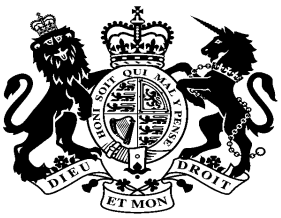


Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **DA/00356/2014**

THE IMMIGRATION ACTS

At **Field House** Decision signed: **29.01.2015**
on **12.01.2015** sent out: **24.04.2015**

Before:

Upper Tribunal Judges
John FREEMAN and **Andrew JORDAN**

Between:

Nimalan SUNTHARAMOORTHY

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Colin Yeo* (counsel instructed by Rodman Pearce, Luton)
For the respondent: Mr Tom Wilding

DETERMINATION AND REASONS

1. This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Gillian Jackson), sitting at Kingston on 15 July 2014, to allow a deportation appeal by a citizen of Sri Lanka, born 8 August 1973, and married to a citizen of Germany, originally from the same island, and now 39.

NOTE: no anonymity direction

2. The Home Office applied for permission to appeal on grounds relating to the judge's findings on (1) the consequences of the decision under appeal in terms of separation between the appellant and his wife; and (2) the nature of his ties with this country and with Sri Lanka. That was refused by a first-tier judge; but permission was granted by the Upper Tribunal on renewed grounds, relating to the judge's proportionality conclusions at paragraph 47, on the basis of her assessment of the evidence, especially at paragraphs 40 and 44.

3. We cannot improve on the judge's summary of the evidence, up to paragraph 43: it is both comprehensive and clear, without being unnecessarily long. The essential features of the case are that

(a) the appellant was here with leave as a student from 2004 – 05, and then as a worker from 2005 till 15 January 2012.

(b) His wife left Sri Lanka with her family for Germany in 1988, and became a German citizen in 1993: in 2008 a marriage was arranged between them, following which she moved to this country, where she has stayed ever since with him, exercising her Treaty rights as a worker. They have no children so far.

(c) On 18 June 2012 the appellant was sentenced to five years' imprisonment for his involvement in money-laundering. The sentencing judge found he had been directly involved in a fraudulent transfer of €415,000 on 5 May 2010, but that his involvement had clearly been something "substantially greater" than that one transaction, since the jury had found him guilty on a count involving a course of business taking place between October 2009 and then.

(d) The judge found that the money represented the proceeds of trafficking in cannabis. The appellant had had a far more limited rôle in what had been going on, but not just as a courier, than that of his co-accused, each sentenced to ten years' imprisonment, though they too had no previous convictions, for laundering sums amounting to £40m in all.

(e) That conviction led to the appellant's being refused a husband residence card on 13 May 2013, and to a decision to deport him, served on 17 February 2014, now under appeal.

(f) The appellant maintained his innocence throughout, to probation officers and the judge, till a statement of 9 January 2015, to which we shall turn later.

(g) The appellant's Offender Assessment System [OASys] assessment of 12 November 2012 rated his likelihood of reconviction as 'low', with a probability of 10% within one year and 19% in two. However, a further National Offender Management Service [NOMS] assessment of 15 January 2013 still rated his likelihood of reconviction as 'low'; but that must have referred to their own rating system, rather than to ordinary English usage, since the percentage risks were 30% in one year, and 47% in two.

ERROR OF LAW?

4. It is easy to see why the judge who refused permission in the First-tier Tribunal did so: the original grounds really do no more than challenge Judge Jackson's proportionality assessment, on the basis of the facts she found. As the permission judge rightly remarked, "While other judges may not have come to the same conclusion, it is not said and cannot be said that her findings were perverse". Though those grounds were not withdrawn in the renewed ones before us, we do not need to linger on them: not only was the judge's assessment of the facts themselves unchallengeable, but on some points she added her own shrewd observations.

5. For example, in discussing the OASys report at paragraph 39, the judge pointed out that it had been

> "… completed over eighteen months ago … on the basis only of the Appellant's account of the offence and where he continues to refuse to accept responsibility for an offence which he was convicted by a jury of (with no appeal); I attach less weight to the OASys assessment than I otherwise would."

6. We regard the judge's decision, up to and including her paragraph 43, as not open to any serious criticism at all. The appeal before us turns entirely on what she said at paragraphs 44 – 47. At paragraph 44 she concluded, on the basis of her own findings of fact, that "… the Appellant does represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society", in terms of public order and the prevention of crime.

7. That was of course a reference to the Immigration (European Economic Area) Regulations 2006 [the EEA Regulations], which the judge went on to consider at 45. The relevant part appears at reg. 21:

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

8. The judge had already accepted at 44 that the requirement at reg. 21 (5) (c) was made out: given the present wording of sub-paragraphs (b), (d) and (e), we do not think her decision is open to challenge by the Home Office on the basis of the now rather ancient decision in *Bouchereau* [1977] EUECJ R-30/77. (We shall come back to that case when we deal with Mr Yeo's submissions). Paragraph (6) sets out relevant considerations for the proportionality decision, required by sub-paragraph (a), and none of those taken into account by the judge at paragraphs 45 – 46 are irrelevant. Our decision turns on how she reached her final conclusion, at 47, that the appellant's removal would be disproportionate to the legitimate purpose of prevention of crime, despite the strong finding she had already made as to his conduct representing "…a genuine, present and sufficiently serious threat to one of the fundamental interests of society".

9. The judge's relevant findings of fact at 45 – 46 were these: the appellant had been living lawfully, studying and working in this country since 2004, and, though he hadn't lost his ties with Sri Lanka, since he still had family there, had been back twice on visits, and still spoke Tamil, he had stronger ties with the United Kingdom. He and his wife had had a strong marriage since 2009, even after he was sent to prison; and, although there was no evidence that she would be at risk on return to Sri Lanka, she was "at least subjectively fearful" of going back there, and had no intention of doing so, her own family members being either in this country or in Germany.

10. We do not see any reason for any of those findings of fact to be challenged, so far as they go; though the judge might perhaps have reminded herself, that, though the appellant had been here lawfully throughout, so far as his immigration status was concerned, he had on the sentencing judge's findings been engaged in very serious criminal activity from 2009 – 11.

11. At paragraph 46 the judge went on to discuss a suggestion made by the presenting officer before her, and repeated by Mr Wilding before us. He argued that, even if the appellant were removed to Sri Lanka, it would be open to him to seek lawful entry to Germany from that island. The EEA Regulations were designed to enact the provisions of the relevant Directive of the Council of Ministers, by which Germany is also bound, and it was entirely reasonable for the judge to assume that similar rules to those set out in reg. 21 would also apply there.

12. The judge may have gone wrong in theory, by assuming without evidence that Germany would operate rules on entry clearance similar to those applying to these on removal; but we regard that as a distinction without any real difference. If the appellant were removed from this country, then he would be barred entirely from seeking entry clearance for another ten years, and any future application might meet similar objections to his being here as those now raised.

13. While there is no evidence that the rules in Germany are similar, we regard it as not unreasonable for the judge to have assumed that they would be as strict, or stricter in the case of someone who wanted to move to that country, than one of someone facing removal to another. There is no arguable challenge to this part of the judge's decision.

14. The difficulty comes, if at all, with the judge's final paragraph 47, which is worth setting out in full:

> "In all of the circumstances, although I have found that the appellant poses a genuine, present and sufficiently serious threat in the United Kingdom, I do not find that his deportation would be proportional to that threat, particularly taking into account that he has been assessed as a low risk of reoffending after a single offence (as opposed to a high risk of reoffending with clear triggers or risks being identified or following a more significant history of multiple convictions). I therefore allow the Appellant's appeal under the EEA Regulations."

15. If that paragraph had stopped at "that threat", then the judge's decision might not have been open to challenge as irrational; but it would have been open to serious challenge, in the circumstances of this case, as insufficiently reasoned, and the judge was quite right to give some further explanation for her main conclusion. The real difficulty with her decision lies in the way she set about that.

16. It is of course right that the appellant's likelihood of reconviction had been assessed as 'low', both by OASys in November 2012, and by NOMS in January 2013. That represented ordinary English usage, in terms of the percentage risks (10 – 19 %) found by OASys; but the judge had discounted their conclusions, for the good reasons she gave herself, at paragraph 39 (see **5**).

17. It follows that the judge must have reached her main proportionality conclusion on the basis that the appellant's likelihood of reconviction within the next two years was low, on the basis of the NOMS report, and it is quite true that this is how they classified it themselves. However, as we have already noted, a risk of 30 – 47 % can hardly be called 'low', in terms of ordinary English usage; and, if it had been 'low', in any reasonable use of the word in the context of a judicial decision, then that could not possibly have been reconciled with the judge's own conclusion that the appellant "…the appellant poses a genuine, present and sufficiently serious threat in the United Kingdom".

18. On that basis, there was a material error of law in the judge's decision which meant we needed to re-make it. Both sides were content for us to do so there and then on the basis of further submissions, which they went on to make; and, with one exception on the part of Mr Yeo, her conclusions on the facts.

DECISION RE-MADE

19. The only one of the judge's conclusions which Mr Yeo was not prepared to accept was as to the threat posed by the appellant. The r. 24 response to the Home Office grounds of appeal (appellant's solicitors' letter, 1 December 2014) did not challenge any of her findings or conclusions at all, and on that basis we are not prepared to undertake a detailed reconsideration of all the facts before her for ourselves.

20. What we will do is to re-examine the judge's conclusions on the basis of her findings of fact, and of the parties' submissions on this part of the case, as well as considering further evidence to which Mr Yeo referred us. He first mounted an ingenious challenge to her threat conclusion, on the basis of *Bouchereau* . The passage he relied on was this: we shall

set it out in full here, since the only version available on line is in block capitals, and very hard to read.

> "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 of persons subject to community law and of the fundamental nature of the principle of the free movement of persons"

21. Mr Yeo's argument was that, in view of that paragraph 29, the judge might have based her threat conclusion solely on the appellant's past conduct. The short answer to this is that she did not: when she began her paragraph 44 "Taking into account the above in the round …", she clearly meant to refer to all her findings of fact from paragraph 35 to that point. The judge also went on from the threat conclusion which followed to mention the OASys and NOMS assessments, and to announce her conclusion in terms of "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society", as it now appears in reg. 21 (5) (c).

22. Whatever else was required under the terms of the Directive in force at the date of the decision in *Bouchereau*, the European Court of Justice there left open the possibility that, regardless of any continuing propensity to the kind of criminal conduct in question, the past conduct of the subject alone might constitute a present threat to the requirements of public policy. However, by the date of the decision under appeal in the present case, the terms of reg. 21 (5) as a whole, and in particular the warnings that:

> "(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;"

and

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

make it quite clear that questions of deterrence, or of expressing society's abhorrence of crime, are not to be taken into account in assessing risk. There is no reason to suppose that the judge, who set out reg. 21 (5) in full for herself at paragraph 5, was not perfectly well aware of this. As Mr Yeo rightly pointed out in his final submissions, replying to Mr Wilding, the present Regulations are based on a new Directive, not in force at the time of

Bouchereau . [The provisions behind the one we are considering are articles 27 and 28 of Directive 2004/38].

23. Mr Yeo went on to make further submissions, on the basis of his fresh evidence (contained in the supplementary bundle). That took the case forward from where it had got to in the OASys assessment (a 10% risk of re-offending within one year, and 19% in two, classified as 'low'); and the NOMS one, also classified as 'low', but on the basis of corresponding figures of 30% and 47%. We should say before going any further that we think the judge was quite right to discount the OASys assessment, and to prefer the NOMS one, for the reasons she gave at paragraph 44, and that is the basis on which we shall deal with the fresh evidence.

24. The first part of the fresh evidence to which Mr Yeo referred us appears at pp 17 – 18 of the appellant's supplementary bundle, and consists in an e-mail to his solicitors from a probation officer called Ruth Davie. It is relied on to answer what the judge said at paragraph 42 about there being

> "… no evidence that the Appellant has taken steps to address his offending behaviour, in fact it would be surprising if he had, given he maintains his innocence."

25. Also in the supplementary bundle at pp 15 – 16 are applications by the appellant to the prison authorities, and their answers to them. On two occasions in 2014 (29 August and 3 September), he applied to do the 'Assertiveness and Decision-making' [ADM] course; on the second he added a request for the 'Thinking Skills Programme' [TSP]. The first application got the answer that the ADM course was not run at the prison where he was being held; the second, not surprisingly a few days later, gave the same answer about the ADM: as for the TSP, the officer dealing with it had looked at his current OASys assessment, and it did not give TSP as a target.

26. Miss Davie says that the appellant did not reach the criteria for inclusion on any Probation accredited programme, presumably including both ADM and TSP, because he would need to score 50% on the Offender Group Reconviction Score [OGRS], but was only rated at 10%. Clearly she was looking at the OASys, rather than the NOMS assessment, and taking the one-year, rather than the two-year reconviction rate; but we accept that the appellant has applied for courses, for which he turned out to be ineligible.

27. Then there was a letter in the appellant's original bundle from the person in charge of one of the prison workshops. The judge noted at paragraph 24 that he had worked in a computer refurbishment workshop, so no doubt this was the one. We note in his favour what the charge-hand said about his being very affable, extremely diligent, exemplary in his general demeanour, time-keeping and attendance.

SUBMISSIONS

28. Mr Yeo made the obvious general points about the appellant being non-violent, a first offender, and not involved in drug use; though we have to say that, like the sentencing judge, we regard his help in facilitation of drug-trafficking as a great deal more serious than mere use. It is also right to say that he is well educated, with a good work record even when at large, with a wife who is standing by him, and is 'well-integrated' into

society herself. This makes it all the more surprising, and unnecessary, that he should have become involved in crime of this kind in the first place: his motive can only have been greed.

29. Mr Wilding referred us to *Tsakouridis (European citizenship)* [2010] EUECJ C-145/09, and in particular to paragraphs 49 – 53. We do not need to set those out in full: the issue was about whether a conviction for dealing in narcotics could involve the necessary 'imperative grounds of public security' for the removal of someone with ten years' residence in the country in question. The two preceding paragraphs are also relevant, as we pointed out at the hearing:

> "47. Since drug addiction represents a serious evil for the individual and is fraught with social and economic danger to mankind … trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it.
>
> 48. It should be added that Article 27(2) of Directive 2004/38 emphasises that the conduct of the person concerned must represent a genuine and present threat to a fundamental interest of society or of the Member State concerned, that previous criminal convictions cannot in themselves constitute grounds for taking public policy or public security measures, and that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention cannot be accepted."

30. Paragraph 49 mentions the need for dealing with the individual case, in terms of the necessity for removal the person concerned; 50 – 51 for the usual balancing exercise, including "the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which … is not only in his interest but also in that of the European Union in general". Paragraph 52 is about the fundamental rights the principle of freedom of movement is designed to protect.

31. Paragraphs 53 – 54 we shall again set out in full, apart from *Maslov v. Austria* - 1638/03 [2008] ECHR 546, about people brought up in the country from which they face removal, which does not apply here, and other citations.

> "53 To assess whether the interference contemplated is proportionate to the legitimate aim pursued, in this case the protection of public security, account must be taken in particular of the nature and seriousness of the offence committed, the duration of residence of the person concerned in the host Member State, the period which has passed since the offence was committed and the conduct of the person concerned during that period, and the solidity of the social, cultural and family ties with the host Member State. In the case of a Union citizen who has lawfully spent most or even all of his childhood and youth in the host Member State, very good reasons would have to be put forward to justify the expulsion measure (see, to that effect, in particular, *Maslov v. Austria*, §§ 71 to 75).
>
> 54 In any event, since the Court has held that a Member State may, in the interests of public policy, consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs … it must follow that dealing in narcotics as part of an organised group is *a fortiori* covered by the concept of 'public policy' for the purposes of Article 28(2) of Directive 2004/38."

32. Mr Wilding also referred to *Essa (EEA: rehabilitation/integration)* [2013] UKUT (IAC) 316, as summarized in the judicial head-note:

> "3. For those who at the time of determination are or remain a present threat to public policy but where the factors relevant to integration suggest that there are reasonable prospects of rehabilitation, those prospects can be a substantial relevant factor in the proportionality balance as to whether deportation is justified. If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation.
>
> 4. At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, it cannot be seen how the prospects of rehabilitation could constitute a significant factor in the balance. Thus, recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with propensity to commit sexual or violent offences and the like may well fall into this category.
>
> 5. What is likely to be valuable to a judge in the immigration jurisdiction who is considering risk factors is the extent of any progress made by a person during the sentence and licence period, and any material shift in OASys assessment of that person."

CONCLUSIONS

33. We are prepared to accept that the judge was entitled to take the view that this appellant was unlikely to be let into Germany, where otherwise he could have joined his wife: there may not have been any evidence about that, but we think she was perfectly entitled to take judicial notice of the fact that states generally, like this country, have rules on admitting people more restrictive than the criteria for excluding them, once they are in. It followed that she was entitled to assume that he would have stood to be refused admission to Germany for the same, or similar reasons as those on which the Home Office decided to refuse him a residence card, based as they are on a Directive binding on all member states of the EEA.

34. The result, if we were to uphold the decision under appeal, would be that the appellant and his wife faced a stark choice: either she would have to return with him to their country of origin, leaving behind all the advantages of being an EEA citizen, and her own family here and in Germany, besides what she has gained by her own hard work; or to let him go back to Sri Lanka without her, losing the chance of any real married life, or the hope of having children together, except for what at her age must now be the diminishing chance of conception as a result of visiting him there. The appellant's wife has also what the judge found to be a subjectively genuine fear of return to Sri Lanka: however, as the judge rightly pointed out, there is no evidence of her facing any real risk there.

35. This is a stark choice, and not one which the appellant's wife deserves to have forced on her: she may well have been unaware of his offending, though we cannot help wondering whether she must to some extent have shut her eyes to the improvement in their joint finances likely to have been brought about by his handling sums of the kind involved,

over a period of more than a year, as the sentencing judge found. However, if that is to be the result, it will be one brought about by the appellant's own criminal conduct.

36. We come back to the judge's finding, which we have upheld, that the appellant's personal conduct does represent a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. One good reason why that is the case is that he was involved, at whatever level, in serious organized crime, relating, even if indirectly, to the supply of narcotics: see the passages already cited from *Tsakouridis* .

37. Against that, the factors set out in reg. 21 (6) have of course to be considered too: in our view (and neither side suggested otherwise) they quite adequately cover the principles set out in *Tsakouridis*, including the potential public, as well as individual benefit from any possible social reintegration.

> age
> 41 is a reasonable age for moving back to one's country of origin.
>
> health
> There is no evidence of the appellant's having any problems here.
>
> family and economic situation
> We have already discussed the situation of the appellant's wife. As for his economic situation, the letter of 19 April 2013 (supplementary bundle p 20) shows that he was due to pay just under £1050 under a confiscation order no later than 16 September that year, in default of which he would be liable to 28 days' imprisonment consecutively to his sentence. We were referred to no evidence as to whether or not he had done that; but in any case the order would for practical purposes be unenforceable in Sri Lanka. There is no evidence of the appellant's having any particular source of income there; but, as a well-educated enterprising man who lived there till he was over 30, we see no reason why he should not be able to support himself on the island.
>
> length of residence in the United Kingdom
> The appellant was here, with leave to remain as a student and a work permit holder from 2004 till 2012, and was, if he had not become involved in crime, entitled to be here as the husband of an EEA citizen from 2008 onwards.
>
> social and cultural integration into the United Kingdom
> The appellant was always in work while at large; but nevertheless he was involved in serious crime from 2009 till he was arrested in 2010. The only personal relationship to which we were referred in submissions was with his wife.
>
> links with country of origin
> There is no particular evidence on this to which we were referred, so we remain at the default position of assuming that, at 41 and having lived there till he was 31, he is more likely than not to have retained some significant ones.

38. Balancing the 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' represented by the appellant's presence here against

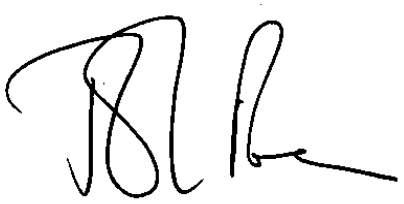
those factors we have noted as being in his favour, in terms of the scale set out in *Essa*, this is our view of the case as a whole. While he does not come directly into the categories set out in paragraph 4 of the head-note, his criminal career having lasted only from 2009 till it was cut short by his arrest in 2010, he was involved in serious organized crime, connected with the supply of narcotics, even if, as the sentencing judge noted, those were not class 'A' drugs.

39. The appellant has good reports about his conduct in prison; but there is nothing in the OASys and NOMS assessments to indicate any actual progress in his attitude to his offending; nor, as Judge Jackson rightly noted, was this very likely while he continued to deny it, as he did till three days before our hearing. He had a good work record while at large; but, apart from his relationship with his wife, and no doubt other family members, there is no evidence of any other form of social integration into this country.

40. Taking all these things together, we have no doubt that this appellant's removal would be proportionate to the legitimate purpose of prevention of crime.

Home Office appeal against first-tier decision allowed

Decision re-made: appellant's appeal against deportation dismissed



(a judge of the Upper Tribunal)