



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005109

First-tier Tribunal No:
DA/00395/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
23rd of January 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR SADIK HUSAN HALANI
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr A Mian, instructed by MS Visas and Immigration Limited
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 14 December 2023

DECISION AND REASONS

1. The appellant appeals against the decision by the Secretary of State to refuse to revoke his deportation order on 4 July 2019. His appeal against that decision was most recently allowed by the First-tier Tribunal in a decision promulgated on 31 August 2022, which was set aside for the reasons set out in my decision promulgated on 13 July 2023.
2. The appellant is the subject of a deportation order made under the Immigration (EEA) Regulations 2006. That order was signed on 14 March 2013.

3. The appellant is a French citizen who was on 18 January 2008 convicted upon his own confession of attempting to murder his wife. He was sentenced to nine years' imprisonment for that offence and an additional eighteen months (served concurrently) for prior threats to kill his wife and an assault on her occasioning bodily harm.
4. In light of these offences the Secretary of State took a decision to make a deportation order against him which was signed on 14 March 2013.
5. The offences against his wife took place in 1994 but the conviction took place much later as, having fled the United Kingdom, first to France and then to Madagascar, it was only when he attempted to re-enter the United Kingdom in 2007 that he was apprehended.
6. Subsequent to his deportation, the appellant sought twice to enter the United Kingdom in breach of his deportation order on 16 October 2013 and 17 June 2015.
7. On 12 December 2017 the appellant submitted an application to revoke his deportation order which was refused on 4 July 2019 with an out of country right of appeal.
8. The Secretary of State's case is that there has been no material change in the appellant's circumstances since the deportation observing that he had been classed as a MAPPA level 3 offender and an OASys Report assessed him to be a high risk of harm to known adults. She rejected the submission that the appellant was remorseful for his criminal offences and that although he had no further criminal convictions his character was impugned by his attempts to re-enter in breach of the extant deportation order and the decision to maintain exclusion was proportionate pursuant to Regulation 27 of the Immigration (EEA) Regulations 2016.

Procedural History

9. The appellant's appeal against the decision to maintain exclusion first came before the First-tier Tribunal on 5 February 2020. In a decision promulgated on 13 February 2020, First-tier Tribunal Judge J W H Law allowed the appeal. The Secretary of State sought permission to appeal against that decision which was granted by Upper Tribunal Judge Pitt on 21 May 2020.
10. The matter came before the Upper Tribunal where Judge Blundell found that the decision of the First-tier Tribunal involved the making of an error of law and remitted it to the First-tier Tribunal for a fresh decision on all issues. The appeal was then heard by Judge Brewer found that there had been a material change since the making of the deportation order, such criteria for making the order no longer satisfied.
11. Permission to appeal to the Upper Tribunal was granted by Judge Stephen Smith on 31 March 2024, and the appeal then came before me on 25 May

2023. For the reasons set out in my decision on 13 July 2023, that decision was set aside.

12. Subsequent to the promulgation of my decision the Secretary of State set out in position paper on 23 November 2023 that the continued exclusion of the appellant from the United Kingdom was justified on public policy grounds given the gravity of his criminal offending, regardless of the level of risk that any further offences will be committed by him, relying on SSH D v Robinson (Jamaica) [2018] EWCA Civ 85. It is also said that this is a case that the appellant's past conduct will have caused serious public offence.

The Hearing

13. On 14th December I heard submissions from Mr Mian and Mr Tufan. No application was made to adduce further evidence from the appellant, to adduce further oral evidence, but I agreed to permit the appellant to adduce further evidence obtained by way of a Subject Access Request with the Ministry of Justice set out in part B of is consolidated bundle. That consists, for the greater part, in documents relating to extracts from the OASys Report, parole assessments and documents relating to the Parole Board's decision and confirmation of attendance on courses post sentence.
14. In addition to the submissions, I had the position paper from the Secretary of State and skeleton argument from Mr Mian.

Submissions

15. Mr Mian relied on his skeleton arguments submitted and took me through the additional material, submitting that this indicated that there was a significant change in the appellant's circumstances, in that he had been released on the basis that he no longer presented a significant threat, there being a clear and distinct change in his position, as confirmed both by Dr Waheed and Dr Galapatthie, such that he does not now pose any risk. I was also taken to evidence indicating that he has no criminal record in Madagascar.
16. Mr Mian submitted that the appellant has been rehabilitated, is genuinely remorseful of his actions; issues of domestic violence and his current relationship, which has lasted a significant period. Attention is drawn to the fact the appellant has not committed any offences since 1994.
17. It was submitted further that it would be unfair for the Secretary of State now to rely on a decision in Bouchereau [1978] ECR 732 given that this had never been relied upon in the original deportation order, or before Judge Khan in 2013, or in any subsequent letter refusing to revoke deportation orders. It was not raised in either of the appeals before the First-tier Tribunal. It is submitted that it would be unfair to permit the Secretary of State to rely on the matter now.
18. Further, it was submitted that even where past conduct may alone be sufficient to provide a genuine, present and sufficiently serious threat to

public policy, that was reserved for exceptional cases and this case did not reach that necessarily high threshold. It is further argued that in any event it would be disproportionate.

19. Mr Tufan relied on Mr Lindsay's position statement, submitting that there had not, in this case, been a sufficient change in the appellant's situation, such that he no longer presented as a genuine, present and sufficiently serious threat. He submitted the initial evidence did not take the case much further.
20. He submitted that the Secretary of State was not prevented from raising the issue and that the crime committed here was heinous. It followed on from a course of conduct and even on a guilty plea there was a sentence of nine years' imprisonment. He submitted further that this is clearly a case in which Schedule 1, paragraph 7(f) of the EEA Regulations applied. He submitted further that there was no basis on which, if the appellant did not succeed under the EEA Regulations and thus there was no prospect of any Article 8 case succeeding.
21. In response Mr Mian submitted that in any event there needs to be a genuine, current and present threat and rehabilitation was a point to be taken into account in assessing that. He submitted that there would not be public revulsion in what had been a serious crime.

The Law

22. The appeal in this case was brought under the EEA Regulations. Although the EEA Regulations were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, many of its provisions are preserved for the purpose of appeals pending as at 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309), ("the EEA Transitional Regulations").
23. The effect of the amendments is that the sole ground of appeal is now, in effect, whether the decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.
24. The EEA Regulations provided as follows, so far as they are relevant.
 27. (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
 - (2) A relevant decision may not be taken to serve economic ends.
 - (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security
 - (4) ...

- (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) ...
- (7) ...
- (8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

25. The First-tier Tribunal was also duty-bound to take into account Schedule 1 of the 2016 Regulations which provided as follows, so far as is relevant:

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

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

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

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

- (a) the commission of a criminal offence;
- (b) an act otherwise affecting the fundamental interests of society;
- (c) the EEA national or family member of an EEA national was in custody.

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

...

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

(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);

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);

...

(j) protecting the public;

26. It is important to bear in mind the context in which the EEA Regulations are to be interpreted and applied, which is that the right of free movement is a fundamental right and curtailment of that must be proportionate. That

is the overriding consideration implicit in the phrase “sufficiently serious”. It follows from the jurisprudence that restrictions on the right of free movement are to be narrowly construed even though there are parameters within which a state can choose what its fundamental interests are.

27. It is equally important to note that both the EEA Regulations and the underlying Directive draw a distinction between public policy and public security; considerations of both may justify exclusion where there is no or only an enhanced level of protection.
28. It is established law that when seeking to deport an EEA national under the EEA Regulations the burden was on the Secretary of State to demonstrate that it was justified.
29. In Straszewski v SSHD [2015] EWCA Civ 1245 Moore-Bick LJ held:

13. Given the fundamental difference between the position of an alien and that of an EEA national, one would expect that interference with the permanent right of residence would be subject to more stringent restrictions than those which govern the deportation of nationals of other states. Moreover, since the right of free movement is regarded as a fundamental aspect of the Union, it is not surprising that the Court of Justice has held that exceptions to that right based on public policy are to be construed restrictively: see, for example *Van Duyn v Home Office* (Case 41/71) [1975] 1 C.M.L.R. 1 and *Bonsignore v Oberstadtdirektor der Stadt Köln* (Case 67/74) [1975] 1 C.M.L.R. 472.

14. Regulations 21(5)(b) and (d) provide that a decision to remove an EEA national who enjoys a permanent right of residence must be based exclusively on the personal conduct of the person concerned and that matters that do not directly relate to the particular case or which relate to considerations of general prevention do not justify a decision to remove him. On the face of it, therefore, deterrence, in the sense of measures designed to deter others from committing similar offences, has of itself no part to play in a decision to remove the individual offender. Similarly, it is difficult to see how a desire to reflect public revulsion at the particular offence can properly have any part to play, save, perhaps, in exceptionally serious cases. As far as deterrence is concerned, the CJEU has held as much in *Bonsignore v Oberstadtdirektor der Stadt Köln*.

15. Nonetheless, there have been instances in which deterrence and public revulsion have played a part in the decision. In *R v Bouchereau* (Case 30/77) [1978] 1 Q.B. 732 the defendant, a French national working in England, was convicted for a second time of possessing dangerous drugs (small quantities of amphetamine, cannabis and LSD). The magistrate was minded to recommend him for deportation, but he argued that it would be unlawful to deport him as he was a migrant worker exercising Treaty rights. The magistrate referred a number of questions to the European Court, the second of which was whether the provision that previous convictions do not in themselves justify a decision to deport, now to be found in regulation 21(5) (e), meant that such convictions were relevant only as demonstrating a propensity to offend in the future.

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

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

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

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

30. While that decision relates to the previous EEA Regulations, there was no change in the underlying Directive.

31. It must, however, be born in mind, as was identified in SSHD v Robinson [2018] EWCA Civ 85, when discussing Bouchereau that [71]:

71 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.

32. Bearing in mind that what is in issue is public policy, rather than threat posed to the public, then it is sufficiently clear that this consideration falls within paragraph 7 (f) of Schedule 1 to the 2016 Regulations which the judge must apply.

Can the Secretary of State plead Public Policy?

33. The Secretary of State submitted that, relying on the decision in Bouchereau there are grounds of public policy as well as grounds of public

security, that the decision not to revoke the deportation order could be justified. As noted in my decision on the error of law [34] to [36], this point had not been made, despite Judge Brewer referring to the appellant's crime as "heinous".

34. Mr Mian submitted that this issue cannot be raised at this stage in the proceedings, raising issues of fairness, and procedure.
35. Whether, and to what extent, the principles of and issue estoppel apply in public law is complex, particularly where, as here, the argument from the respondent could and perhaps should) have been raised previously. The relevant principles were discussed by Carnwath JSC in R(DN)Rwanda [2020] UKSC 7 at [44] onwards. Having had regard to that, and having had regard to the fact that this is the same set of proceedings, I do not consider that the Secretary of State is as a matter of law prevented from raising this issue now, subject to the requirements of fairness.
36. I do not consider that the Secretary of State can fairly be prevented from raising, as he now has, an argument that the appellant's crime is so heinous, such that it falls within the public policy ambit. The appellant has had ample time to address that issue and indeed has produced a detailed skeleton argument in response to the issue being raised in the position paper of 23 November 2023. There was no request for additional time to address the matter. Accordingly, I am satisfied that it is open to the Secretary of State to raise this issue.

Is the decision not to revoke justified on public policy grounds?

37. In considering Robinson I note that the passages relied upon by Mr Mian in his skeleton argument follow mainly from the passages in which the court was considering the test applicable, the test to be applied in the light of the decisions by the CJEU in Rendon Marin and CS. In essence, they set out the law as set out in broadly the same terms as are set out in the Citizenship Directive, as enacted by operation of the 2016 EEA Regulations, in particular Regulation 27. At paragraph 70 the Court of Appeal said this:

70. At paras. 27-30 of its judgment the ECJ said:

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

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

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

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

38. In its decision the Court of Appeal in Straszewski stated [17]:

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

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

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

39. As Mr Mian submitted, the courts have avoided setting down guidelines for the cases that may fall within that class of cases, being described as "especially horrifying" or "repugnant to the public"

40. In this case the circumstances of the offending are set out in the judge's sentencing remarks.

41. To summarise, the appellant made threats to kill his wife, drove a car into the car in which she was sitting along with their daughter and finally, whilst on bail, travelled back to her place of work with a knife and stabbed her three times. The severe injuries caused required removal of her spleen and pancreas and as a result she has to take medication for the rest of her life.

42. I am satisfied in the light of the facts of the crime that this is a case in which public revulsion is such that this appellant continues to present a genuine, present and serious threat to public policy, in this case, as illustrated by paragraph 7 (f) of Schedule 1 to the EEA Regulations. I do not consider that the passage of time is such that public revulsion has diminished.
43. Having reached that conclusion, I must consider whether maintaining that deportation order is proportionate, an issue considered below.

Does the Appellant present a Genuine and Sufficiently Serious Threat?

44. It is at this point sensible to consider Judge Brewer's findings at paragraphs 59 to 60 of her decision:

59. It is plain from the nature of the cluster of offences in this case and in particular the index offence (attempted murder) that this appellant committed a heinous crime against his ex-wife, which has life long consequences for her. I find that this crime was set against a backdrop of a history of domestic violence. I make this finding because the index offence and the offences leading up to the attempted murder are consistent with a pattern and history of domestic violence as disclosed by the appellant's ex-wife in the course of the criminal proceedings. I do not accept the appellant's evidence that the cluster of offences committed by him were the only time he subjected her to violence. I find that he has not been credible on this front, taking into account that both Dr Smith and Dr Galppathie identify the appellant's controlling, aggressive and possessive behaviour to his ex-wife and his lack of self-awareness about this behaviour. Dr Smith's observation that he was not forthcoming about his violent conduct towards her. Further, I take into account his fleeing the jurisdiction following the attempted murder and repeated denial of these offences when questioned by the police 13 years later are evidence of someone who has evaded responsibility for his criminal conduct and not been forthcoming about the same. However, as identified in the regulations a person's previous criminal convictions do not in themselves justify the decision to deport.

60. I take into account and place weight on the findings of Judge Khan, viz in 2013, the appellant was found to be a person who represented a present, genuine and sufficiently serious threat justifying his deportation at that time. These findings were not the subject of a successful challenge. However, the findings are of limited value in assessing whether criteria is presently met, because they were made 9 years previously. That is not to say that I discount them entirely because they provide an important backdrop to whether the criteria is presently met.

45. That said, for the reasons set out in my error of law decision I continue to be satisfied that the judge's conclusion that the appellant did not present a genuine, present and sufficiently serious threat was flawed. It must be borne in mind in assessing the appellant's propensity to reoffend that he twice sought to enter the United Kingdom in breach of a deportation order and had been found not to be a reliable witness. These are factors to be

taken into account in assessing the reports of Dr Waheed and Dr Galapatthie and in the appellant's own evidence.

46. In doing so, I also take into account the new material presented in part B of the consolidated bundle.
47. Given the length of time since the OASys Report was initially prepared, prior to sentencing, it is now of little assistance in assessing current risk. That said, I do note that at pages 7 to 8 of the report it is recorded that the appellant had stalked his wife on a number of occasions. On consideration of the probation reports prepared for the parole hearing, a further disturbing feature of the appellant's conduct is that he used members of his local community to help him locate his wife each time she left and that they also brought her back to him. It is recorded also the appellant was unable to and willing to accept that this was very controlling behaviour and did not respect the rights and needs of his former wife. It is of concern also at [2.6] that the appellant had said at the time he was going very slowly when he reversed his car twice into a car, in which his daughter was travelling as well as with the ex-wife, contrary to what was established.
48. It is recorded [3.1] he has made good progress and it was assessed that the appellant had taken steps to address the very specific issues and his use of domestic abuse in instrumental violence. The Probation Officer did not support his application under the early removal scheme, concerning that he continues to pose a significant risk of harm (5.1). The parole hearing was deferred but the Parole Board was eventually satisfied, that the appellant, having been an enhanced prisoner for nearly all of his time in custody without any adjudications, could be released. I have noted also a then current OASys Report, indicating the appellant presents a medium risk of harm to the public and children with a high risk of harm to a known adult, but that they recommended release on the basis that he would be required to undertake an IDAP (Independent Domestic Abuse Programme), which the material shows that he did. His licence conditions were relatively restrictive and it is of note that the Probation Officer who had initially indicated that he ought not to be released changed her mind) (see page 62 of the report).
49. The earliest psychiatric report in the bundle is preferred by Dr Smith in preparation for the sentencing hearing. Dr Smith noted that the appellant was not forthcoming in providing an explanation for his seriously violent conduct towards his wife, stating that he had intended to kill himself but not harm her, but he was concerned that although there had been some maturation of his personality in the years since the offences, the appellant demonstrated only a limited appreciation of the victim's sensitivities, demonstrating very little genuine understanding why he behaved towards her in the manner he did over a sustained period of time.
50. In considering Dr Waheed's report, I note that it is said that the appellant has significant mental ill-health issues, resulting in the prescription of

antidepressants and sleeping tablets since 2016. There is, however, an error in the reference to there being no other criminal conviction other than attempted murder, as the appellant was convicted of other offences in the lead up to that and he was sentenced to nine years not seven years, nor is there mention of the controlling behaviour referred to above.

51. The appellant was diagnosed with recurrent depressive disorder and he was found to be feeling guilty and remorseful. Dr Waheed concluded on the available facts that the risk of repetition of his violent behaviour was low, noting that the assaults took place in 2004 over a short period of time and that he had acted specifically towards his immediate family at that time. It is noted that “his behaviour was driven by reports of his wife having an extramarital relationship” and that no other person was targeted during these acts.
52. I have a concern that this does not take into account the pattern of controlling behaviour over a number of years before the incidents. It has also recorded that the appellant’s child and another relative were in the car when he drove at it and it is surprising that the incidents are supposed to have taken place in 2004, yet they took place in 1994.
53. There is a degree of carelessness in this report with respect to dates and the number of convictions, but I do not consider that these are material. What does concern me is that the doctor appears simply to have accepted the appellant’s account (and I note he has been found not to be credible) and there is no indication of him probing the appellant over his apparent remorse and guilt of his actions. There does not appear to be any probing over why the appellant carried out the acts of criminal offences and it was inappropriate for him to opine as to whether the appellant’s continued removal was serving any public interest.
54. The report appears to be focussed on current mental ill-health and the interests of the children from the second marriage rather than an assessment of the risk he poses. In the circumstances, I attach less weight to it.
55. Dr Galapatthie’s report, like that of Dr Waheed, sets out a summary of the case, which appears to reproduce the information provided to him by the appellant’s solicitor. Much of the information relates to the relationship with the appellant’s wife and their children and the suffering that is said is caused to them and it is said:

“Concerning risks Mr H presents to his ex-spouse, Mrs SH, their children, other possible partners or children, or to the public, and whether there is a risk that he will reoffend in future, Mr H will say that as a result of him serving the sentence he has completely reviewed his past behaviour, attitudes and views, is a completely changed person now and would never harm anyone or commit any crime.

...

He is extremely remorseful for his past actions now understands the harm he has done and pain he caused his ex-spouse, her family and his own family.”

56. Dr Galapatthie noted [13] that in his opinion the appellant’s mental health symptoms were genuine and were not exaggerated or feigned but noted that the appellant appeared to lack the emotional intelligence and knowledge required to feign symptoms of depression, anxiety and PTSD. In his assessment of the index offence, it is notable that Dr Galapatthie does not appear to take into account the offences which occurred before the stabbing and he said “He said that in the period prior to the index offence he felt he was deeply in love with her and was not controlling of her”. He said that he did not follow her or check her handbag. He did not stop her going out or try to control her.”
57. That is in direct contradiction with the earlier probation report referred to above. It is unclear whether the appellant had said to Dr Galapatthie that he now realised that his wife was not having an affair. It is noted that:

“Mr Halani said that he thinks the offence occurred as he was young and could not think properly at the time. Mr Halani said that he should not have committed the index offence, that her having an affair was not the end of the world and the relationship should just have ended.”

While Dr Galapatthie does note Dr Smith’s report, he does not comment on the apparent differences between that report and the OASys Report which refer to the earlier offences prior to the stabbing, but he does note [65] that:

“It is notable that he (the appellant) accepts the index offence but does not acknowledge the alleged possessive and controlling behaviours that are implied to have occurred. Whilst he accepts the 6 offences for which he has pleaded guilty he does not acknowledge the pattern of behaviour prior to the index offence can be seen as possessive and controlling behaviours that would have implicitly been present in the period leading up to the commission of the index offence. In my opinion, this lack of appreciation may be due to Mr Halani not being able to equate the terminology related to possessive and controlling behaviour in relation to his actions and is only able to focus on his convictions as they relate to specific offences. In my opinion, it is unlikely that Mr Halani will have the ability to appreciate that his behaviours were generally possessive given that he presents as an individual who has appears to have limited emotional awareness and a poor emotional vocabulary. In my opinion, this does not mean that he does not feel remorse for his behaviours and actions but indicates he is not capable of easily articulating an appreciation of his understanding of his actions, behaviours and their impact on the victim. In my opinion, despite an inability to articulate that he was being possessive and controlling he does accept the index offences and has what appears to have remorse and victim empathy to the highest level that he is capable of experiencing and expressing. During my interview with him, he was able to acknowledge both the physical and psychological harm of the index offence. He was able to appreciate the long term psychological impact on his ex-wife of not only the index offence but also his actions by way of absconding following the index

offence and that this would have made his ex-wife feel scared that he was still at large and could potentially attack her again.”

58. Although Dr Galapatthie opines that the appellant’s victim empathy has improved, he now expresses genuine remorse to the highest level possible for him, his level of remorse is unlikely to improve with any further therapy.
59. While Dr Galapatthie does refer to the attempts to enter the United Kingdom deportation order, this is put down to lack of appreciation of the seriousness of his actions at the time. Yet this failure to appreciate on two occasions that his actions were unlawful is not taken as an indicator of risk.
60. It is only in assessing current risk that Dr Galapatthie refers to the four offences prior to the index offence and reversing into the car and does refer [74] to the appellant’s possessing and controlling behaviour before the offences. He opines it is likely the index offence and previous offences in the four months prior to the index offence represents an isolated cluster of offences that occurred in 1994, which whilst very serious, were isolated in nature, but does not explain adequately why he thought they were isolated given the previous controlling behaviour.
61. At this point it is worth considering the findings of Judge Brewer at paragraph 59:
62. Whilst I accept that both Dr Waheed and Dr Galapatthie are entitled to be treated as expert witnesses, and that their reports are detailed, but these must be set in the context of whether the appellant is a reliable witness and has told the truth to those examining him. That is in particular in the noting that he had not been credible as to his previous violent behaviour and the finding by Judge Brewer that he had not been forthcoming about his evasion of responsibility for criminal conduct.
63. Taking these factors into account, I attach less weight to the reports from both Dr Galapatthie and Dr Waheed.
64. With regard to, given the level of planning for the index offence, the failure to accept the controlling behaviour in the past and viewing the evidence as a whole, I conclude that the respondent has satisfied me that the appellant continues to present a genuine, present and sufficiently serious threat to public security, given what I find is a continuing propensity to reoffend. In reaching that conclusion, I do take into account the lack of evidence of any convictions since 1994, but I do take into account his attempts to enter the UK in breach of a deportation order.

Proportionality

65. I now consider the issues of proportionality and bearing in mind what is said in Article 33 of the Citizenship Directive. He attempts to enter in

breach of a deportation order and not adequately explained. I consider that these exacerbate the risk factors.

66. In assessing proportionality and having had regard to the factors set out in the Regulations, I accept that the appellant continues to have a family life with his wife who is resident here and his four children, three of whom are now over 18, although one is 17½. They have, however, been separated from him for a significant period of time and in addition to being citizens of the United Kingdom while having leave to remain here, they are citizens of France and it is unclear to me why they could not relocate there. The appellant, apart from his family, has few, if any ties to the United Kingdom. He lives in Madagascar, although a French citizen and he appears to be financially solvent where he is. His residence in the United Kingdom ended some years ago.
67. I have assessed proportionality on the assumption that the appellant's freedom of movement is inhibited, which is a serious factor in his favour.
68. I am satisfied, having had regard to all the relevant factors, that it is proportionate to maintain the deportation order against the appellant and that the decision not to revoke it was justified. I find that is so with reference to whether this is simply a propensity to reoffend or that he presents a threat to public security given the nature of his crimes. I am also satisfied that even were it the case that he did not have a propensity to reoffend, that the heinous nature of his crimes would, in all the circumstances of this case, be sufficient to justify, on a proportionate basis, his continued exclusion, given the very serious nature of his offending.

Notice of Decision

- (1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
- (2) I remake the decision by dismissing the appeal.

Signed
Jeremy K H Rintoul
Judge of the Upper Tribunal

Date: 19 January 2024

ANNEX - ERROR OF LAW



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005109

First-tier Tribunal No: DA/00395/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:

.....

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR SADIK HUSAN HALANI
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr A Mian, instructed by MS Visas and Immigration Limited

Heard at Field House on 25 May 2023

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Michelle Brewer promulgated on 31 August 2022, allowing his appeal under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). For ease of reference I refer to Mr Halani as the appellant as he was before the First-tier Tribunal.
2. The appellant is the subject of a deportation order made under the Immigration (EEA) Regulations 2006. That order was signed on 14 March 2013.

3. The appellant is a French citizen who was on 18 January 2008 convicted upon his own confession of attempting to murder his wife. He was sentenced to nine years' imprisonment for that offence and an additional eighteen months (served concurrently) for threats to kill his wife and an assault on her occasioning bodily harm.
4. In light of these offences the Secretary of State took a decision to make a deportation order against him which was signed on 14 March 2013.
5. The offences against his wife took place in 1994 but the conviction took place much later as, having fled the United Kingdom, first to France and then to Madagascar, it was only when he attempted to re-enter the United Kingdom in 2007 that he was apprehended.
6. Subsequent to his deportation, the appellant sought twice to enter the United Kingdom in breach of his deportation order on 16 October 2013 and 17 June 2015.
7. On 12 December 2017 the appellant submitted an application to revoke his deportation order which was refused on 4 July 2019 with an out of country right of appeal.
8. The Secretary of State's case is that there has been no material change in the appellant's circumstances since the deportation observing that he had been classed as a MAPPA level 3 offender and an OASys Report assessed him to be a high risk of harm to known adults. She rejected the submission that the appellant was remorseful for his criminal offences and that although he had no further criminal convictions his character was impugned by his attempts to re-enter in breach of the extant deportation order and the decision to maintain exclusion was proportionate pursuant to Regulation 27 of the Immigration (EEA) Regulations 2016.

Procedural History

9. The appellant's appeal against the decision to maintain exclusion first came before the First-tier Tribunal on 5 February 2020. In a decision promulgated on 13 February 2020, First-tier Tribunal Judge J W H Law allowed the appeal. The Secretary of State sought permission to appeal against that decision which was granted by Upper Tribunal Judge Pitt on 21 May 2020.
10. The matter came before the Upper Tribunal where Judge Blundell found that the decision of the First-tier Tribunal involved the making of an error of law and remitted it to the First-tier Tribunal for a fresh decision on all issues. Judge Brewer found that there had been a material change since the making of the deportation order, such criteria for making the order no longer satisfied [58]. She observed [59]:

It is plain from the nature of the cluster of offences in this case and in particular the index offence (attempted murder) that this appellant committed a heinous crime against his ex-wife, which has life long

consequences for her. I find that this crime was set against a backdrop of a history of domestic violence. I make this finding because the index offence and the offences leading up to the attempted murder are consistent with a pattern and history of domestic violence as disclosed by the appellant's ex-wife in the course of the criminal proceedings. I do not accept the appellant's evidence that the cluster of offences committed by him were the only time he subjected her to violence. I find that he has not been credible on this front, taking into account that both Dr Smith and Dr Galpathie identify the appellant's controlling, aggressive and possessive behaviour to his ex-wife and his lack of self-awareness about this behaviour. Dr Smith's observation that he was not forthcoming about his violent conduct towards her. Further, I take into account his fleeing the jurisdiction following the attempted murder and repeated denial of these offences when questioned by the police 13 years later are evidence of someone who has evaded responsibility for his criminal conduct and not been forthcoming about the same. However, as identified in the regulations a person's previous criminal convictions do not in themselves justify the decision to deport.

11. The judge found:-

- (1) that weight could be attached to the decision of Dr Waheed in January 2020. The appellant presented a low risk of a repetition of violent behaviour, and also on the report of Dr Galapathie leading her to conclude [70] the appellant is at low risk of reoffending, observing also [71] that the appellant had maintained a relationship with his second wife of 21 years and there was no reported history of domestic violence;
- (2) the appellant expressed remorse [72] and the absence of any criminal offending for 28 years [74].

12. The Secretary of State sought permission to appeal on the grounds that the judge had erred:-

- (i) in misdirecting themselves on the application of Regulation 27 in not applying the principles set out in Bouchereau [1977] EC], although noting that the judge described the index crime as heinous yet found on the basis of the expert's report and lack of subsequent reoffending, relationship with wife, limited remorse, it being a requirement to have in mind that the crime committed on its own could meet the Bouchereau threshold;
- (ii) in failing to consider Schedule 1(2) in the proportionality assessment as, had she done so, she would have attached little weight to their integration as a family member of an EEA national given the integrated links were formed at a time the appellant had fled.

13. On 31 March 2023 Upper Tribunal Judge Stephen Smith granted permission stating:

1. It is (just) arguable that the judge's analysis at para. 59 irrationally disregarded the appellant's offending history, history of domestic violence and flight from the jurisdiction on the basis that "a person's previous convictions do not in themselves justify the decision to deport." As the grounds contend at para. 9, it is at least arguable that the judge failed to engage with the underlying conduct of the

appellant's offending history when balancing those factors against those telling in favour of the appellant.

2. The other grounds have less merit. It is by no means clear that the judge applied the higher "serious grounds" threshold, as suggested by the grounds at para. 6. Further, it is not clear that the Secretary of State's refusal letter relied upon the so-called Bouchereau-exception, or that it was otherwise put to the judge by the Secretary of State at the hearing. Para 1(2) of Schedule 1 to the Immigration (European Economic Area) Regulations 2016 concerns the weight to be ascribed to claimed extensive familial and societal integrating links an appellant claims to have forged within the UK, which was not part of the judge's reasoning.

The hearing on 25 May 2023

14. I heard submission from both representatives, Mr Mian relying on a skeleton argument served previously.
15. Mr Lindsay submitted that it was sufficiently clear from the refusal letter at [48] that the respondent had argued that the appellant's criminal behaviour was sufficiently serious to fall within the scope of Bouchereau. He did not accept that it had not been raised in the hearing, and that it was evident from the judge's findings at [59] – in particular the reference to "heinous" – that she had considered this issue. It was also clear from that paragraph that the judge had considered the appellant's conduct beyond the immediate convictions, but had failed properly
16. Mr Lindsay submitted also that the judge had failed to have regard, in assessing proportionality, the blatant disregard of the deportation order which ought to have been factored into that assessment.
17. Mr Mian submitted that the grounds were factually incorrect. Contrary to what had been stated at [5], the respondent had not successfully appealed on the previous occasion on similar Bouchereau grounds; that was not what Judge Blundell had found. It was submitted that this point had simply not been put to the judge, and it was improper to raise it at this point.
18. He submitted further that there was no indication that the judge was unaware of the nature of the crime, and had reached a balanced decision, finding, as she was entitled to do, that there had been a change in circumstances. Mr Mian submitted that the judge had given proper reasons, grounded in the expert evidence, for her findings.
19. There was, at the end of submissions, a discussion on whether the appellant's position had been changed since the United Kingdom had withdrawn from the EU on 31 December 2020. I directed that the parties should prepare written submissions on this issue, if so advise, to be submitted within three weeks. I am indebted to Mr Lindsay for his post-hearing submissions.

The Law

20. The appeal in this case was brought under the EEA Regulations. Although the EEA Regulations were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, many of its provisions are preserved for the purpose of appeals pending as at 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309), (“the EEA Transitional Regulations”).
21. The effect of the amendments is that the sole ground of appeal is now, in effect, whether the decision under appeal breaches the appellant’s rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.
22. The EEA Regulations provided as follows, so far as they are relevant.
 27. (1) In this regulation, a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.
 - (2) A relevant decision may not be taken to serve economic ends.
 - (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security
 - (4) ...
 - (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) ...
 - (7) ...

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

23. The First-tier Tribunal was also duty-bound to take into account Schedule 1 of the 2016 Regulations which provided as follows, so far as is relevant:

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

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

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

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

(a) the commission of a criminal offence;

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

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

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

...

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

(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);

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);

...

(j) protecting the public;

24. It is important to bear in mind the context in which the EEA Regulations are to be interpreted and applied, which is that the right of free movement is a fundamental right and curtailment of that must be proportionate. That is the overriding consideration implicit in the phrase “sufficiently serious”. It follows from the jurisprudence that restrictions on the right of free movement are to be narrowly construed even though there are parameters within which a state can choose what his fundamental interests are.
25. It is equally important to note that both the EEA Regulations and the underlying Directive draw a distinction between public policy and public security; considerations of both may justify exclusion where there is no or only an enhanced level of protection. Where imperative grounds exist, it is only on public security grounds that exclusion can be justified.
26. It is established law that when seeking to deport an EEA national under the EEA Regulations the burden was on the Secretary of State to demonstrate that it was justified.
27. In Straszewski v SSHD [2015] EWCA Civ 1245 the Moore-Bick LJ held:
13. Given the fundamental difference between the position of an alien and that of an EEA national, one would expect that interference with the permanent right of residence would be subject to more stringent restrictions than those which govern the deportation of nationals of other states. Moreover, since the right of free movement is regarded as a fundamental aspect of the Union, it is not surprising that the Court of Justice has held that exceptions to that right based on public policy are to be construed restrictively: see, for example *Van Duyn v Home Office* (Case 41/71) [1975] 1

C.M.L.R. 1 and *Bonsignore v Oberstadtdirektor der Stadt Köln* (Case 67/74) [1975] 1 C.M.L.R. 472.

14. Regulations 21(5)(b) and (d) provide that a decision to remove an EEA national who enjoys a permanent right of residence must be based exclusively on the personal conduct of the person concerned and that matters that do not directly relate to the particular case or which relate to considerations of general prevention do not justify a decision to remove him. On the face of it, therefore, deterrence, in the sense of measures designed to deter others from committing similar offences, has of itself no part to play in a decision to remove the individual offender. Similarly, it is difficult to see how a desire to reflect public revulsion at the particular offence can properly have any part to play, save, perhaps, in exceptionally serious cases. As far as deterrence is concerned, the CJEU has held as much in *Bonsignore v Oberstadtdirektor der Stadt Köln*.

15. Nonetheless, there have been instances in which deterrence and public revulsion have played a part in the decision. In *R v Bouchereau* (Case 30/77) [1978] 1 Q.B. 732 the defendant, a French national working in England, was convicted for a second time of possessing dangerous drugs (small quantities of amphetamine, cannabis and LSD). The magistrate was minded to recommend him for deportation, but he argued that it would be unlawful to deport him as he was a migrant worker exercising Treaty rights. The magistrate referred a number of questions to the European Court, the second of which was whether the provision that previous convictions do not in themselves justify a decision to deport, now to be found in regulation 21(5) (e), meant that such convictions were relevant only as demonstrating a propensity to offend in the future.

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

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

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

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

17. In my view the clear emphasis of that passage is on the fundamental nature of the principle of free movement and the need to identify a present threat to the requirements of public policy, while recognising that there may

be cases in which past conduct alone may suffice. However, paragraph 29 must be read and understood in the context of the court's answer to the third question, namely, whether "public policy" includes reasons of state in circumstances where no breach of the peace or public order is threatened. The court recognised that public policy may vary from country to country and may differ under different circumstances and at different times. National authorities must be allowed a degree of discretion in how they apply it within the limits imposed by the Treaty. The court then concluded with an endorsement of the underlying principles in these terms:

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

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

28. While that decision relates to the previous EEA Regulations, but there has been no change in the underlying Directive.
29. It must, however, be born in mind, as was identified in SSHD v Robinson [2018] EWCA Civ 85, when discussing Bouchereau that [71]:

72 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.

30. Bearing in mind that what is in issue is public policy, rather than threat posed to the public, then it is sufficiently clear that this consideration falls within paragraph 7 (f) of Schedule 1 to the 2016 Regulations which the judge must apply.
31. To the extent that there is a so-called "Bouchereau" principle, it is that certain crimes may, by their nature justify exclusion on public policy

grounds. It is not therefore properly considered as an exception to there being a need to demonstrate a threat to the public security. It may of course be the case that both considerations apply.

32. In effect, what the Secretary of State's case is now (as opposed to how it was formulated before the First-tier Tribunal) is that the appellant does present genuine, present and sufficiently serious threat to public safety; and, if not, his continued exclusion is justified on grounds of public policy, given the nature of his crimes.
33. The grounds are, however, poorly drafted. They confuse the threat to the public and threat to public policy. They also contain an error. As Mr Mian submitted, the previous appeal was not allowed on "Bouchereau" grounds. In fact, Upper Tribunal Judge Blundell wrote this:

[60]. I can deal very briefly with the respondent's remaining grounds of appeal. No error of law on the part of the FtT is identified by those grounds. Ms Petterson made no reference to those grounds, and rightly so. The R v Bouchereau principle was not invoked by the Secretary of State before the judge and it was not for him to take it of his own volition. I do not understand the point which is made in the grounds with reference to Kamki v SSHD, which was a case on its own facts. And, as the judge himself stated, neither s117C of the Nationality, Immigration and Asylum Act 2002 nor the principle of deterrence was of any relevance in an EEA case such as this".

34. The question arises as to whether the issue concerning Bouchereau and public policy was put to the judge. While I accept that were it simply for the decision in Bouchereau, as characterised in the grounds, as being an exception in there being a need to show propensity to reoffend, that does not reflect Regulation 27(5) which requires the judge to have regard to specific factors. Further, in the refusal letter the seriousness of the offending is referred to at [48], an indication that the appellant poses a significant threat to the safety and security of the United Kingdom. It is sufficiently clear also from paragraph 64 that the appellant is said to represent a genuine, present and sufficiently serious threat to a fundamental interest of society in addition to posing a serious risk to the safety of the public. That in addition shows that it is a policy issue also. It is also sufficiently clear from paragraph 75 and 76, reference is to the offending showing a total disregard for the laws of the United Kingdom and their severity, that there remains a strong justification on grounds of public policy to maintain the deportation order.
35. In these circumstances, where the applicability or not of Bouchereau was in play, and where the burden lay on the Secretary of State, all the more surprising that it was not put to her that Bouchereau applied; there is insufficient evidence that it was. Given the facts of the appellant's criminal offending - fairly described as heinous - it is surprising that the Secretary of State did not make such a submission.
36. In her decision the judge correctly directs herself [50] that an individual may be expelled on grounds of public policy, public security or public

health and that it must be proportionate [51]. She directed herself properly as to the need for a decision to be justified on grounds of public policy, public security or public health [52] but she does not refer to Schedule 1 of the EEA Regulations or indeed specifically paragraph 1.7(f). The greater part of the decision is taken up by whether the appellant presents a threat to the public in the sense of reoffending and a detailed discussion of the psychiatric report. What she does not do at any stage is address whether there is a threat to public policy by the appellant being granted permission to enter.

37. That said, and as indicated in the grant of permission, the judge did not properly take into account the appellant's offending – and the gravity of it, as well as the finding that he was not a reliable witness, and had not told the truth in assessing the danger he poses. It is of note also that the judge did not take into account the appellant's conduct in seeking to enter illegally in breach of a deportation order. While that did not result in criminal charges, it is irrational to consider that the appellant had not offended since the index offences. Accordingly, and despite Mr Mian's forceful submissions and skeleton argument, I am satisfied that the judge's conclusion that the appellant did not present a genuine, present and sufficiently serious threat was materially flawed.
38. In reaching that conclusion, I have taken into account the assessment made of the expert medical reports. But, equally, Dr Smith and Dr Galapatthie had concerns about the appellant's failure to confront his past behaviour.
39. Accordingly, for these reasons, I conclude the decision of the First-tier Tribunal did involve the making of an error of law as the judge reached an irrational conclusion and I set it aside.
40. The appeal will be remade in the Upper Tribunal on the basis that it will be necessary to make a fresh assessment of whether the appellant presents a genuine, present and sufficiently serious threat. It is observed that the respondent is not debarred from arguing that this is a case in which the appellant's continued exclusion is justified on public policy grounds given the gravity of the offending. There is no indication that any concession has been made on this point.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. The appeal will be remade in the Upper Tribunal on a date to be fixed, and on the basis that no further oral evidence will be called. Any request to call further evidence must be made at least 21 days before the next hearing and supported by an application made pursuant to rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 setting out the name of any witness, whether an interpreter is required and a witness statement from that person.

3. If either party wishes to produce additional evidence, then that evidence, supported by an application made pursuant to rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, must be served at least 14 days before the next hearing

Signed

Date: 13 July 2023

Jeremy K H Rintoul

Judge of the Upper Tribunal