Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00223/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 November 2015	**On 21 December 2015**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

The Secretary Of State For The Home Department

Appellant

and

Airidas Jurkus

Respondent

Representation:

For the Secretary of State:	Ms A. Brocklesby-Weller, Home Office Presenting Officer
For the respondent, Mr Jurkus:	No appearance.

DECISION AND REASONS

Introduction and immigration history

1. Mr Airidas Jurkus is a citizen of Lithuania who was born on 15 April 1980.

2. The Secretary of State appeals against the determination of First-tier Tribunal Judge Povey who allowed Mr Jurkus' appeal against the decision to deport him to Lithuania under the provisions of reg. 19 of the Immigration (European

Economic Area) Regulations 2006 (2006 No 1003), as amended. For the sake of continuity I shall refer to Mr Jurkus as the appellant as he was before the First-tier Tribunal.

3. The facts can be briefly stated because so few are known to the respondent or to the Tribunal.

4. The Treaty of Accession 2003 was signed on 16 April 2003 in Athens and entered into force on 1 May 2004, resulting in the enlargement of the European Union with 10 states, including Lithuania. The appellant claims to have arrived lawfully in the United Kingdom in January 2006 as an EEA citizen. There is no reason to doubt this. However, he left the United Kingdom at a time he does not specify. Suffice it to say he was in Lithuania on 14 January 2011 when he committed the offence for which he was subsequently sentenced to 2 years imprisonment on 7 June 2011. Since I would not infer that he returned to Lithuania and committed the offence within a fortnight of his return and the appellant himself has not sought to establish the date of his return, it is not open to the Tribunal to find that the appellant acquired a permanent right of residence on the basis of five years continuous residence in the United Kingdom. (That apart, he never claimed to have been exercising Treaty rights during that period.)

The conviction

5. The evidence of the conviction is sparse indeed. It takes the form of a printout from the Police National Computer extracted on 15 June 2015 confirming the appellant was born on 15 April 1980 at Siauliai in Lithuania and was convicted on 7 June 2011 of a sexual offence at the Siauliai City District Court. The relevant entry at [G3] of the respondent's bundle states:

> FOREIGN LEG[ISLATION]/RAPE OF FEMALE IMPRISONMENT 2 YRS
>
> ON 14/01/11-15/01/11 (PLEA: NOT KNOWN)
>
> SEXUAL OFFENCES ACT 2003 s.1

6. The reference to s. 1 of the Sexual Offences Act 2003 is a reference to the offence of rape found in the United Kingdom legislation. However, I would exercise a degree of caution in assuming that this was an offence of rape bearing in mind the sentence of two years imprisonment although, of course, sentencing policy in relation to this type of offence in Lithuania might be radically different from that in the United Kingdom. Nevertheless, it is clear evidence that the appellant was convicted of some form of sexual assault of sufficient gravity to merit a period of imprisonment of two years. That is sufficient for the purposes of this appeal.

7. The appellant returned to the United Kingdom on 10 May 2013, having presumably served his sentence. He did so after a period of at least 2 ½ years

absence. His absence, including an absence due to imprisonment, broke his continuity of residence.

The notice of liability

8. On 17 December 2014, the respondent served the appellant with a notice that he was liable to deportation in accordance with the 2006 EEA Regulations 2006. He was given an opportunity to submit any reasons why he should not be deported from the United Kingdom. He responded on 24 December 2014. He gave an address in Reading and asserted his claim that his girlfriend and daughter live in London and that he visits his daughter at weekends fortnightly depending upon his work commitments. He said he contributed towards their maintenance.

The decision to make a deportation order and the EEA Regulations 2006

9. On 18 May 2015, the Secretary of State made a decision to deport the appellant on grounds of public policy in accordance with reg. 19 (3) (b) and reg. 21 of the 2006 regulations.

10. The regulations relied upon by the Secretary of State, where material, are as follows:

'**Exclusion and removal from the United Kingdom**

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

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

Decisions taken on public policy, public security and public health grounds

21. (1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

...

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

...

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

...

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

11. Since the appellant failed to establish the relevant 5 years residence, he also failed to acquire the enhanced level of protection set out in reg. 21 (3):

> 'A relevant decision may not be taken in respect of a person with a permanent right of residence … except on *serious* grounds of public policy or public security.'

Or the even greater protection afforded by reg. 21 (4):

> 'A relevant decision may not be taken except on *imperative* grounds of public security in respect of an EEA national who … has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision ...'

12. Subject to the provisions of regulation 21, a person who commits an offence of this nature is capable of being excluded on grounds of public policy: society is the poorer for having within it those who commit serious sexual offences and there is a public policy in excluding non-nationals who have been convicted of such offences. The public policy element does not evaporate when the non-national offender is a fellow Union citizen but it is tempered by an acknowledgment of his special status and the restrictions imposed in the 2006 Regulations. Crucially, the tests are whether the personal conduct of the person concerned represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and whether the decision is proportionate such that the offender's special status as a Union citizen is balanced against the offending and the risk he poses.

The appellant's grounds of appeal

13. The appellant appealed against the decision of the respondent. In his grounds of appeal [E29-34] he stated that his removal would violate his human rights because deportation to Lithuania would cause him to be homeless and unemployed, without any prospects of gaining stable employment as a result of difficult economic circumstances in Lithuania and that to be reduced to beggary would pose a real threat to his health and life.

14. He also relied upon the presence in the United Kingdom of his daughter, who was born on 13 May 2004. She is now aged 11. He contended that it would be extremely disruptive and unreasonable to force either his partner or his daughter to move to Lithuania. His daughter's primary language is English. He also described how his partner had lived and worked in the United Kingdom exercising Treaty rights for '*the last five years*' implying that she had acquired a permanent right of residence. He stated that the couple were planning to get married but there is nothing from his partner to support this claim. At [E31], he

described how he and his partner had been in a '*sustainable and serious relationship*' for a period of 14 years. His partner Viktorija Seteenova, who was born on 9 May 1982, had made her life in the United Kingdom for a continuous period of five years. At [E33], the appellant described how his daughter was living with her mother. Although she had been in Lithuania from an early age, her command of Lithuanian was '*rather bad than good*'. In paragraph 36, [E 34] he described that it would be unduly harsh for her to go with him to Poland. It is not clear whether this was a simple typographical error or whether either Viktorija Seteenova or her daughter have some links with Poland.

15. There is no suggestion that the relationship that the appellant allegedly maintains with Viktorija Seteenova was continuous over the period of 14 years which could potentially cover the period 2001 to 2014. The limited information provided by the applicant is that he came into the United Kingdom in 2006 some two years after the birth of his daughter. He did not, however, state that he was accompanied by his daughter or her mother. He was obviously in Lithuania when he committed the offence in January 2011 whilst if his daughter and her mother were continuously in the United Kingdom for five years according to his submissions of December 2014, the pair of them were not in Lithuania when he committed the sexual assault. The material before the Secretary of State fell short of establishing or indeed even asserting that the couple had been living together for all or part of the period.

16. Viktorija Seteenova did not give evidence or provide a written witness statement. There was no material, therefore, either before the decision maker or the Tribunal that provided an objective assessment of the wishes of Ms Seteenova or where the best interests of his daughter might lie. Indeed, there was no written material to confirm their presence in the United Kingdom or the nature and extent of their rights as Union citizens in the United Kingdom.

No viable Article 8 claim

17. This was a deportation decision where the appellant's removal was in contemplation. No s. 120 notice had been served requiring the appellant to raise an Article 8 claim because the decision maker had treated the circumstances as raising such a claim and had given express consideration to it. The respondent had approached the decision on the express basis that the Immigration Rules and Part 5A of the 2002 Act did not directly apply to EEA nationals. The respondent conceded, however, that Article 8 applied to everyone, regardless of nationality and, in order to achieve consistency of approach and outcome, the decision maker applied paragraphs 398 and 399A and s.117C as a guide before considering whether the circumstances required an exception to be made to a strict application of the Rules. No argument was advanced as to whether this approach was correct in law but the decision was directed to ensure the appellant received no less favourable treatment than any other claimant. For the purposes of this appeal, it is not necessary to determine the approach to be adopted save that I am satisfied that an EEA national should

not be treated less favourably than a non-Union citizen. In the circumstances of this appeal, if there is a difference, it is not material because, in the absence of detailed information about the appellant's relationship with Ms Seteenova or his daughter, there was no prospect of a successful claim under Article 8, whatever approach was adopted.

The Secretary of State's reasoning

18. In her decision, the Secretary of State approached her task by reference to whether the appellant's deportation was warranted on grounds of public policy. The Secretary of State recorded the impact both on the victim and the community as a whole of crimes of sexual violence. The decision maker also made reference to s. 97 of the Sexual Offences Act 2003 and the requirement that the appellant, on return, is to remain on the register as a sex offender until 7 June 2021, a period of 10 years from his conviction in Lithuania. Based upon this, the Secretary of State concluded that the appellant posed a continuing risk to vulnerable women. The placing of his name on the register was a restriction upon his freedom designed to protect a vulnerable group in society. Further, the fact that the appellant had been convicted demonstrated that he was capable of committing criminal offences and, indeed, acts of violence against women, such as to represent a genuine, present and sufficiently serious threat to the public. This justified the decision to deport him on grounds of public policy. On this basis, the Secretary of State concluded that the decision to deport the appellant was proportionate and satisfied the principles set out in reg. 21 (5), above.

19. In reliance upon reg. 29, although the Secretary of State conceded the appellant had a right of appeal, the exercise of the right of appeal did not preclude the respondent from effecting his deportation. In reliance on reg. 24AA, the Secretary of State certified that despite the appeals process not having been begun or not having been finally determined, the appellant did not face a real risk of serious irreversible harm if removed from the United Kingdom during the course of the appeal process. She, therefore, certified the case under reg. 24AA and notified the appellant of her intention to remove him. That process was a lawful process. Indeed, bearing in mind the fact that he had spent some years in Lithuania, since at least 2011, the plea that he would face economic hardship by reason of the poor economic circumstances in Lithuania did not bear scrutiny. Nothing has since transpired to establish a real risk of serious irreversible harm. Nevertheless, the appellant was offered the opportunity to return to the United Kingdom on temporary admission in order to make submissions at an appeal hearing in person. He was also offered the opportunity within a 20 working day period of the notification to this effect that, if he had any reasons why he should not be expected to pursue an appeal outside the United Kingdom, he was to say so. He did not respond to either suggestion.

20. In due course, the appellant was deported. His appeal was conducted in his absence. He did not apply to return to conduct his appeal in person; nor did he instruct a representative to act for him.

21. Since the grounds of the Tribunal were submitted the appellant has taken no further part in these proceedings

The determination in the First-tier Tribunal and the error on a point of law.

22. At the hearing of his appeal, First-tier Tribunal Judge Povey allowed his appeal, notwithstanding the absence of material from the appellant since the decision was made. He did so on the basis that the requirement to establish a genuine, present and sufficiently serious threat implied a propensity to act in some way in the future; that the propensity to re-offend was crucial and was a prerequisite for deportation. This implied that the Secretary of State had the burden of establishing a real risk of re-offending and that this required positive evidence that had to be provided from some external source. In doing so, I am satisfied the First-tier Tribunal Judge erred in law for the reasons I will now develop.

'Public policy'…'a genuine, present and sufficiently serious threat'…'criminal convictions do not in themselves justify the decision'

23. As long ago as 1978 in *R. v Bouchereau* [1978] 1 QB 732, the European Court of Justice considered provisions that acted as the precursor to reg. 21(5) of the 2006 Regulations. One of the questions the Court of Justice asked itself was whether the expression 'previous criminal convictions shall not *in themselves* constitute grounds for the taking of measures based on public policy or public security' meant that previous criminal convictions were solely relevant insofar as they manifested a present or future propensity to act in a manner contrary to public policy or public security. The defendant had maintained before the national court, 'previous criminal convictions are solely relevant in so far as they manifest a present or future intention to act in a manner contrary to public policy or public security' whilst the national authorities maintained the State was entitled to take into account the past conduct of the defendant which resulted in the previous conviction.

24. The Court determined that the expression '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 distinct and specific appraisal of the interests inherent in protecting the requirements of public policy which might extend beyond the criminal conviction itself. Although, in general, a finding that such a threat exists implied the existence in the individual concerned of a propensity to act in the same way in the future, it was possible that past conduct alone might constitute such a 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."

25. The Court of Justice went on to consider whether the words 'public policy' were to be interpreted as including reasons of state even where no breach of the public peace or order was threatened. Whilst acknowledging the importance of the fundamental principle of freedom of movement for workers, the particular circumstances justifying derogation from that principle on grounds of public policy might vary from one country to another. The national authorities were permitted an area of discretion within the limits imposed by the treaty.

26. In *Tsakouridis (European citizenship)* [2010] EUECJ C-145/09 (23 November 2010) the Court of Justice spoke of the balance to be struck between the threat to public security as a result of the personal conduct of the person concerned by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity, and, *if appropriate*, the risk of reoffending (referring to *Bouchereau*) on the one hand and, on the other hand, the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated. In the present case, the principle of free movement has to be seen in the context of the appellant returning to Lithuania where he had committed the offence, having provided little or no material to establish whether he had been exercising Treaty rights in the United Kingdom. There was little or nothing in the proportionality balance to suggest his deportation prejudiced his social rehabilitation in the United Kingdom or that he had become genuinely integrated here.

27. The risk of re-offending was afforded only a provisional place, that is, '*if appropriate*'.

28. Cases such as *Essa (EEA: rehabilitation/integration)* [2013] UKUT 00316 (IAC) and latterly *MC (Essa principles recast)* Portugal [2015] UKUT 00520 (IAC) which followed the decision of the Court of Appeal in *Secretary of State for the Home Department v Dumliauskas & Ors* [2015] EWCA Civ 145 were concerned with whether the prospects of rehabilitation in the host state were prejudiced by removal to the country of the offender's nationality. Assuming that a broad reference to rehabilitation is concerned with assessing the reasonable prospect of a person ceasing to commit crime by gauging the relative prospects of rehabilitation in the United Kingdom and Lithuania, it cannot be assumed that prospects are materially different in either country in the absence of evidence to that effect. It is not suggested his rehabilitation (if such a process has occurred in Lithuania) will be prejudiced by returning him there. Nor is there evidence that rehabilitation will be more effectively advanced by his presence in the United Kingdom.

29. Although *MG and VC (EEA Regulations 2006; "conducive" deportation)* Ireland [2006] UKAIT 00053 (Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal; Senior Immigration Judges Freeman and Jordan),

appears on its face to have been heard on 23 May 2005, this is misdated as the decision refers to the operation of the Immigration (European Economic Area) Regulations 2006 which were made on 30 March 2006 and came into operation on 30 April 2006, three weeks before the date of the hearing. It was the first occasion on which the Tribunal expressed a view about the 2006 Regulations. The appellant, a convicted robber, fell into the second level of protection against removal, 'serious grounds of public policy or public security'. Once again, the panel referred to *R v Bouchereau* (above) and the passage referred to above in paragraph 24.

30. The Immigration Judge had allowed the appeal under the 2000 Regulations and the IAT found he was permitted to do so because of the Judge's express findings of fact as to there being no risk of re-offending and in relation to his intention to keep away from alcohol and the heightened threshold of 'serious' grounds. Removal of an EEA national was not to be based on past conduct but on future risk about which express findings of fact had been made. *MG and VC (EEA Regulations 2006; "conducive" deportation)* says nothing about how the Tribunal is to approach a case where the appellant himself has not attempted to engage with the assessment of the risk of re-offending. Reliance on the cases cited by the First-tier Tribunal Judge in paragraph 11 of his determination do not, therefore, address the circumstances of the present appeal and place a restricted gloss on what is required to establish a '*genuine present and sufficiently serious threat*' by reference to evidence of the risk of re-offending.

31. The offence itself cannot be determinative of removal both in logic and by reason of the words in reg. 21(5)(e). It would, however, be perverse to construe the expression '*a person's previous criminal convictions do not in themselves justify the decision*' as meaning they should have no part to play in the decision. If that were the case, an appellant with numerous criminal convictions would stand in the same position as one with none. The meaning of reg. 21(5)(e) is to be found in the words '*in themselves*' as indicating there can never be a lawful removal decision if the decision-maker does no more than recite the past offence or offences as a mantra justifying removal. It is axiomatic that all deportation cases have to assess the circumstances in the round.

32. Since the hearing of this appeal but before it was promulgated, the Court of Appeal has given its decision on 3 December 2015 in *Secretary of State for the Home Department v. Straszewski* [2015] EWCA Civ 1245 (Moore-Bick, Davis and Sharp LJJ). It should be noted that *Straszewski* was a case that concerned the second tier of the levels of protection against deportation. The question to be decided was whether the Secretary of State's decision to remove Mr. Straszewski was justified on serious grounds of public policy or public security. Having considered the nature of his offending and various reports directed to the risk of his further offending, including two from an independent psychiatrist, Dr. Joanna Dow, the Tribunal concluded that he did not pose a serious threat of harm to the public and that his removal was not permitted by regulation 21(3).

33. In *Straszewski,* counsel for the Secretary of State had submitted that the scheme envisages that the person facing deportation bears the burden of showing that his removal would not be in accordance with the law. Moore-Bick, (with whom the other Lord and Lady Justices agreed) rejected that submission.

34. The Court of Appeal then went on to consider *Bouchereau* (see above) and whether, on the evidence, the offences were of such gravity to merit a finding that there was such a sense of revulsion that removal was justified without establishing a risk to the community. The Court accepted, by reason of the express terms of paragraph 21 that deterrence, in the sense of measures designed to deter others from committing similar offences, had no part to play in a decision to remove the individual offender. Similarly, it was difficult to see how a desire to reflect public revulsion at the particular offence could properly have any part to play, save, perhaps, in exceptionally serious cases.

35. The propensity to re-offend must be a key element in the consideration. Moore-Bick LJ said at paragraph 25:

> "Public policy" for these purposes includes the policy which is reflected in the interest of the state in protecting its citizens from violent crime and the theft of their property. These are fundamental interests of society and therefore, although regulation 21(3) does not speak in terms of the risk of causing harm by future offending, in a case of this kind that is the risk which the Secretary of State is called upon to assess when considering deportation. That requires an evaluation to be made of the likelihood that the person concerned will offend again and what the consequences are likely to be if he does. In addition, the need for the conduct of the person concerned to represent a "sufficiently serious" threat to one of the fundamental interests of society requires the decision-maker to balance the risk of future harm against the need to give effect to the right of free movement. In any given case an evaluative exercise of that kind may admit of more than one answer. If so, provided that all appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in the sense of falling outside the range of permissible decisions.

36. Following *Straszewski,* and as I set out above, the burden rests firmly with the Secretary of State and the enquiry is directed to whether the future risk that the community faces is a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society by reason of the appellant's past wrong-doing. The appellant's conduct, taken as a whole, establishes a propensity to offend which has not been counterbalanced from anything from the appellant. The respondent's burden does not require that it is discharged by reference to specific reports from the authorities which are directed to the issue of re-offending. Rather, it is an evaluation that requires an holistic approach. It is with this in mind that I have conducted the assessment.

37. The error of the First-tier Tribunal in Mr Jurkus' appeal is that the Judge was looking for the type of material which directly addressed the risk of offending such as might be found in appeal brought against a deportation appeal when a Union citizen is convicted of an offence in the United Kingdom. In the case of a

deportation order based on a conviction in a foreign country, it is not a requirement that such material, if it exists, is abstracted from the local prosecution, judicial or probation authorities and then translated. Instead, the Tribunal has to apply the structured approach set out in the provisions of reg. 21 and to make its decision on the material before it. I accept that, were it to be necessary as a matter of law, then the fact that the process is onerous (requiring corresponding with the local court or local police in a language both parties might understand or communicating with the national authorities via the Embassy) would be no excuse.

38. In the context of the present appeal, there was ample evidence to support the public policy stance adopted by the Secretary of State that the appellant represented a genuine, present and sufficiently serious threat without thereby treating his criminal conviction as in itself justifying the decision to deport the appellant.

Re-making the decision

39. The offence was one of sexual assault.

40. Its seriousness is reflected in the sentence imposed of 2 years.

41. Though serious, there is not enough evidence to establish it is not of the type of offence identified in *Bouchereau* or *Straszewski* as creating by itself such a sense of revulsion that removal was justified without establishing a risk to the community. The Court in *Straszewski* stressed the limited role that public revulsion at the offence might play save, perhaps, in exceptionally serious cases. There is insufficient material to classify this conviction as exceptionally serious. (I leave open what the outcome would have been had I been satisfied that this was an offence of rape for which a sentence of, say, 7 years had been imposed.)

42. No material was adduced by the appellant which might seek to mitigate or undermine due weight being attached to the offence itself, the circumstances of it or a claim that the sentence itself did not properly reflect its gravity.

43. Whilst the nature of the offence speaks for itself, it is not the criminal conviction itself which is being relied upon to justify removal but the underlying offence of serious sexual violence.

44. The fact that the appellant has committed a sexual assault demonstrates that he has overstepped the boundary that the majority of people accept should exist against wrong-doing of that type. Ms Brocklesby-Weller described this as a 'propensity to offend', a phrase taken up in the decision of *Straszewski*. To that extent he represents a threat to the well-being of society because he has acted against its interests in a way that others do not. The nature of the offence – sexual violence against women – must amount to a serious threat to the fundamental values of society. That threat is not fanciful: it is *genuine*. The First-tier Tribunal Judge failed to recognise that threat, presumably because he

was looking for evidence of a particular type: some form of opinion/statistical evidence from an evaluative assessment that there was a likelihood of re-offending, perhaps expressed as 'low', 'medium' or 'high'. In doing so, he simply overlooked the material that was before him. The evidence of the threat might be inferential but then it was not countered by anything at all from the appellant himself.

45. The appellant's conduct resulted in a sentence of imprisonment of 2 years. This clearly falls within the range of offences capable of meriting his exclusion. Sometimes such offences might merit exclusion, sometimes not. The one person who is able to provide details of whether his case falls at one end of the spectrum or at the other is the appellant himself. Had he, for example, offered detailed, verifiable evidence about the offence, his attitude towards it, the court's attitude to the offending as well as insightful evidence from the prosecutor or victim or the Lithuanian equivalent of the probation service and his attempts at rehabilitation whilst in prison or since his release, it was open to him to settle which place in the spectrum his case fell to be decided. This is what occurred in *MG and VC (EEA Regulations 2006; "conducive" deportation)*. The absence of any attempt to provide this evidence or to engage with his offending or the assessment of risk upon which the Tribunal was required to embark is itself a source of material evidence without thereby displacing the evidential burden. In the circumstances of this case, it was not sufficient to remain silent. It cannot be right that an appellant who fails to engage with the process is in a better position than the appellant who participates fully.

46. In reaching this conclusion, I am not reversing the burden of proof but neither am I imposing the positive burden on the Secretary of State of approaching the Lithuanian authorities and seeking, from the relevant court, evidence directed towards the risk of re-offending which it is usual (though not essential) to have from the sentencing judge, the probation service or OASys in deportation cases where the criminal offending takes place in the United Kingdom. This approach is consistent with the terms of reg. 21 (5). Above all, the Secretary of State's response is proportionate given the facts of this appeal, limited as they are, and as I understand them to be. The position is simply that the appellant has done nothing to dispel the conclusion that any ordinary person would draw from the material available.

The Sexual Offences Act, 2003, s.97

47. In the context of this appeal, there is a further element. The respondent contends that the appellant is subject to the requirements of registration under the Sexual Offences Act, 2003. Section 97 (1) of the Act provides that a chief officer of police may, by complaint to the magistrates' court for a *'notification order'* in respect of a person if the person takes up residence in his police area or the chief officer believes he is or intends to do so. Three conditions must be fulfilled:

(i) Under the law in force in a country outside the United Kingdom, the individual must have been convicted of a sexual offence of a type described in section 99. These include rape (s.1 of the Act) but also various types of sexual assault including offences under s. 14 (sexual assault on a woman).

(ii) The conviction must have occurred on or after 1st September 1997.

(iii) The notification period must not have expired. (As the appellant was sentenced to 2 years imprisonment in 2011, the notification period is likely to have been 10 years.)

48. It is of course far from clear what is the nature of the appellant's offending. However, the structure of the 2003 Act is clear: once the process is commenced, the burden of proof passes to the appellant in accordance with the express statutory provisions of s. 99 (3):

> '(3) Subject to subsection (4), on an application for a notification order the condition in subsection (1)(b) [the foreign offence constituting an equivalent offence in United Kingdom law] is to be taken as met unless, not later than rules of court may provide, the defendant serves on the applicant a notice—
>
> (a) stating that, on the facts as alleged with respect to the act concerned, the condition is not in his opinion met,
>
> (b) showing his grounds for that opinion, and
>
> (c) requiring the applicant to prove that the condition is met.'

49. These provisions, to which the Secretary of State made reference in her decision letter, are to protect the public or at least a section of the public thought to be vulnerable unless protective measures are taken. The need for protection implies risk. Hence, the direct evidence of risk that the First-tier Tribunal considered was absent in this case was to be found, in addition to the matters I have referred to above, in the operation of s.97. It is true that the reverse burden set out in s.99(3) does not strictly arise until the notification process is commenced by the actions of the chief officer of police but, in the context of a decision in which the appellant's liability to be made subject to a notification order was raised by the decision maker, it must follow that if the appellant is to say, in response to deportation, that the notification order is inappropriate, he has to say so in his appeal to the Tribunal.

50. I am satisfied that the appellant's absence in this case has not resulted in a determination which has extended the relevant principles beyond permissible bounds. This is the appellant's appeal. If he had sought to return and had given evidence he would have been cross-examined and he would have answered the matters which are presently left obscure. If he had been represented but not attended or given evidence, his counsel would have been expected to have made submissions. In either event, the cloak of obscurity over

which the appellant's true circumstances have been shrouded would, to a greater or lesser extent, have been dispelled. This could not have been unfair because the acid test by which all such decisions are made is one of proportionality. The more information available to a decision maker, (administrative or judicial), the more material goes into the balance on one side or the other and the better the proportionality assessment must be.

51. I summarise my reasons in the following way:

(1) Where the nature of the offence speaks for itself, it is not the criminal conviction which is being relied upon to justify removal but the underlying nature of the offence. Depending on the offence, a conviction is capable of establishing a propensity to offend which represents a threat to the well-being of society, capable of amounting to a 'genuine present and sufficiently serious threat'.

(2) Once the evidence establishes such a threat, it is not sufficient for the appellant to remain silent if he seeks to avoid a finding that his removal is justified under reg. 21 of the Immigration (European Economic Area) Regulations 2006.

(3) In an EEA case involving a deportation order based on a conviction in a foreign country, it is not a requirement that the respondent has to produce the type of material which directly addresses the risk of offending such as usually found in an appeal brought against a deportation appeal when a Union citizen is convicted of an offence in the United Kingdom. The Tribunal has to make its decision on the material before it.

DECISION

1. The Judge made an error on a point of law and I allow the appeal brought by the Secretary of State.
2. I remake the decision dismissing Mr Jurkus' appeal on all the grounds advanced.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
17 November 2015