Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00325/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 December 2019	**On 16 January 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MRS GUNARATNAM SRISKANTHARAJAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B. Malik, Counsel (direct access)
For the Respondent: Mr D. Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the respondent dated 9 May 2018 to deport the applicant, Gunaratnam Sriskantharajah, a citizen of Germany born on 7 April 1966, to Germany under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). In a decision and reasons dated 25 September 2019, a panel of the Upper Tribunal (Upper Tribunal Judge Rintoul, Upper Tribunal Judge Stephen Smith) allowed the appellant's appeal against a decision of First-tier Tribunal Judge Hollingworth promulgated on 2 May 2019 dismissing her appeal against the

respondent's decision to make a deportation order against her. The error of law decision may be found in the **Annex** to this decision.

2. The error of law decision preserved Judge Hollingworth's findings that the appellant represented a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society, and directed that the matter be re-heard in this tribunal in order for the proportionality of the appellant's deportation to Germany to be assessed. In those circumstances the matter came before me, sitting alone.

Factual background

3. The appellant is of Tamil ethnicity, and her main language is Tamil. She claims to speak no German and have only limited English. She moved with her husband to Germany from Sri Lanka in 1986. They have three daughters. The family moved to the United Kingdom in 2003. On 10 November 2014, the appellant, along with her husband and two others, were convicted of a number of counts of money laundering, arising from their use of the family *Bureau de Change* shops in central London as a front for laundering approximately £145,000,000 of the proceeds of crime. The offence involved the appellant and the co-defendants placing large and frequent orders for wholesale foreign currency (mainly Euros), which was paid for using cash. The sums involved greatly exceeded those which could genuinely have been generated by a genuine business of a similar size.

4. The appellant was sentenced to seven years' imprisonment and disqualified from acting as a company director for eight years. Her husband, who is also German, was sentenced to twelve years' imprisonment and remains in prison. The appellant's husband was the lead defendant in the criminal trial. The appellant had a subsidiary, although significant, role.

5. Judge Hollingworth found that the appellant continued to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In the error of law decision, the panel summarised the judge's findings in these terms:

> 24. As to the personal conduct of the appellant, the judge noted that the offending under consideration had continued for a period of five years, from 2006 to 2011. At [14], the judge highlighted the appellant's readiness over that time to engage in these serious criminal activities which were "effectively encouraging criminal activity on the part of organised gangs". As to the risk she posed, he found that her conduct was "the antithesis of a low risk of reoffending". The judge ascribed significance to the fact that the appellant had been willing to engage in this extensive criminal activity against a background of having no previous convictions. The judge observed that the "sheer scale and enormity of the criminality upon which she embarked and remained so embarked for such a period of time" was such that provided a strong foundation to conclude that the personal conduct of the appellant represented a substantial risk of reoffending.
>
> 25. At [15] the judge specifically considered the principle which Mr Malik contends he failed properly to apply, namely that the previous convictions

of an appellant do not in themselves justify a decision. We consider that the judge correctly directed himself concerning the requirement that the individual conduct of the appellant must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The judge analysed the appellant's conduct carefully. He noted the seriousness of the offence.

26. Judge Hollingworth outlined the Crown Court judge's sentencing remarks that criminals cannot operate in this country without the presence of those prepared to launder the proceeds of their crime. The appellant was engaged in organised crime, found the sentencing judge. Judge Hollingworth observed that in order to satisfy a confiscation order which had been made against her, the appellant had been required to sell her home and other assets in order to have any hope of satisfying the requirements made against her. The appellant had no meaningful qualifications and the only time she had worked in this country was in the Bureau de Change which had provided the front for the money laundering operations.

27. Against that background, at [17], Judge Hollingworth found that the appellant had demonstrated no remorse and had not taken any steps towards achieving rehabilitation. He also found that there had been no evidence that the appellant had undertaken any rehabilitative work while in custody, and he also observed that the primary offending had taken place by the appellant alongside her husband; that was a relevant factor because the presence of those associated with the commission of criminal offences goes to the willingness and the risk of an individual committing further offences.

28. We consider that these findings demonstrate that the judge correctly applied the principle that previous convictions do not in themselves justify decisions under regulation 27. Rather, the judge focused on the underlying conduct of the appellant and her wider circumstances, before concluding that her presence represented the necessary, genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

29. We consider these were findings that were open to the judge to reach on the evidence before him. This appellant had engaged in a serious, sustained and organised pattern of offending. We accept that in the context of the wider conspiracy of which she was a part, she played a lesser role than that of her husband, who was the main culprit. He was sentenced to a period of twelve years' imprisonment. The mere fact that there were co-conspirators or other offenders who were of greater culpability than the appellant cannot have the effect of diminishing her involvement in this offence.

6. The appellant's case is that it would be disproportionate to deport her to Germany. She relies on what she considers to be the preserved findings of fact from the First-tier Tribunal which are in her favour. She points to the fact that she has resided here for over 16 years, having arrived in 2003. She was only educated to a basic level in Sri Lanka. Her age and health conditions make manual labour difficult for her, reducing

the prospect of her being able to gain employment in Germany. She has no social or familial links with Germany, whereas her three adult daughters all live in this country. She lives with them and enjoys a close and supportive relationship with them. She speaks no German. She would face very austere conditions in Germany or could be forced to rely on the remitted financial support from two of her daughters. Her daughters would struggle to provide her with the necessary financial support, meaning that, realistically, they would have to move to Germany with her, thereby terminating the social and cultural links that each of them has established in this country, since having arrived here as minors. The appellant's husband is in prison in this country with a possible release on licence in 2020.

7. Against that background, the appellant highlights an OASys report dated 17 December 2019 which concludes that she represents a low risk of reoffending. Her probation officer has no concerns about her propensity to commit further offences. In the circumstances, submits Mr Malik, deportation is a measure which has drastic effects, and goes significantly further than would be required to attain the objectives which the Secretary of State is constrained to achieve under the EU law framework which underpins her decision to deport the appellant.

Legal framework

8. The legal framework is set out at [5] to [8] of the Error of Law decision.

9. Mr Malik relied on R (on the application of Lumdson and others) v Legal Services Board [2015] UKSC 41 concerning the doctrine of proportionality under EU law. He highlighted the following key themes from the joint judgment of Lord Reed and Lord Toulson.

10. First, the principle of proportionality under EU law is neither expressed nor applied in the same way as the principle of proportionality under European Convention on human rights. Although there is some common ground, the four-stage analysis of proportionality explained in Bank Mellatt v Her Majesty's Treasury (No 2) [2013] UKSC 39; [2014] AC 700 at [20] and [72] – [76] is not applicable to proportionality under EU law (see [26]).

11. Secondly, he highlighted the following at [33]:

> "Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method."

The hearing

12. The appellant provided a bundle featuring her statement and that of her daughter, Surega, both dated 18 December 2019, a letter from a Ms B Kelly, probation officer, and accompanying OASys assessment, both dated 17 December 2019. The materials also featured the product of some internet research, in English, concerning benefits

eligibility in Germany, and some bank statements concerning Surega's financial position.

13. The appellant and Surega gave evidence, adopted their statements dated 18 December 2019, and were cross-examined. A full note of their evidence is on the tribunal's file, and the proceedings were, of course, recorded. I will outline the salient aspects of their evidence to the extent necessary to give reasons for my findings.

Discussion

14. At the outset, it is necessary to recall the context in which my analysis of the issue of proportionality takes place. Judge Hollingworth found that the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. That was a finding which was disputed by the appellant at the hearing before the judge below, and which Mr Malik sought to challenge when this appeal was initially heard for the error of law determination in September. In the error of law decision quoted above, the panel found that the findings of the First-tier Tribunal were within the range of findings that the judge was entitled to reach on the basis of the evidence before him.

15. The extent and nature of the risk posed by the appellant are relevant to the question of proportionality. Judge Hollingworth's findings were based on the conduct that led to the appellant's conviction. Her bundle from the original hearing before the First-tier Tribunal includes the Crown's opening note from the trial at Crown Court at Southwark. It describes how the appellant and her husband were responsible for the administration of two relatively small *bureaux* in central London. There was a third outlet, also in central London, run by another of the co-defendants. The leaseholder for that shop was the appellant's husband, and documents relating to the outlet, including Companies House records, were found at the appellant's home during a police search. From February 2006 to September 2011, the three outlets placed wholesale currency orders totalling over £145 million for euros, mainly for €500 and €200 denomination notes. Transactions of this magnitude greatly surpassed the level of business which the small outlets ostensibly run by the appellant and her husband would ever normally encounter and were for denominations which are rarely used by the tourist trade at which the *bureaux* were ostensibly targeted. By way of comparison, the *bureaux de change* operating out of 11,500 Post Offices between September 2009 and March 2010 dealt with €500 notes in only 0.12% of transactions, and €200 notes in 0.06% of transactions, across £2.9billion of transactions in total. Large denomination Euro notes are favoured by organised crime. The appellant dealt in the currency of money-laundering, over a sustained period, to a significant extent.

16. I outline these factors here to provide some context to the preserved findings of Judge Hollingworth concerning the threat posed by the appellant. In common with the position she adopted before the First-tier Tribunal, before me the appellant did not display any remorse for her offences. She has never accepted responsibility for the serious harm that the facilitation of such a large quantity of criminal proceeds is

likely to have caused. As the Crown's opening note records, the appellant's *bureaux de change* were revealed to have connections to a well known drug dealer in Croydon. The wider criminal context in which the operation sat was never revealed by the appellant. The orders placed by the appellant's *bureaux de change* for foreign currency were often paid for by large numbers of Scottish banknotes; although legal tender in England, their use and frequency are much less common south of the border, as they are routinely returned to Scotland as soon as they enter the banking system. In England, Scottish banknotes are prevalent in the drugs trade, the Crown said. The jury must have accepted those assertions by its guilty verdict passed in relation to the appellant.

17. Before me, the appellant contends that her risk is minimal, and that the proportionality assessment should be calibrated to reflect her risk profile. She relies on a letter dated 17 December 2019 from Ms Kelly, her probation officer, which states:

> "From a probation perspective, [the appellant] has been assessed as low risk to the public. Since release she has complied with all her licence conditions and there haven't been any concerns with compliance."

18. Mr Malik accepts that he cannot go behind the preserved findings of Judge Hollingworth but submits that the judge's findings should be viewed in light of new material such as Ms Kelly's letter and the accompanying OASys report.

19. I accept that, in principle, it is necessary for me to conduct an assessment of the risk posed by the appellant at the date of the hearing. The earlier findings of Judge Hollingworth are a significant and foundational factor in that assessment. To the extent that there is new material which may cast the risk posed by the appellant in a different light, I must take such materials into account.

20. Ms Kelly did not provide any qualitative analysis of the nature of the conduct of the appellant that led to her convictions. Similarly, although the appellant has provided what purports to be an OASys assessment dated 17 December 2019, it features no analysis or commentary as to why the appellant is regarded as a "low" risk. The document itself appears to be targeted at assessing violent risk, as confirmed by the subheading on many of the pages which states, "Risk of Serious Harm Screening". There follows on each page what appears to be a tick box list of potential offence types, for the author of the report to select as appropriate. On each page, the author has ticked the "none of the above" box. That is hardly surprising, as the nature of the offences covered by the "risk of serious harm" assessment are all offences of violence. For example under R1.2, the offences include murder, attempted murder, wounding, rape or serious sexual offences, any other offence against a child, aggravated burglary, arson, criminal damage with intent to endanger life, kidnapping or false imprisonment, possession of a firearm with intent to endanger life or resist arrest, racially motivated/racially aggravated offences, robbery, offences involving the possession and/or use of weapons, any other offence which is "as serious" including blackmail, harassment, stalking, indecent images of children, child neglect, and abduction "etc".

21. The OASys document does not consider the risk of harm that may arise from large scale money-laundering. It does not look at the calculated steps which the appellant must have been found by the jury to have taken in order to facilitate her offending from January 2006 to September 2011, the dates covered by the indictment.

22. I find that the lack of analysis and the absence of references to the underlying circumstances of the appellant's offences in the December 2019 OASys report mean that it attracts little weight in the proportionality assessment that I am to perform. Therefore while, in principle, I accept Mr Malik's submission that such materials may be relevant to an updated risk assessment, the materials adduced by the appellant do not, in fact, cast Judge Hollingworth's findings in a different light. The appellant, of course, continues to refuse to engage in an acceptance of the underlying seriousness of her offence. Mr Malik submitted that the appellant had been let down by the probation service; the OASys report originally before the First-tier Tribunal was incomplete, and the revised report for these proceedings is light on detail. The difficulty with that submission is that expressions of remorse, understanding and insight concerning the offence committed by the appellant are, and have always been, entirely within the gift of the appellant. It was her choice not to express remorse before the First-tier Tribunal. It has been her choice to continue in that attitude before me. She has not taken any steps to reveal to the authorities the wider criminal community with which she was involved in order to commit the offences; the appellant must have been provided with the £145,000,000 from external sources. The appellant has not worked with the authorities to bring those persons to justice. These are not failings of the probation service; they are the natural consequences of an attitude which reflects the appellant's lack of understanding of the seriousness of her offence, and the absence of rehabilitation.

23. The lack of remorse the appellant displays, combined with the preserved findings of Judge Hollingworth and the absence of any contemporary material to demonstrate that her risk profile has changed, lead me to the conclusion that the risk assessment by Judge Hollingworth that she represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society is a finding which continues to apply in the proceedings before me.

24. Regulation 27(6) of the 2016 Regulations requires me to take into account considerations such as the age of the appellant, her state of health, her family and economic situation, the length of her residence, and cultural integration issues. These are the factors which Mr Malik focused upon in his submissions, and which the appellant and her daughter gave evidence.

25. I accept that the enforced return of the appellant to Germany will be disruptive to a considerable extent. She has lived in this country for 16 years and during that time has brought up her young children to be successful young adults. There is absolutely no suggestion that any of her children had any involvement in the offending for which she was convicted. They are individuals of standing, who contribute to society and pay taxes. Removing the appellant from the family she knows here will be a wrench for them as well as for the appellant. The children have already had to

endure the shame of their parents each being convicted to lengthy periods of imprisonment, and I do not underestimate the hardship which the family as a whole had to endure, and no doubt continues to endure. The children are all German citizens, exercising their rights under the EU treaties to reside and work here. The quality of their enjoyment of their Union citizenship rights will materially be affected by the removal of the appellant.

26. There are some weaknesses, however, in the appellant's account of the extent to which the relationships she has with her daughters form a significant part of the fabric of her life in this country. At [5] of her statement, the appellant wrote that she had been helping to look after her daughter Surega following some surgery she received. In the appellant's statement, she did not provide a date for when this took place. Under cross-examination, she could not recall whether the operation that Surega had undertaken had been prior to her release from prison, or subsequent to it. In my view, this is a key omission. There is also a degree of inconsistency in the evidence given by the appellant and that of her daughter. The appellant's evidence was that she suffers a mobility impairment from having a slipped disc. Yet she also said that she was the one who cared for and looked after Surega when she had been ill. Surega's evidence provided a degree of illumination as to what actually took place: the operation had taken place after the appellant's release from prison, and her mother helped her at her own pace. At times, Surega said, she (Surega) was bedbound. Her mother was of particular assistance at those times.

27. I find that the assistance provided by the appellant to Surega was time-limited, and a natural by-product of the two living in the same accommodation. The fact that the appellant could not remember when the crucial operation had taken place undermines her evidence of the depth and quality of the assistance she provided. She was there, and she provided help. In itself, that would have been a significant change from the previous few years, as the appellant had been in prison. The appellant still does practical tasks around the house, helping with cooking and laundry. Her daughters provide her with financial help and assistance, paying for acupuncture and counselling sessions. I accept that there is a strength in depth of relationship between the appellant and her daughters, but it does not stray into territory of particular significance. It is difficult to put matters much higher than that.

28. The appellant said in her evidence that she would be unable to work in Germany, unable to support herself financially, unable to speak the language, and unable to find housing. I do not underestimate the difficulties that she would encounter upon seeking to return. However, there is no evidence before me as to why the appellant would be unable to work in any form of employment whatsoever. She has not given a reason why she would not be able to learn German, the language of her nationality. This appellant would have the advantage of being a citizen of Germany. I accept that an initial process of having to learn German would be difficult and may mean that the appellant's integration takes longer than would otherwise be the case.

29. In any event, there is no reason why the appellant's daughters cannot accompany her to Germany, at least initially. It would not be necessary for them permanently to

relocate. They could accompany her on the journey there and use their own (in the case of Surega, fluent) ability in the German language to assist her in the early days. They would be able to assist with the drafting, and understanding, of emails and other official documents, even remotely from this country. They would be able to make telephone calls on her behalf. All the while, the appellant would be able to take steps to learn the language for herself.

30. I accept that the appellant has some mobility impairments. Certain forms of manual labour would be difficult. At least initially, the language barrier would make obtaining work difficult. She is educated only to GCSE level in Sri Lanka and would return to Germany without the benefit of any education there. These are factors which mitigate against removal, to which I will return.

31. A significant amount of time during the evidence of the appellant and Surega, as well as the submissions of Mr Malik, was devoted to the claimed inaccessibility of social welfare benefits to a person in the appellant's position in Germany. The appellant and Surega had approached the German embassy in London to ascertain the likely entitlement of the appellant to housing and other benefits. They explained that, although an embassy official was initially willing to provide advice as to the appellant's likely eligibility, he was prevented from doing so in a form suitable to be relied upon in this tribunal, upon taking instructions from his superior officers. According to the appellant and Surega, the embassy official had advised that Germany has a contributory benefits system. As the appellant has not "paid in" in the form of social security contributions, she would be unable to draw benefits "out" from the system. There is a long wait for social housing, and the appellant would initially be placed in a homeless shelter. Surega said in her evidence that her parents still own a flat in Germany, but that it is tenanted. In order to satisfy a confiscation order that was made in respect of her father following the convictions, the flat must be sold. From the perspective of the German government, however, that is an asset which counts against her mother for the purposes of benefit eligibility. They cannot sell the flat at the moment because her father must sign the sale papers in the presence of a German notary, which is difficult as he is in prison. The tenants are refusing to pay their rent and are being generally uncooperative, as they are aware of the appellant's convictions here, and are seeking to exploit her perceived vulnerability for their own gain, she said.

32. The difficulty with the evidence concerning the availability of social benefits is that it relates to the operation of a foreign legal system, and is, therefore, a matter which ordinarily falls to be established by means of expert evidence. I readily accept that a diplomatic officer posted to the German embassy in London would be subject to constraints as to the extent to which he could participate in legal proceedings in this jurisdiction. That is hardly surprising, and I hold nothing against the appellant in this regard. Even had the embassy officer been able to participate, there is no evidence to suggest that he would have the necessary expertise in order to establish with any degree of precision the workings of the German social benefit system, as a matter of foreign law. Surega said, in response to a question by me, that the official had not touched upon the issue of social security coordination. That is a complex area of law

whereby social security contributions in one Member State are able to count as contributions in another Member State. The EU regime underpinning such coordination is intended to prevent those moving from one member state to another to lose out on account of having exercise their rights under the EU treaties. It would be necessary to explore the non-availability of social security coordination before concluding that social benefits would not be available to the appellant on the basis that she had not "pain in" in Germany.

33. From the materials that were provided on behalf of the appellant, it is clear that there is a social security system in Germany. I accept that there will be administrative and bureaucratic hurdles to clear in order for the appellant to enjoy benefits under it. Social housing may take some time to finalise. I do not accept that the appellant will never enjoy social benefits in Germany.

34. However, the issue of benefits is a potential distraction. Surega and her sister Sinduya have a joint income of in the region of £69,000 – £70,000. Their younger sister, the appellant's youngest daughter, Gowsaleya, will start graduate work soon, Surega said. Between them they have no dependents. Surega's evidence was that the sisters would not be able to afford to support their mother.

35. There was, as Mr Clarke highlighted, a paucity of evidence concerning the outgoings the sisters have to meet. The income of the two sisters who are currently working is far higher than the average wage in this country, and, as Mr Malik accepted at the hearing, the fact that that income is earned by two persons means that the total take-home pay received by the pair will be higher than if a single person earned £69,000. That is because each taxpayer receives a tax-free allowance, and the operation of the income tax thresholds is such that the overall tax paid by two people is less than if a single person earns the same amount. So much is uncontroversial. The impact, however, of that reality is that the appellant's daughters are relatively well off. They have not provided any financial details as to the commitments or otherwise that they are subject to. There is no reason why they would not be able to provide financial support to their mother upon her return to Germany. It would not necessitate their relocation (which Judge Hollingworth appeared to conclude would be disproportionate: see [19] of his decision). As Surega accepted in in cross examination, she would support her mother financially; she would, she said "have to".

36. I find that the appellant would not be destitute in Germany, nor would she be dependent upon a potentially lengthy and difficult wait for social housing, as her daughters would be able to support her financially. I reject the assertion that they could not afford to do so, given their outgoings were not evidenced. Mr Malik provided some contemporary bank statements at the outset of the hearing. They were not exhibited to the appellant's or Surega's witness statements and were not accompanied by any analysis of the expenditure they reveal. They show income and expenditure in the region of £3000 over the course of a month. The start and end statement balances were both overdrawn, however the money in and money out was considerable. Before the First-tier Tribunal, Sinduya's bank statement displayed a

balance of over £5700 at 26 March 2019, with much larger sums regularly featuring in the months leading up to that point. For example, on 24 September 2018, the balance was £35,018.56. It was consistently over £30,000 until 30 November 2018, when it dropped to £28,000. It had gradually decreased in the run-up to the final date on the statement, 26 March 2019. Sinduya maintained a healthy balance at all times. Her statement for the First-tier Tribunal said that her income was around £45,000 annually. The appellant's daughters are relatively wealthy, and no evidence has been provided to demonstrate that they would not be able to manifest the clear love and support that they currently provide for their mother in the form of financial help upon her return to Germany.

37. I have been provided with no documentary evidence concerning the alleged dispute between the appellant's tenants in Germany, nor the claimed requirement for a German notary to witness a formal transfer of property. In any event, these points are neutral as regards the appellant; her flat in Germany is required to satisfy a confiscation order made here. My analysis will be based on the premise that the appellant has no assets in Germany.

38. In relation to the appellant's health, she claims to have slipped a disc. She currently receives counselling from a psychotherapist for depression and anxiety; her counsellor writes that the counselling, in Tamil, is to help the appellant cope with the return to family life following her release from prison. The appellant has provided no GP records or other medical evidence going to her claimed inability to relocate to Germany. She explained that her GP has requested her medical records from the prison where she served her sentence, and that it has been difficult to obtain them. I accept that explanation to a point, but it does not satisfy the wider criticism that Mr Clarke highlights that there is a paucity of medical evidence. I accept that the appellant would not be able to undertake manual work in Germany. Other than that, there is an absence of evidence going to the wider medical impairments the appellant claims to experience.

39. The appellant made two mutually exclusive claims about the likely social impact of being returned to Germany. On the one hand, she said that she had lost all links with the Tamil community. Everyone she knew had moved on. Their children had grown up and their circumstances had changed, she said. On the other hand, she said that she was now well known within the Tamil community in Germany on account of her convictions. Everyone knows about her offences, as they were well documented in the Tamil press. I consider this aspect of the evidence to be contradictory. It cannot be the case that the Tamil community in Germany knows about the appellant's offending if she is an unknown to them. If, as she claims, she has no connections with the Tamil community in Germany, and is a complete stranger to that community, it cannot be the case that her offending has any profile to speak of in Germany. If she has no connections in the community, it must be speculation that the community has ostracised her. Although both the appellant and Surega claimed that there had been news coverage of the appellant's trial and convictions, they provided no documentary evidence, not even a screenshot of a web-based news article, to support

that. Such assertions would be relatively easy to document, yet the appellant has provided no supporting evidence.

40. I attach very little weight to the suggestion that the appellant has been ostracised by the Tamil community. I accept that, in the 16 years that have passed since she left, the family may have a lost the links they previously enjoyed in Germany. In my view, that provides no basis to conclude that such links could not be re-established in the future. Surega said that she has added Facebook friends from the community to her Facebook account, although added that they are dormant and that she has no real interaction with them. There was no suggestion, for example, that either the appellant or her daughters had sought to reach out to the acquaintances, or former acquaintances, they have in the Tamil community in Germany. The suggestions that they have lost all links, and that any former links are beyond restoration, cannot be established on the evidence.

Proportionality

41. Drawing the above analysis together, therefore, I return to the question of whether it would be proportionate for the appellant to be removed.

42. Mr Malik relied upon Lumsdon, which concerned the proportionality of a criminal advocacy quality assurance scheme, and the proportionality of the regime as a whole. It is of course of valuable assistance but, as the Supreme Court noted at [23]:

> "It has also to be said that any attempt to identify general principles [concerning proportionality under EU law] risks conveying the impression that the court's approach is less nuanced and fact-sensitive than is actually the case. As in the case of other principles of public law, the way in which the principle of proportionality is applied in EU law depends to a significant extent upon the context."

43. The examples of proportionality under EU law outlined by the Supreme Court related to the proportionality of the measures and acts of EU institutions, and decisions taken by a Member State concerning derogations from EU law relied upon in (or in order to establish) a regulatory regime, rather than case-specific decisions. For example, the Supreme Court considered the regulation of gambling [37], Community legislation concerning the harmonisation of tobacco products marketing [40], regulation of hormones in livestock farming so as to address barriers to trade and distortions in competition arising from differences in legislation across the internal market [41], authorisation procedures for the use of certain regulated substances [47], the right to establishment of posted workers [55], the application of Luxembourg's employment law in the case of services provided by employees based in other Member States [56], the prohibition of foodstuffs fortified with additives [57], currency controls [61], restrictions on the ownership of pharmacies [64], and so on.

44. The context-specific approach (c.f. Lumsdon at [23]) taken by Directive 2004/38/EC and the 2016 Regulations to the question of proportionality is, within the wider framework of the approach of EU law to proportionality, to set out a series of free

movement of persons-specific considerations relevant to the question of removal on proportionality grounds. Those are the factors contained in Article 27(2) of the Directive and regulation 27(6), taken with the derogations on the right to private and family life under the Charter of Fundamental Rights, Article 7.

45. As an EU citizen, the appellant's right to reside in this country is conferred by the EU Treaties. The free movement of persons is one of the fundamental freedoms upon which the EU is based. Her fundamental status is that of being a citizen of the Union (Grzelczyk Case C-184/99 at [31]). Derogations from EU law should be construed narrowly.

46. In Robinson v Secretary of State for the Home Department [2018] EWCA Civ 85 at [58], the Court of Appeal accepted that, in principle, the aims of public policy and public security provide legitimate aims which can justify the interference such fundamental rights. It said:

> "In principle, the concepts of 'public policy' and 'public security' provide legitimate aims which can justify an interference with those fundamental rights."

47. The Court of Appeal outlined at [60] to [62] the factors relevant to proportionality in this context:

> "60. [The finding that an individual represents a genuine, present and sufficiently serious threat etc] cannot be drawn automatically on the basis solely of the criminal record of the person concerned. It can only result, where appropriate, from a specific assessment by the national court of all the current and relevant circumstances of the case, in the light of the principle of proportionality, of the child's best interests and of the fundamental rights whose observance the courts ensure.
>
> 61. That assessment must therefore take account in particular of:
>
> (1) the personal conduct of the individual concerned;
>
> (2) the length and legality of his residence on the territory of the member state concerned;
>
> (3) the nature and gravity of the offence committed;
>
> (4) the extent to which the person concerned is currently a danger to society;
>
> (5) the age of the child at issue and his state of health;
>
> (6) his economic and family situation.
>
> 62. In carrying out the balancing exercise required by that assessment, the court must take account of the fundamental rights at stake, in particular the right to respect for private and family life, and ensure that the principle of proportionality is observed."

Put another way, the relevant criteria are those contained in regulation 27(5) and (6) of the 2016 Regulations.

48. The preserved findings of the First-tier Tribunal are that the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Inherent to that preserved finding is the fact that the appellant's removal is, in principle, justified on grounds of public policy and public security. The appellant committed a very serious criminal offence, meriting a period of imprisonment of seven years. The circumstances of her offending, including its persistence, calculation and gravity are such that (i) she bears a high level of culpability for very serious offences which will have facilitated and encouraged much broader criminal offending and (ii) she poses a risk of reoffending. The appellant has consistently eschewed the opportunity to express remorse for her offence and demonstrate insight into the underlying causes of her offending behaviour.

49. As noted by paragraph 5 of Schedule 1 to the 2016 Regulations:

> "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."
>
> The contrary is true in the case of this appellant, who has not demonstrated any reformation or rehabilitation.

50. I accept that the appellant has resided here for 16 years. Although Mr Malik accepted in the error of law hearing that the appellant enjoys only the lowest level of protection, there is no suggestion that at all points she has been without a right to reside. I accept that she has been lawfully present for at least some of the time. She has, of course, spent a considerable period of time in prison since her conviction in 2014, and such imprisonment breaks continuity of residence and, in principle, evidences a loss of any integrating links previously forged.

49. The appellant's cultural and social integration in this country is limited. She does not speak English. Her evidence was that she has no friends, and that her focus is primarily on life with her daughter. Schedule 1(2) to the 2016 Regulations provides that such life circumstances are minimal evidence of integration:

> "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."

The appellant's offending took place over a significant period of time, meaning that what integrating links there are were formed over a largely overlapping period and attract little weight. See Schedule 1(4)(a).

50. Despite her limited integration, the appellant's deportation will be disruptive, as outlined at [25], above. It will have a significant impact upon her adult daughters. The impact will not go beyond that which would normally be expected in a

deportation situation; the claims that the appellant provided invaluable assistance after Surega's operation are tempered by the fact that the appellant could not remember when the operation was. Germany is a short flight away from the United Kingdom. Her daughters, who are German citizens, will be able to return to visit her, even if they do not choose to relocate with her (I make no finding that permanent relocation would be reasonable or necessary; the findings in this decision are premised upon the appellant returning alone).

51. As a woman of 53 with limited German and limited mobility, the appellant is likely to take some time to find work, if she is able to at all. The appellant will not be destitute, as I have found that her daughters will provide her with funds and wider support until she is able either to support herself or receive help from the German state. I have been presented with no reasons as to why she will not be able to learn German.

52. The appellant will return to Germany having lost links with the Tamil community there, but there are no reasons why she cannot begin to reach out to the community and establish relationships again. It was common ground that there is *a* Tamil community in Germany. I do not accept the evidence of ostracization for the reasons given above, and find that the appellant will be able to integrate within a community of likeminded individuals. I have been presented with no evidence that she will not be able to attend the temple in Sri Lanka.

53. I accept that the appellant has never lived alone; she married when she was relatively young, and has always lived with her husband and family, and more recently her daughters. I consider that subjecting the appellant to this state of affairs is a proportionate response to the threat she poses, given the gravity of the underlying conduct which led to her convictions.

54. The appellant is in need of healthcare. There is no suggestion that adequate healthcare will not be available in Germany. To the extent that her daughters are willing and able to pay for private healthcare, there are no reasons they will not be able to pay for it to take place in Germany.

Conclusion on proportionality

55. I find that the appellant's deportation is necessary to protect the United Kingdom's public security from the risk of repetition of serious crime. It is a proportionate response to risk posed by the appellant's presence. The impact on the appellant and her wider family is a proportionate response. Her deportation goes no further than is necessary to achieve the United Kingdom's public policy and public security objectives, in the face of an individual whose presence represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Article 8

56. Mr Malik did not pursue any submissions based on Article 8 of the ECHR. The regime established by the 2016 Regulations is more generous to the appellant than

that contained in the Immigration Rules and in section 117C of the Nationality, Immigration and Asylum Act 2002. The appellant could only defeat deportation under the rules or section 117C if she were able to point to "very compelling circumstances" over and above the statutory exceptions to deportation. Neither of the exceptions are engaged in the present case: the appellant has not lived here for most of her life, she is not socially and culturally integrated, and there are no very significant obstacles to her integration in Germany. She does not have a relationship with a qualifying child. To the extent that she retains a relationship with her husband, no reasons have been presented to me as to why it would be *unduly* harsh on him for the appellant to be removed. See sections 117C(4) and (5) respectively. There is nothing exceptional about the appellant's case as analysed elsewhere in this decision which could be capable of reaching the elevated threshold that there need be "very compelling circumstances". The appellant cannot succeed on Article 8 grounds.

57. This appeal is dismissed.

Notice of Decision

The appellant's appeal against the respondent's decision dated 9 May 2018 is dismissed on EU law grounds.

No anonymity direction is made.

Signed *Stephen H Smith* Date 6 January 2020

Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and there can be no fee award.

Signed *Stephen H Smith* Date 6 January 2020

Upper Tribunal Judge Stephen Smith

Annex – Error of Law Decision

IAC-FH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00325/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 September 2019	
Extempore decision	…….

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

GUNARATNAM SRISKANTHARAJAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B. Malik, Counsel (Direct Access)
For the Respondent: Ms J. Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Gunaratnam Sriskantharajah, is a citizen of Germany born on 7 April 1966. She appeals against a decision of First-tier Tribunal Judge Hollingworth promulgated on 2 May 2019 dismissing her appeal against a decision of the respondent to deport her to Germany under the Immigration (European Economic Area) Regulations 2016.

Factual Background and Permission to Appeal

2. On 10 November 2014, the appellant was convicted of a number of accounts of converting criminal property contrary to section 327 of the Proceeds of Crime Act 2002 (money laundering) following a trial before a jury in the Crown Court at Southwark. She was sentenced on a number of counts to seven years' imprisonment, to run concurrently. We will turn to her offences in more detail shortly. Put simply, she worked in a Bureau de Change in Central London which she, with at least three others including her husband, had used as a front for a money laundering operation through which £145,000,000 of the proceeds of crime in sterling and euros and were laundered.

3. The judge found that the personal conduct of the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and that it would be proportionate for her to be deported.

4. Permission to appeal was granted by Upper Tribunal Judge Storey on the basis, first that it was arguable that the judge relied "unduly" on the November 2014 conviction in the absence of any analysis as to whether the appellant continued to represent a genuine, present and sufficiently serious threat. Judge Storey noted that there appeared to be an absence of references to the lapse of time since the offence had been committed. Secondly, Judge Storey considered that it was arguable that the judge erred by his application of the established principles derived from Article 8 of the European Convention on Human Rights, in particular the concept of "unduly harsh" and whether there were more than the normal emotional ties between the appellant and her adult daughters in this country, and it was arguable that that had infected the assessment of proportionality.

The Law

5. This appeal is governed by the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"), which implement the requirements of Directive 2004/38/EC of the European Parliament and of the Council. Regulation 27 reflects Article 27 of the Directive. It governs removal decisions taken on grounds of public policy, public security and public health.

6. The 2016 Regulations provide a graduated scheme of residence rights, with corresponding tiered levels of protection from removal. The most basic right of residence is conferred on those with fewer than five years' continuous residence in accordance with the Regulations. Those resident in the United Kingdom on this basis may be removed "on grounds of public policy, public security or public health" (Article 27(1)), provided certain additional criteria are met.

7. Those resident under the Regulations for a period of five years or more acquire the right of permanent residence. Where an individual enjoys the right of permanent residence, the level of protection from removal is upgraded to *serious* grounds of public policy, public security and public health.

8. Where a decision is taken on any grounds of public policy, public security or public health, it must comply with the principles of proportionality. Regulation 27(5) of the Regulations implements the requirements contained in Articles 27 and 28 of Directive 2004/38/EC. Regulation 27(5) provides, where relevant:

> "(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 who is resident in the United Kingdom ('P'), 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.
>
> […]
>
> (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). "

Schedule 1 sets out a range of considerations relevant to that issue.

Discussion

Ground 1

9. It is common ground in the present matter that the appellant does not enjoy the right of permanent residence, and therefore benefits from the basic level of protection (see the analysis of this issue at [10] to [12] of the judge's decision). Before us, Mr Malik did not seek to detract from this position.

10. On behalf of the respondent, Ms Isherwood submits that the judge did not fall into error in relation to whether the appellant represents a genuine, present and sufficiently serious threat. She points to the factors that were considered and endorsed in linked cases K v Staatssecretaris van Veiligheid en Justitie and H. F. v Belgische Staat (Cases C-331/16 and C-366/16) ECLI:EU:C:2018:296 [2018] INLR 693 at [44] to [46], such as maintaining social cohesion and public confidence in immigration systems. Those are some of the factors outlined in Schedule 1 to the 2016 Regulations.

11. The respondent also highlights the nature of the conduct involved. This was an offence committed over a period of five years, involving the laundering of a substantial amount of money. It was an offence that has a cross-border dimension as it involved euros as well as sterling. It facilitated and encouraged other criminal activity, on a very significant scale.

12. Ms Isherwood highlights the judge's findings that the appellant did not recognise herself to be an offender. It was clear from the description of the evidence that the judge heard that the appellant had not recognised the seriousness of the offences for which she had been convicted and sentenced.

13. Mr Malik highlights the minimal risk of reoffending identified by the OASys report. He accepts that, in principle, it is not always necessary for judges to follow OASys Reports prepared by the Probation Service. We agree; judges can depart from the analysis contained in such reports, provided there are sufficient grounds for doing so.

14. In the present matter that principle applies with greater force. The report said in terms that it was to be disregarded. On page 7 of the report dated 19 September 2017 the following words feature in capital letters:

> "NO FORMAL ASSESSMENT HAS BEEN PERFORMED SO PLEASE DISREGARD THESE SCORES AS THEY ARE NOT INDICATIVE OF THE OFFENDER".

15. Accordingly, although it is right to observe that judges where appropriate can depart from the terms of an OASys assessment, the present assessment provided no basis upon which it could rationally have been followed by the judge in any event. Although the report does feature some cursory analysis by way of unexplained quantities placed in boxes describing the likelihood of reoffending (for example on page 6 it states there is a 4% possibility of reoffending within a year and a 7% possibility of reoffending in two years), it is clear from the caveat quoted above that it is not possible to ascribe any degree of significance to the contents of the report. The report itself stated that the "scores" it contained were to be disregarded.

16. Turning to Mr Malik's submission that previous convictions in and of themselves are an insufficient basis upon which a decision under regulation 27 of the Regulations may be taken, that submission, in principle, correctly reflects the legal framework. So much is clear from the extract of the case of K referred to by both representatives

in their skeleton arguments. The principle features not only in regulation 27(5)(e) of the 2016 Regulations, but may also be found in Article 27(2) of the Directive.

17. K concerned a decision that had previously been taken by the competent authorities of the Netherlands concerning exclusion of a Croatian citizen from the Refugee Convention pursuant to Article 1F(a), prior to the accession of Croatia to the EU. Upon accession, the Croatian citizen sought to reverse the decision taken under Article 1F by reference to his newly-acquired residence rights under Directive 2004/38/EC. The issue was to what extent was the prior Convention exclusion decision relevant for the purposes of Article 27(1) of Directive 2004/38/EC?

18. The operative part of the judgment of the Court of Justice in K provided the following answer to the question referred by the Dutch referring court. It states that past offending or a finding under Article 1F of the Refugee Convention:

> "…does not enable the competent authorities of that member state to consider **automatically** that the mere presence of that person in its territory constitutes, whether or not there is any risk of reoffending, a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society." (Emphasis added)

See also [51] in the body of the judgment:

> "It follows that the fact that the person concerned has been the subject, in the past, of a decision excluding him from refugee status pursuant to one of those provisions **cannot automatically** permit the finding that the mere presence of that person in the territory of the host Member State constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, within the meaning of the first sentence of the second subparagraph of Article 27(2) of Directive 2004/38." (Emphasis added)

19. We consider that the same principle is capable of applying by analogy in relation to previous convictions, consistent with Article 27(2) and regulation 27(5)(e). In the present context, we consider that a central feature of the operative part of the judgment in K is the word "automatically". Plainly, were it the case that the judge had relied solely on the mere fact of the conviction, without any accompanying analysis of the underlying circumstances of the offence or, for example, the attitude of the appellant to her conviction, then that would not be an approach that could be sustainable. In K, the Court of Justice found that previous findings of reprehensible conduct cannot "automatically" form the basis of a decision under Article 27(2).

20. However, it is clear from an analysis of the decision of the judge that he did consider the underlying conduct of the appellant, the attitude of the appellant to her conviction, and considered the indicators of likely future risk arising from her attitude to her offending and her understanding of what she had done.

21. We consider that it is possible to categorise the analysis of the judge in relation to this issue under two broad headings: first the seriousness of the offence; and secondly, the personal conduct of the appellant.

22. As to the seriousness of the offence, the judge noted at [13] of his decision that the decision letter had quoted the remarks of an Assistant Director of Criminal Enforcement at HMRC. The HMRC official is quoted at [25] of the decision letter as having said that the appellant and her co-defendants used their business, "as a front to launder profits made by many of the UK's most serious and dangerous criminal gangs". The judge observed at [13] that the appellant's conduct had enabled numerous criminal enterprises to exist and to thrive.

23. The seriousness of the offence is undoubtedly relevant; it goes to the presence of the necessary grounds of public policy and public security. It places the role of the appellant in the context and, in principle, provided it is sufficiently linked to her personal conduct, the seriousness of the offence can reveal the nature and extent of the likely risk that the appellant may present in the future.

24. As to the personal conduct of the appellant, the judge noted that the offending under consideration had continued for a period of five years, from 2006 to 2011. At [14], the judge highlighted the appellant's readiness over that time to engage in these serious criminal activities which were "effectively encouraging criminal activity on the part of organised gangs". As to the risk she posed, he found that her conduct was "the antithesis of a low risk of reoffending". The judge ascribed significance to the fact that the appellant had been willing to engage in this extensive criminal activity against a background of having no previous convictions. The judge observed that the "sheer scale and enormity of the criminality upon which she embarked and remained so embarked for such a period of time" was such that provided a strong foundation to conclude that the personal conduct of the appellant represented a substantial risk of reoffending.

25. At [15] the judge specifically considered the principle which Mr Malik contends he failed properly to apply, namely that the previous convictions of an appellant do not in themselves justify a decision. We consider that the judge correctly directed himself concerning the requirement that the individual conduct of the appellant must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The judge analysed the appellant's conduct carefully. He noted the seriousness of the offence.

26. Judge Hollingworth outlined the Crown Court judge's sentencing remarks that criminals cannot operate in this country without the presence of those prepared to launder the proceeds of their crime. The appellant was engaged in organised crime, found the sentencing judge. Judge Hollingworth observed that in order to satisfy a confiscation order which had been made against her, the appellant had been required to sell her home and other assets in order to have any hope of satisfying the requirements made against her. The appellant had no meaningful qualifications and the only time she had worked in this country was in the Bureau de Change which had provided the front for the money laundering operations.

27. Against that background, at [17], Judge Hollingworth found that the appellant had demonstrated no remorse and had not taken any steps towards achieving

rehabilitation. He also found that there had been no evidence that the appellant had undertaken any rehabilitative work while in custody, and he also observed that the primary offending had taken place by the appellant alongside her husband; that was a relevant factor because the presence of those associated with the commission of criminal offences goes to the willingness and the risk of an individual committing further offences.

28. We consider that these findings demonstrate that the judge correctly applied the principle that previous convictions do not in themselves justify decisions under regulation 27. Rather, the judge focused on the underlying conduct of the appellant and her wider circumstances, before concluding that her presence represented the necessary, genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

29. We consider these were findings that were open to the judge to reach on the evidence before him. This appellant had engaged in a serious, sustained and organised pattern of offending. We accept that in the context of the wider conspiracy of which she was a part, she played a lesser role than that of her husband, who was the main culprit. He was sentenced to a period of twelve years' imprisonment. The mere fact that there were co-conspirators or other offenders who were of greater culpability than the appellant cannot have the effect of diminishing her involvement in this offence.

30. Although we note the observations of the permission judge that there had been minimal references to the passage of time since the offence in question, we do not consider that to have been an error of law. The judge carefully considered the risk profile the appellant was likely to present by reference to her personal circumstances and her previous willingness to engage in such serious and sustained offending against the background of having no previous convictions. The judge appeared to have highlighted the well-established pattern taken by many criminals whereby offending of greater seriousness is preceded by a build-up, or crescendo, of less serious offending. By contrast, this appellant had launched straight into offending of such seriousness and of such a magnitude that a custodial sentence of seven years' imprisonment was merited. The judge was entitled to observe that the appellant had no apparent means of supporting herself and displayed no insight or remorse into her offending.

31. We reject the submissions of Mr Malik that it is necessary for the previous conduct of the appellant to evoke "a deep public revulsion" in order for it to be sufficient to merit a decision under Article 27 of the Directive. Mr Malik relies on the case of Secretary of State for the Home Department v Robinson [2018] EWCA Civ 85 in order to establish this point. Mr Malik highlights the judgment of Lord Justice Singh at [71] in which the issue of public policy was addressed. In our view it is important to read that entire paragraph in context.

32. Lord Justice Singh had introduced the discussion of the "public revulsion" issue at [68] in these terms:

> "There was an interesting debate between the parties in this appeal about whether past conduct alone, and "public revulsion" in particular, may be sufficient to justify deportation of an offender in this sort of case. In that context there was debate about the extent to which the decision of the European Court of Justice ("ECJ") in *R v Bouchereau* remains good law. That case concerned Directive 64/221."

The context of the discussion in R v Bouchereau [1978] ECR 732 was in response to submissions by the United Kingdom that certain conduct, even where there was no demonstrable present threat, could justify removal under one of the predecessor instruments to Directive 2004/38/EC. The Advocate General in Bouchereau (at page 742) recorded the submissions made by the United Kingdom as follows:

> "The United Kingdom Government … points out that cases do arise, exceptionally, where the personal conduct of an alien has been such that, **whilst not necessarily evincing any clear propensity on his part**, it has caused such deep public revulsion that public policy requires his departure." (Emphasis added)

33. Against that background, Lord Justice Singh's judgment at [71] needs to be quoted in full. His Lordship quoted extracts from the Court of Justice's judgment in Bouchereau from [27] to [30] and then said:

> "It is important to recognise that what the ECJ was there talking about was not a threat to "the public" but a threat to "the requirements of public policy". The latter is a broader concept. At para. 28 the ECJ said that past conduct can only be taken into account in so far as it provides evidence of personal conduct constituting a "present threat to the requirements of public policy." As the ECJ said at para. 29, "in general" that will imply that the person concerned has a "propensity to act in the same way in the future" but that need not be so in every case. It is possible that the past conduct "alone" may constitute a threat to the requirements of public policy. In order to understand in what circumstances that might be so, I consider that it is helpful and appropriate to have regard to the opinion of the Advocate General in *Bouchereau*, when he referred to "deep public revulsion". That is the kind of extreme case in which past conduct alone may suffice as constituting a present threat to the requirements of public policy."

34. Lord Justice Singh was considering the first limb of public policy and public security formulation contained in the Directive. It was in the context of addressing public policy, specifically and in isolation, rather than addressing the public security limb of the test, which the Court of Appeal said that requires evidence of offending of such a magnitude as to trigger "deep public revulsion", in order to merit a decision under Article 27 of the Directive. As the quote highlighted by Mr Malik in his skeleton argument makes clear, it will be an "extreme case" in which past conduct alone may suffice as constituting a present threat to the requirements of public policy.

35. In the present matter we are in different territory. We do not need to address whether a conviction for laundering £145,000,000 meriting a seven year sentence of imprisonment crosses that threshold. The respondent does not rely wholly on the public policy limb of the Directive, but rather the public security limb. We note that

the opening paragraph of the decision letter does address the situation in terms of this being a public policy removal. However, when the operative analysis contained in the decision letter is examined it is clear that the position of the Secretary of State relates to the public security limb, for example from [21] to [35]. It is in that context that the remarks that the Assistant Director of Criminal Investigations at HMRC is outlined and the risk to the United Kingdom of serious harm is highlighted specifically at, for example, [28].

36. We also note the submissions of Ms Isherwood in her skeleton argument concerning the cross-border dimension of the present case. In our view this is not a case where it is necessary to highlight the deep public revulsion necessary to sustain a deportation decision taken solely on the grounds of public policy.

37. For these reasons we find that there is no merit to ground 1. The judge analysed the evidence by reference to the applicable principles of both the Directive and the Regulations. In doing so he reached a decision that was rational on the material before him.

Ground 2 – unduly harsh

38. Turning to Ground 2, Mr Malik highlights the repeated use throughout the judge's proportionality assessment of the term "unduly harsh". Elsewhere, the judge made references to whether there were more than "normal emotional ties" between the appellant and her adult children. Mr Malik highlights the origins of these terms in the established Article 8 jurisprudence, for example as articulated in section 117C of the Nationality, Immigration and Asylum Act 2002. Establishing the presence of more than "normal emotional ties" is the established test for determining whether Article 8 is engaged on a family life basis between adult relatives: see Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 at, for example, [25].

39. There is considerable force to these submissions. We consider the judge's importation of the established Article 8 jurisprudence to have been an error of law. Given the sensitivity of the assessment that would be required ahead of returning this appellant to Germany it is not possible to accept the submissions of Ms Isherwood that any error of law on the judge's part in this respect is not such that the decision needs to be set aside.

40. This is a case where the appellant claimed not to have any social or other support network upon her return to Germany. She claimed not to speak German, having lived entirely within the confines of a Tamil speaking German community prior to her arrival in the United Kingdom. A careful and finely balanced assessment of all relevant factors would be required in order to form this assessment: Article 28(1) of the Directive, and regulation 27(6) of the 2016 Regulations required consideration of the appellant's family situation. In assessing those matters, at [19], the judge appeared to find that Article 8 was not engaged. As [19] is a single paragraph that spans three pages, it is difficult in this decision for us to pinpoint the judge's

problematic analysis without quoting extensively. Halfway down page 9, the judge said:

> "I do not find that it has been shown that the appellant was **dependent** on her two elder daughters or any member of her family prior to her imprisonment. I **do not find that family life, therefore, exists** between the appellant and the members of her family at this juncture. I do not find that it has been shown at this juncture that the **ties go beyond normal emotional ties**." (Emphasis added)

The text emphasised above is clearly drawn from the established jurisprudence relating to Article 8.

41. While we have sympathy for the judge's use of Article 8 terminology, given this was the approach adopted by the respondent in the decision letter, we consider the entirety of the proportionality assessment conducted by the judge to be tainted by the references to established Article 8 concepts.

42. For example, the "due" amount of harshness that may be expected in an Article 8 deportation situation is calibrated by reference the public interest in the deportation of foreign criminals, which is a statutory factor under section 117C(1) of the Nationality, Immigration and Asylum Act 2002: see the discussion in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 at [23]. In the context of free movement rights conferred by the EU Treaties, the concept of a certain amount of harshness being "due" does not necessarily sit well with the established tests contained in Article 27 of the Directive and regulation 27 of the 2016 Regulations.

43. The threshold under Article 8 and the corresponding public interest in deportation is much easier for the Secretary of State to satisfy than it is for the Secretary of State to satisfy the requirements of the 2016 Regulations for deportation. As such, the application of these Article 8 concepts subjected the appellant to a higher threshold to demonstrate that her deportation would not be proportionate than would necessarily have been the case had the Regulations been applied properly. We note Ms Isherwood's submissions that the Article 8 terminology was peppered throughout an assessment which otherwise appeared to apply the correct tests pursuant to the correct terminology. However, in our view, the analysis was tainted and needs to be set aside.

44. As such this appeal succeeds in relation to ground 2.

45. The judge's findings that the appellant's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society are preserved. His assessment of proportionality is set aside. The matter will be retained in this Tribunal for a rehearing on that issue.

46. The appropriate course of action is for the matter to be reheard in this Tribunal in order for the proportionality requirements of the Regulations to be applied.

47. No anonymity direction is made.

Notice of Decision

Judge Hollingworth's decision involved the making of an error on a point of law. It is set aside, with his findings that the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society preserved. The proportionality – or otherwise – of the appellant's removal will be determined following a rehearing in the Upper Tribunal.

DIRECTIONS

The re-making hearing is to be before Judge Stephen Smith sitting alone, time estimate 3 hours.

It is to be listed on the first available date, taking into account Mr Bilal Malik's availability.

Signed Date 25 September 2019

Upper Tribunal Judge Stephen Smith