of conspiracy to possess with intent to distribute heroin and had been sentenced to 350 months' imprisonment. He had been imprisoned since his arrest on 12 December 1992 in relation to that offence. He served almost 26 years of the sentence before he was released from prison on 23 January 2019 to the custody of the US Immigration Services. On 5 May 2019, he was removed to Nigeria.

8. The appellant did not disclose his conviction or deportation in his EUSS family permit application made on 15 February 2020, nor in two earlier visit visa applications made on 31 October 2019 and 24 December 2019. Indeed, in all three applications in answer to questions whether he had been convicted of a criminal offence in the United Kingdom or in any other country, the appellant had replied that he had not.

9. The appellant appealed to the First-tier Tribunal. In a decision sent on 27 May 2020, Judge Mailer allowed the appellant's appeal. Judge Mailer was not satisfied that the respondent had established on a balance of probabilities that the appellant's conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. His exclusion from the UK could not, therefore, be justified under EU law."

...

10. The Secretary of State appealed to the Upper Tribunal with permission.

11. In a decision dated 28 February 2022, [the UT, by UTJ Grubb] set aside Judge Mailer's decision on the basis that he had erred in law in allowing the appeal under the EEA Regulations. The reasons are set out in full in [UTJ Grubb's February 2022] decision. In essence, [he] concluded that the judge had failed to consider the so-called "*Bouchereau* exception" in concluding that the appellant did not represent a "genuine, present and sufficiently serious threat" to a fundamental interest in society based upon his conduct.

12. The appeal was adjourned for a resumed hearing in order for the Upper Tribunal to re-make the decision on that issue."

6. The UT decision of 28 February 2022 adjourning the appeal included express provision that:

“74. The appeal is adjourned in order to re-make the decision. The judge’s finding that it is “not likely that the appellant will re-offend in the future” in the sense of commit a drugs offence is preserved.

75. The appeal will be relisted in the Upper Tribunal in order to re-make the decision on the basis of the evidence that was before the First-tier Tribunal.”

7. The finding of the First-tier Tribunal [“FtT”] to which the UT was referring had been expressed at [137] of FtT Judge Mailer’s decision as follows:

“Having regard to the evidence as a whole, I find that it is not likely that the appellant will re-offend in the future. The appellant has not been shown to have any intention or desire to re-engage in criminal conduct. Nor is there any evidence that he would be likely to lapse so as to breach the United Kingdom laws if he considered it expedient to do so.”

The evidence to which the FtT Judge was referring included evidence of good behaviour while in custody and the obtaining of qualifications and employment while in custody, including a BSc in Business Law and becoming a Quality Assurance Clerk.

The UT judgment

8. Having set out the background, the Judge identified the issue on the appeal to the UT at [14]:

“The scope of the appeal was limited to the issue of whether the appellant’s conduct, arising both from his criminal conviction in the USA and his conduct subsequently in failing to disclose his convictions in his UK immigration applications, justified his exclusion on the basis that it represented a “genuine, present and sufficiently serious threat affecting one of the fundamental interests of society” applying the “*Bouchereau* exception”.”

9. The Judge then addressed the “*Bouchereau* exception”, starting with Regulations 27 and 28 of the EEA Regulations, the relevant parts of which I set out below. Having at [20] set out the four stage test established by *BF (Portugal) v SSHD* [2009] EWCA Civ 923 at [3], he returned to the central issue in the appeal at [21]:

“The central issue in this appeal is whether the appellant’s conduct falls within reg 27(5)(c). It is not suggested, not (sic) sensibly could it be, that his drugs offending does not fall within the rubric of a “fundamental interest of society” (see e.g., Schedule 1, para 7(g) of the EEA Regulations). The same is equally true of his deceptive conduct in the immigration context (see, e.g. Schedule 1, para 7(a) of the EEA Regulations). The

issue is whether the appellant’s conduct represents a “genuine, present and sufficiently serious threat” to one or more of those fundamental interests.”

10. At [22]-[23] the Judge, while recognising that the “usual” case requires the SSHD to establish that the individual has a “propensity” to re-offend or that there is a risk of re-offending, identified (on the authority of *SSHD v Robinson* [2018] EWCA Civ 85) that:

“even in the absence of a propensity to commit further offences, where the individual’s conduct can be said to produce a “deep public revulsion” then the requirement of EU law that the individual should represent a “genuine, present and sufficiently serious threat” to a fundamental interest of society may still be met. That, as will be clear, unusual case is the so-called “*Bouchereau* exception”.”

11. Amongst other passages, the Judge cited [84]-[86] of *Robinson*, where Singh LJ (with whom Underhill and Lindblom LJ agreed) declined to attempt an exhaustive definition but (a) identified that what one is looking for is a present threat to the requirements of public policy, (b) accepted that past conduct alone was potentially sufficient if the facts were “very extreme”, (c) suggested that “the sort of case” that the ECJ had been thinking of in *Bouchereau* was “where, for example, a person has committed grave offences of sexual abuse or violence against young children”, and (d) adopted the phrase “the most heinous of crimes” as giving an indication of the sort of case that the ECJ had in mind when it said that a past offence alone might suffice”.
12. In the light of his review of the authorities, at [27]-[30] the Judge attempted to identify the scope of the *Bouchereau* exception:

“27. First, it is clear from *Bouchereau* itself, and the Court of Appeal’s approach subsequently, that a propensity to re-offend or a risk of re-offending is usually a *sine qua non* to establishing that there is a “genuine, present and sufficiently serious threat” to a fundamental interest of society.

28. Second, the “*Bouchereau* exception” will arise only “exceptionally” (see the Advocate-General’s opinion at [69] of *Robinson* above).

29. Third, the “*Bouchereau* exception” arises when the individual’s conduct can be said to engender “deep public revulsion”. The courts have indicated that conduct which gives rise to “deep public revulsion” is likely to be in cases which are “extreme” (see [71] of *Robinson*) and which involve the “most heinous crimes” and which are “especially horrifying” and “repugnant to the public” (see [86] of *Robinson*). In *Robinson*, Singh LJ referred to examples where “a person has committed grave offences of sexual abuse or violence against young children”.

30. Fourth, without offending the EU law prohibition on applying the public policy exception based upon “previous criminal convictions” alone (see reg 27(5)(e)), the exceptional or unusual case must be based “exclusively on the personal conduct of the person concerned” (see reg 27(5)(b)), i.e. an assessment of the seriousness and nature of the offence and the circumstances of the offending (and the offender) *as a whole*. In *K and HF*, in the context of an individual whose previous offending had excluded him from the Refugee Convention, the CJEU emphasised the need for an overall assessment of the individual’s past offending, its circumstances and *his subsequent conduct* (at [66]):

“66. The finding that there is such a threat must be based on an assessment, by the competent authorities of the host Member State, of the personal conduct of the individual concerned, taking into consideration the findings of fact in the decision to exclude that individual from refugee status and the factors on which that decision is based, particularly the nature and gravity of the crimes or acts that he is alleged to have committed, the degree of his individual involvement in them, whether there are any grounds for excluding criminal liability, and whether or not he has been convicted. *That overall assessment must also take account of the time that has elapsed since the date when the crimes or acts were allegedly committed and the subsequent conduct of that individual, particularly in relation to whether that conduct reveals the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, capable of disturbing the peace of mind and physical security of the population. The mere fact that the past conduct of that individual took place in a specific historical and social context in his country of origin, which is not liable to recur in the host Member State, does not preclude such a finding.*” (Emphasis added)

13. In summarising the parties’ submissions and arguments, the Judge started by addressing the preserved finding of the FtT at [137] of Judge Mailer’s judgment, which I have set out at [7] above. He held that it amounted to a finding that it was not likely that Mr Okafor would re-offend by committing any drug-related offences and that the SSHD had failed to establish on the balance of probabilities that Mr Okafor is at risk of re-offending or engaging in deceptive conduct of the nature involved in his immigration applications. There is and could be no challenge to those findings.

14. The Judge then set out the SSHD’s submission at [37]:

“Consequently, and Ms Rushforth maintained her argument on both bases, the respondent relies on the “*Bouchereau* exception” both in relation to the appellant’s criminal conviction in the USA and also his deceptive conduct in relation to the UK immigration authorities on three occasions in 2019 and 2020.”

15. On behalf of Mr Okafor it was submitted that the SSHD had adduced no evidence about his US criminal conviction apart from the nature of the charge and the length of his sentence. As to that, the Judge referred to evidence adduced on Mr Okafor's behalf from apparently credible independent sources that Mr Okafor's involvement in the drug conspiracy was limited to recruiting and referring a willing drug mule to a Nigerian drug smuggler with whom he had no other relationship, for which he was paid approximately \$1,500. His role was described as peripheral and surprise was expressed by the independent sources at the severity of his sentence which, in the view of at least one source, was out of line with the sentences passed on others who were further up the chain. In addition, while in prison, Mr Okafor had, over a course of approximately eight years, recruited numerous inmates of Nigerian origin to provide information on criminal activities in the areas of drug smuggling, money laundering and healthcare fraud.
16. On the basis of this limited evidence about his offending, as the Judge recorded at [45]-[46], it was submitted on Mr Okafor's behalf that the *Bouchereau* exception was not established either on the basis of his criminal offending or on the basis of his subsequent deceptive conduct in relation to the immigration offences.
17. The Judge recorded that the SSHD's submissions in reply were to the effect that (a) there were difficulties for the SSHD in obtaining information about Mr Okafor's offending in the USA; (b) in *R v SSHD ex p. Marchon* [1993] Imm AR 384 the conduct of a doctor who was convicted in relation to a conspiracy to import 4 ½ kg of heroin was described by the court as "especially horrifying" and "repugnant to the public", justifying the application of the *Bouchereau* exception; (c) although sentencing in the USA could not be equated with sentencing in England and Wales, Mr Okafor's sentence was considerably in excess of the norm for involvement in such offences; and (d) the SSHD relied upon Mr Okafor's deceptive conduct with the UK immigration authorities.
18. The Judge's Discussion section was at [49]-[61] of his judgment. He started by addressing Mr Okafor's criminal conduct in the US, noting at the outset that "there is a paucity of detailed information concerning [Mr Okafor's] offence." Having recorded (a) the conviction for conspiracy to possess with intent to distribute heroin, (b) the 350 month sentence, and (c) that Mr Okafor served nearly 26 years, he noted that the SSHD had adduced no evidence about the circumstances of Mr Okafor's offending and that the only evidence he had was that adduced on behalf of Mr Okafor. Having reviewed the reliability and independence of the sources of evidence, he accepted the evidence of Mr Okafor's limited role, which I have summarised above and which he said would form the basis on which he would proceed.
19. He then reviewed other information about levels of sentencing in the USA and its disproportionate impact upon African Americans, which he had "not found particularly helpful" because he had no way of knowing how it had impacted upon Mr Okafor in particular. He then said at [53]:

"I prefer, instead, to determine whether the "*Bouchereau* exception" applies by looking at the appellant's role, his sentence - bearing in mind the limited information I have about where such a sentence falls upon a spectrum of sentencing for drug related offences - *and his subsequent conduct.*" (Emphasis added)

20. At [54] he summarised Mr Okafor's role in the criminal conspiracy:

“Here, the appellant was involved in a very serious offence - conspiracy to possess with intent to distribute heroin. His role specific role (sic) must, however, be taken into account. His involvement was to recruit a courier. For that, he was paid a fee. That role was described by Agent GT, based upon information he received from the FBI agent, to appear to be a “peripheral role in the conspiracy”. Although it is not entirely clear, it appears that the appellant's role involved recruiting a single courier.”

21. The Judge then addressed the question of “public revulsion” which, he said, needed to take into consideration Mr Okafor's cooperation with the authorities in the United States in providing them with information and the evidence of his positive steps while in prison as found by the FtT Judge. He went on, at [55]:

“The offence took place 30 years ago. The appellant has not been convicted of any offences since his release in 2019, although that is a relatively short time ago, Judge Mailer's finding was that he was not at risk of re-offending. Judge Mailer plainly concluded that the appellant had been rehabilitated.”

22. At [56], the Judge distinguished *Ex p Marchon* on the basis that what made the offending especially horrifying in that case was that the offender was a doctor.

23. Having reminded himself at [57] that it was for the SSHD to establish the public policy ground, that the SSHD had adduced no evidence concerning the circumstances of Mr Okafor's offending, and that the Tribunal can only reach a decision on whether the SSHD has discharged that burden of proof on the evidence before it, the Judge drew the strands together at [58]-[61] (emphasis added in [58]):

“58. In assessing whether the appellant's “personal conduct” gives rise to “deep public revulsion” *it is, in my judgment, important to take all the factors I have identified above into account.* Here, the appellant's offending though very serious, and his role - like the offence itself - should not be understated, it was not offending (based upon the limited circumstances known in this appeal about the offending) which falls within the exceptional or unusual category that invokes the “*Bouchereau* exception” where the appellant has been found not to have a propensity to offend and is not at risk of re-offending in the future.

59. For the above reasons, the Secretary of State has failed to establish on a balance of probabilities that the appellant's conduct falls within the “*Bouchereau* exception” and therefore amounts to a “present, genuine and sufficiently serious threat” to a fundamental interest of society.

60. To the extent that [the SSHD] relied upon the appellant's deceptive conduct in relation to the UK immigration authorities,

the UT's decision in *Arranz* is no more than a recognition that immigration fraud or abuse can affect a "fundamental interest of society". That was, of course, a case where the UT denied, wrongly now given *Robinson*, that the "*Bouchereau* exception" existed and so was only concerned with an individual who had a propensity to commit such offences or was at risk of re-offending. Given that the judge found that there was no risk of the appellant re-offending in the future, whilst his past conduct was such that it affects a "fundamental interest of society" under Schedule 1 to the EEA Regulations, that conduct comes nowhere near falling within the exceptional or unusual case contemplated by the "*Bouchereau* exception" where "deep public revulsion" is engendered by that conduct.

61. As it is not established that the appellant's conduct represents a "genuine, present and sufficiently serious threat" affecting a fundamental interest of society, his exclusion cannot be justified on public policy grounds. The issue of proportionality does not strictly arise given that finding. For these reasons, therefore, the appellant succeeds in his appeal."

The present appeal

24. I have set out the one permitted ground of appeal at [2] above.

The SSHD's submissions

25. The SSHD's primary submission, reflecting the permitted ground of appeal, is that the Judge erred in law in failing to consider the cumulative effect of Mr Okafor's behaviour and whether his drug offending, considered in conjunction with his recent deception, fell within the scope of the *Bouchereau* exception. That asserted failure is submitted to have led the Judge to err when considering the time frame of Mr Okafor's reprehensible conduct, which is alleged to have continued to the recent instances of dishonest behaviour. As a result of these alleged errors, the SSHD submits that the Judge reached the wrong conclusion and that "serving a 26 year sentence for the most serious drugs offences and then brazenly lying about that fact in order to secure entry to the UK is precisely the type of behaviour that can be said to cause "deep public revulsion"."
26. In addition, by his skeleton argument the SSHD submitted that the Judge failed properly to consider the length of the sentence imposed by the US Authorities when assessing Mr Okafor's drugs offending. As Mr Lewis accepted, this point was not covered by the permission to appeal that had been granted. He proposed a second ground of appeal, namely that "the UT erred in law in failing to take into account Mr Okafor's length of sentence in assessing his behaviour." Mr Jafferji objected on the basis that this was a second appeal and the proposed ground raised no point of principle. We refused permission to add the second proposed ground of appeal on three grounds. First, it was raised too late. Second, it raised no point of principle. Third, it was simply unarguable. On any fair reading of the UT judgment, it is plain beyond argument that the Judge took fully into account the length of Mr Okafor's sentence. In truth the fact of the conviction and the length of sentence were his starting point; but he then went on to consider the additional evidence which put the bald fact of the length of his sentence into context:

see the outline summary at [18] above. In the course of his discussion he said at [52] that

“... under EU law it is essential to assess not only the seriousness of the offending based upon sentence but to look, in addition, to the circumstances of the offending.”

That is what the Judge did, as appears from the passage at [53] of the judgment, which I have set out at [19] above. The fact that he ultimately concluded that there was other material that informed his judgment about how serious the offending had been does not mean, or even suggest, that he did not take the length of the sentence fully into account.

27. In the course of Mr Lewis’ oral submissions he accepted that the Judge’s summary of the law disclosed no material error. Specifically, the SSHD did not take issue with the Judge’s formulation of the central issue at [21] of the judgment or his summary of the principles, which I have summarised or set out at [9] to [12] above. The substance of the SSHD’s concerns and of Mr Lewis’ submissions is that the judge applied the law wrongly by failing to aggregate the impact of the criminal conviction and the deceptive conduct when assessing whether the case falls within the *Bouchereau* exception. When Mr Lewis was asked by the Court whether the SSHD accepted that either (a) Mr Okafor’s criminal conduct (as found by the Tribunal) on its own or (b) his deceptive conduct in his immigration applications (as found by the Tribunal) on its own would be insufficient to trigger the application of the *Bouchereau* exception, it emerged that he was without instructions to answer either question.

Mr Okafor’s submissions

28. Mr Okafor rejects the suggestion that the Judge did not have regard to the cumulative effect of the drug offending and the more recent dishonest behaviour. He submits that the Judge made no error of law. Rather, he conducted a thorough review of all relevant features and reached an unassailable conclusion having taken all relevant matters into account. He submits that the SSHD in this appeal is simply trying to re-argue the merits of the Judge’s decision and, in doing so, is hamstrung by his failure to adduce any evidence about the circumstances of Mr Okafor’s drug offending.
29. In oral submissions Mr Jafferji submitted that the Judge’s approach was unimpeachable and that he had not impermissibly left the conduct leading to his conviction and his deceptive conduct in relation to his immigration applications in segregated silos. He emphasised that each case is fact-specific and the strength of the words that have been used to describe the sort of impact or the seriousness of the conduct that is required to trigger the *Bouchereau* exception: “exceptional”, a case whose facts are “very extreme”, “especially horrifying”, “the most heinous of crimes”, and “conduct which has caused deep public revulsion.” He cautioned us, moderately but persistently, against interfering lightly with the findings and assessment of the specialist Tribunals below, relying on well-known passages from *AH (Sudan) v SSHD* [2007] UKHL 49 [2008] 1 AC 678 at [30] and *KM v SSHD* [2021] EWCA Civ 693 at [77].

The legal framework

30. There is no material distinction between the parties about the principles to be applied. The SSHD’s summary of the relevant statutory provisions and the impact of previous

decisions is virtually identical to the exposition of principles provided by the Judge. Mr Lewis' concession is properly and correctly made: the Judge's exposition reveals no error of principle. I set out the statutory provisions below for convenience, taken almost entirely from the SSHD's skeleton argument on this appeal; but I could just as well have taken them from the UT judgment. It is not necessary to engage in any detailed exposition of the cases to which we have been referred.

The legislative framework

31. Regulation 23 of the EEA Regulations deals with the exclusion and removal of individuals from the UK. Regulation 23(1) provides that 'a person is not entitled to be admitted to the UK... if a refusal to admit that person is justified on grounds of public policy...in accordance with regulation 27'.

32. Regulation 27(5) sets out the public policy requirements as follows:

“(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.’

33. Regulation 27(8) states that in deciding whether the requirements of Regulation 27 are met, a court or tribunal must take account of the considerations set out in schedule 1. Schedule 1 provides:

“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 the fundamental interests of society

...

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.”

34. Paragraph 7 of schedule 1 sets out a number of ‘fundamental interests of society’ which fall within the ambit of Regulation 27(5)(c). So far as relevant, it provides:

“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;

...

(c) preventing social harm;

...

(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;

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union).”

Applicable principles

35. In *BF (Portugal) v SSHD* at [3] Sullivan LJ identified four stages to be followed by the Tribunal in applying the EEA Regulations. It must determine:

- i) what was the relevant personal conduct of the individual?; and
 - ii) whether that conduct represents a genuine, present and sufficiently serious threat; and if so,
 - iii) whether that threat affects one of the fundamental interests of society; and if so,
 - iv) whether the removal or exclusion of the individual would be disproportionate in all the circumstances.
36. There is now no doubt that the *Bouchereau* exception forms part of English law. Furthermore, in my judgment, the Judge's setting out of the relevant issues and principles at [14], [21], [22]-[23], [27]-[30] of his judgment provided a suitable working summary of the established principles that he had (and intended) to apply: see [8] to [12] above.

Discussion and resolution

37. The question for us is whether the Judge erred materially in law in reaching his conclusion that the *Bouchereau* exception did not apply in this case.
38. Both counsel accepted that there may be cases where, on their particular facts, the impact of different aspects of a person's conduct could properly be aggregated when the SSHD or the Tribunal comes to assess whether that person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society under regulation 27(5)(c) of the EEA Regulations so as to trigger the application of the *Bouchereau* exception. I agree. I emphasise that my agreement is on the basis that the answer to the question of possible aggregation will be fact sensitive in every case. I do not consider it necessary to say any more, whether by way of examples or otherwise, since resolution of the question will always depend upon the facts of the given case.
39. I am, however, quite unable to accept that the Judge in the present case impermissibly failed to have regard to the cumulative effect of the different aspects of Mr Okafor's conduct. To the contrary, a fair reading of the judgment leads to the conclusion that the Judge not only had the correct principles in mind, identified the central issue and asked himself the right question and but also that he applied the principles correctly.
40. The Judge's appreciation that he was to consider Mr Okafor's conduct as a whole permeates the judgment. In formulating the issue at [14] of the judgment, he framed it as being whether Mr Okafor's conduct (by which he expressly meant both the conduct in relation to his criminal conviction and his subsequent failure to disclose his convictions) justified his exclusion: see [8] above. There is nothing to suggest that by "both ... and" he meant "either ... or". Similarly, when formulating the central issue at [21] of the judgment, he addressed Mr Okafor's conduct as a whole and the issue as being whether his conduct "represent[ed] a "genuine, present and sufficiently serious threat" to one or more of those fundamental interests." Once again, there is no suggestion that the question was only to be asked separately in respect of different instances of conduct viewed exclusively on their own: see [9] above.

41. Any residual doubt about the Judge's meaning in these paragraphs is removed by his reference in [30] of the judgment and the citation from [66] of *K and HF* to "the need for an overall assessment of the individual's past offending, its circumstances and his subsequent conduct"; and that the "overall assessment must also take account of the time that has elapsed since the date when the crimes or acts were allegedly committed and the subsequent conduct of that individual particularly in relation to whether that conduct reveals the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU ...": see [12] above. It is plain from these citations that the Judge considered it necessary to conduct an overall assessment taking into account all relevant conduct.
42. In between these passages he had at [20] of his judgment correctly directed himself about the *BF (Portugal)* four stage test: see [9] and [35] above.
43. It is also plain beyond argument that the Judge appreciated the nature of the SSHD's submission, as appears from his summary of the submission at [37] of the judgment, which I have set out at [13] above. Once more, there is no suggestion that the Judge when saying "both ... and" meant "either ... or".
44. When it came to the section of his judgment where he discussed the competing submissions, analysed the materials before him and resolved the issue he had to decide, the Judge once more indicated his approach at [53], which I have set out at [19] above. Crucially, he made clear that, on his approach, application of the *Bouchereau* exception depended on Mr Okafor's role, the sentence imposed and "his subsequent conduct". Just as there is no basis for treating his role and the sentence imposed as separate and mutually exclusive factors, so there is no basis for interpreting the reference to "his subsequent conduct" as meaning or implying anything other than an overall assessment based on all relevant subsequent conduct, his role and the sentence imposed. That approach is repeated in [58] of the judgment (which I have set out at [23] above), where the Judge said that his assessment of whether Mr Okafor's "personal conduct" gave rise to "deep public revulsion" required him "to take all the factors [he had] identified above into account". In the context provided by the judgment as a whole and the passages I have identified in particular, there is no basis for excluding Mr Okafor's deceptive conduct from this entirely general reference to "all factors".
45. The SSHD is enabled to advance his arguments because the Judge addressed Mr Okafor's offending in [58] of the judgment and his deceptive behaviour in [60] of the judgment having already held in [59] that the SSHD had failed to establish that Mr Okafor's conduct fell within the *Bouchereau* exception. I have set out the concluding paragraphs of his judgment at [23] above. It is not surprising that the Judge addressed the conviction separately from the deceptive conduct in his immigration applications: on the contrary, that was necessary in the interests of clarity. Nor is it surprising that, having stated the need to take all factors into account at the start of [58] he then addressed the criminal conduct first and stated his conclusion that it did not of itself trigger the *Bouchereau* exception. There is and can be no challenge to that conclusion, though Mr Lewis could not and did not concede that it was correct.
46. Furthermore, the Judge's treatment of the deceptive conduct at [60] reflected the submissions of the SSHD, which had treated the deceptive conduct as something of a makeweight on which he placed "some reliance". The Judge was entitled to find that the deceptive conduct came "nowhere near" being an exceptional or unusual case where

“deep public revulsion” is engendered. Once again, there is and can be no challenge to that conclusion, though it was not formally conceded.

47. Paragraphs [58] to [61] must be read in the context provided by the rest of the judgment. That context, which I have attempted to summarise above, shows that the Judge had the relevant principles, issues and questions in mind at all material times and considered that the deceptive conduct added nothing of substance to the overall assessment he was obliged to undertake. His justifiable use of the dismissive phrase “nowhere near” indicates that the deceptive conduct was not such as to affect the balance as it appeared on consideration of the much more important feature, namely the criminal offending. That led him to his overall conclusion in [61]: see above. That does not indicate that he was failing to consider the cumulative effect of Mr Okafor’s behaviour. It merely meant that he concluded that the additive effect of the deceptive conduct, in the circumstances of this case, did not affect the overall balance.
48. I accept that it could have been clearer if he had inserted a single concluding sentence expressly stating that he had reached his overall conclusion taking all relevant matters into account “both singly and cumulatively” (or some such phrase); or if he had reversed the order of [59] and [60]. However, it would be perverse to hold that, having consistently and expressly recognised the correct principles and test that he had to apply, his judgment should be struck down for what, in a legal sense, was the want of a horseshoe nail.
49. I would therefore dismiss this appeal on the basis that the Judge took into account the cumulative effect of all relevant matters and concluded that the deceptive conduct did not tip the balance. His judgment does not disclose any error of law that would justify or permit us to interfere.

Lord Justice Snowden

50. I agree.

Lord Justice Moylan

51. I also agree.