Upper Tribunal (Immigration and Asylum Chamber) **Appeal Number: UI-2022-000543 DA/00122/2021**

THE IMMIGRATION ACTS

Heard at Field House
On the 14 June 2022

Decision & Reasons Promulgated
On the 18 July 2022

Before

MRS JUSTICE THORNTON DBE
and
UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARIO MAKULA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Susana Cunha, Senior Presenting Officer
For the Respondent: Agata Patyna, instructed by A J Jones Solicitors

DECISION AND REASONS

1. Mario Makula is a national of the Czech Republic who was born on 5 February 1993. On 11 March 2022, his appeal against the Secretary of State's decision to deport him from the United Kingdom was allowed by First-tier Tribunal Judge Herlihy ("the judge"). The Secretary of State appeals against the judge's decision with the permission of First-tier Tribunal Judge Connal.

2. To avoid confusion, we will refer to the parties as they were before the First-tier Tribunal: Mr Makula as the appellant and the Secretary of State as the respondent.

Background

3. The appellant entered the United Kingdom with his family in 1998. His father claimed asylum. The remaining family members including the appellant were dependent on that claim. Asylum was refused, an appeal was dismissed and a subsequent claim for Indefinite Leave to Remain (presumably under the Legacy scheme then in operation) was also refused.

4. The appellant and his family did not leave the United Kingdom. The Czech Republic joined the European Union on 1 May 2004 and they had a right to remain from that point onwards. The appellant received written confirmation of his right to reside permanently in the United Kingdom on 20 July 2017.

5. On 29 July 2019, the appellant was convicted of two counts of conspiring to arrange or facilitate the travel of persons within the United Kingdom with the intention of exploitation. On 31 July 2019, HHJ Lowe sentenced the appellant to a total of four and a half years' imprisonment. The other participant in the conspiracy was the appellant's father, Petr Makula, who received a total sentence of eight and a half years' imprisonment. Moulder J subsequently refused permission to appeal to the Court of Appeal Criminal Division, noting that the case involved "exploitation by physical force, threats and deception" and that the appellant's sentence was not arguably manifestly excessive.

6. The respondent duly sought reasons why she should not deport the appellant from the United Kingdom. Representations were made in February 2021. Those representations noted, amongst other things, that the appellant had been in the UK for nearly 23 years; that he had permanent residence; and that his wife and three children (all Czech nationals) also lived in the UK in exercise of their right to free movement within the European Union. It was submitted that the appellant did not pose a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom and that it would in any event be disproportionate to order his deportation.

7. On 18 March 2021, the respondent decided to make a deportation order. She explained her reasons for doing so in a letter which spans 28 pages of single-spaced type. It is not necessary for the purposes of this decision to rehearse the detail of those 124 paragraphs and an outline of the critical conclusions will suffice.

8. The respondent accepted that the appellant had acquired permanent residence and that she was required to show 'serious grounds' of public policy or public security in order to deport him from the United Kingdom. She did not accept that he had acquired enhanced protection against deportation so that only 'imperative grounds' would suffice. Having reviewed the judge's sentencing remarks and the subsequent OASys report, the respondent concluded that the appellant presented a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom. Having considered the

appellant's length of residence in the UK and his family circumstances, the respondent concluded that it would be proportionate to deport him. She concluded that that course was permissible under EU Law and that it was also proportionate under Article 8 ECHR.

The Appeal to the First-tier Tribunal

9. The appellant appealed and his appeal was heard by the judge, sitting at Taylor House on 16 February 2022. The appellant was represented by Ms Patyna of counsel, as he was before us. Ms Patyna had prepared a helpful skeleton argument. The respondent was represented by a Presenting Officer (not Ms Cunha). The judge heard oral evidence from the appellant and his family members. She heard submissions from the advocates before reserving her decision.

10. In her reserved decision, the judge set out a lengthy summary of the competing cases before she made findings of fact from [34] onwards. Again, we propose at this stage to set out only the bones of those findings.

11. Like the respondent, the judge considered that the appellant had acquired serious but not imperative grounds protection against deportation: [37]-[43]. She reached that conclusion because she was not satisfied that the appellant was living in the UK between July 2009 and May 2011: [43]. From [44]-[49], the judge concluded that the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom. At [50], she considered the proportionality of the appellant's deportation and concluded as follows:

> However, other considerations need to be taken into account before removal can be justified. In considering the factors mentioned in Regulation 27(5) I find that there is strong evidence of the Appellant's strong links to the United Kingdom where he has lived for the majority of his life having arrived at the age of five; he clearly speaks and understands English and has worked in the United Kingdom, it is where his [sic] all his close family live including his wife and children. It is also where he has undertaken the entirety of his education. I do not find that the Appellant will be divorced from his cultural heritage and ties to the Czech Republic as he lives very much within the community of his Czech family, he speaks the language fluently and it is spoken within the family home. In my assessment of proportionality, acknowledging that the Appellant's offending was committed when the Appellant was living with his father who was the main instigator and was under his influence, that he has now left his father's home and is living separately with his wife and children. I note that the Appellant was found to have a positive role in the lives of his wife and children and that the social worker highlighted the need for stability and the risks of insecure attachment for his children should the Appellant be deported given the important role he plays in their lives and that strain will be

> placed on his wife. The social work also noted the distress caused to the children by the separation and the likely emotional harm. The Appellant's three children have only ever lived in the United Kingdom and the evidence is that all three of them are performing below the expected level of performance for their age with two of them being deemed to be performing significantly below the level for their age. If the children are struggling in the United Kingdom I find it is likely that they would struggle even more so in the Czech Republic if the decision was made to deport the Appellant or they were to join him there, as they would be entering an education system of which they are unfamiliar. Although the children understand Czech there is no evidence that they can read and write it as when spoken to in Czech the evidence was that they replied in English. The social work report indicates that the family are struggling within the education system at present even allowing for the provision of family support and that this would be aggravated by the Appellant's removal to the Czech Republic where I accept, he will also have less familial support. The social worker concluded that it would be detrimental to the children's welfare to be separated from the Appellant or to move to the Czech Republic. I find that decision is not a proportionate response for someone who has a right of residence as an EEA national, and has significant links in terms of his family and his connections to the United Kingdom.

12. So it was that the judge concluded that the appellant's deportation would be disproportionate under EU Law. At [53]-[55], she gave separate consideration to the appellant's deportation under Article 8 ECHR, concluding in that respect also that it would be a disproportionate step.

The Appeal to the Upper Tribunal

13. The respondent advanced a single ground in her application for permission to appeal, which was that the judge had failed to give legally adequate reasons for finding that the appellant's deportation would be disproportionate under EU Law and the ECHR. She submitted, in particular, that the judge had failed to engage with Schedule 1 to the EEA Regulations and Part 5A of the Nationality, Immigration and Asylum Act 2002.

14. Directions were duly given for the filing and service of skeleton arguments. A rule 24 response settled by Ms Patyna on behalf of the appellant was filed and served on 20 April 2022. A skeleton settled by Mr Tan on behalf of the respondent was filed and served on 4 May 2022. We intend the authors of those documents no discourtesy in summarising their contents very briefly indeed.

15. For the respondent, it was contended that the judge's assessment of proportionality was wholly deficient in both respects (EU Law and Article 8 ECHR).

16. For the appellant, Ms Patyna accepted that the judge had fallen into error in respect of the ECHR proportionality assessment but not in her consideration of EU Law proportionality. In the event that an error was to be found, however, Ms Patyna sought to draw attention to errors in the judge's assessment of the threat posed by the appellant and the level of protection to which he was entitled. Shortly before the hearing before us, the appellant also made an application to adduce further evidence under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, in attempt to address the gap in residence which the judge had found to exist between 2009 and 2011.

17. Ms Cunha submitted before us that the judge had failed to engage adequately or at all with the effect of schedule 1 to the EEA Regulations on the proportionality of the appellant's deportation. She had failed, in particular, to take account of the fact that the appellant had offended over the course of an extended period and that his ties to the UK were mostly based around his family. Ms Cunha also submitted that the judge had failed to turn her mind to the principle in R v Bouchereau (30/77) [1978] 1 QB 732 when assessing proportionality.

18. Ms Patyna adopted her skeleton argument and submitted that the real question for the Tribunal was whether the assessment of proportionality was legally sufficient. It was to be recalled that the FtT was a specialist Tribunal charged with administering the law in a challenging environment. In the event that the Tribunal was not satisfied that the reasons were adequate then the proper course would be for the appeal to be remitted to be heard de novo in the FtT. The Bouchereau submission which Ms Cunha raised had not been raised in the grounds of appeal or the skeleton argument. Nor, for that matter, had it been mentioned in the respondent's lengthy refusal letter. It was too late to raise the point at this stage and the appellant was disadvantaged by it.

19. Aside from the Bouchereau point, Ms Patyna submitted that the judge's paragraph [50] represented a legally adequate assessment of proportionality, and that schedule 1 to the 2016 Regulations could not, in any event, place a gloss on the EU Treaties. It was not a proper or fair reading of the decision to suggest that the judge had focused solely on the appellant's family ties at [50]. His extensive ties to the UK had been formed during more than two decades of residence and formed a proper basis for the conclusion that deportation would be disproportionate.

20. Ms Cunha responded briefly, highlighting that the focus of her submissions was on the omission of schedule 1 from the judge's analysis.

21. We indicated to the advocates that we would be prepared to receive submissions in writing on the Bouchereau point, although we reserved any decision on whether the point was within the scope of the respondent's grounds and, if not, whether she should be permitted to vary her grounds of appeal at this late stage.

22. In the event, Ms Patyna made written submissions in compliance with our directions but Ms Cunha failed to do so. She sought an extension of time within which to file submissions but we refused that application as it gave no indication of why a week had proved insufficient to prepare submissions on a point first raised by the respondent at the hearing.

Analysis

23. As we have recorded above, it is accepted by Ms Patyna that the judge's decision on Article 8 ECHR is legally inadequate. That concession was properly made, not least because the judge made no reference in her decision to the statutory public interest considerations in Part 5A of the 2002 Act. As Ms Patyna observed orally and in writing, however, the judge's error in this respect is immaterial if, as she submits, the conclusion that the appellant should succeed on EU Law grounds was not vitiated by legal error.

24. Parts of the respondent's grounds of appeal are nothing more than disagreement with the judge's decision. At [8] of the grounds, for example, there is a submission that the appellant's wife and children could follow him to the Czech Republic and that it is 'the appellant who has put himself in the position where he is liable to deportation'. As Ms Patyna submitted at [4] of her rule 24 response, these are nothing more than submissions on the merits and disclose no legal error on the part of the judge. Ms Cunha's focus, quite properly, was instead on attempting to demonstrate that the FtT's decision involved the making of an error on a point of law.

25. The gravamen of the respondent's ground of appeal against the judge's decision on EU Law grounds is that she failed to take account of schedule 1 to the 2016 Regulations in assessing proportionality. In order to evaluate that ground, it is necessary to set out something of regulation 27 and schedule 1.

26. Regulation 27 was revoked on 31 December 2020 but remains applicable in the appellant's case. It provides materially as follows:

> **27.— Decisions taken on grounds of public policy, public security and public health**
>
> (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) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.
>
> (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.).

27. It is paragraphs 2 and 4 of schedule 1 to the 2016 Regulations which are said by the respondent to have been left out of account by the judge. Those paragraphs are in the following terms:

> (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.
>
> …

> (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.

28. As a result of regulation 27(6), therefore, a decision maker (whether the Secretary of State or a court or tribunal) is required to conduct a holistic assessment of proportionality before taking a relevant decision on grounds of public policy or public security. Within that assessment, a relevant consideration is the individual's social and cultural integration into the United Kingdom. In undertaking that assessment, a court or tribunal is required to have regard to the considerations in schedule 1. Paragraphs 2 and 4 of the schedule guide the court or tribunal on the proper approach to considering the extent of an individual's social and cultural integration to the United Kingdom.

29. Amongst other matters, the judge attached significance to the appellant's family, education and work in the UK when she concluded that he had 'strong links to the UK' in [50]. As Ms Patyna submitted, the second of those factors is unaffected by the considerations in schedule 1; it was found by the FtT that the appellant was educated in the UK to the year 2009 and he had not started to commit offences at that stage. His education and his length of residence undoubtedly militated in favour of a conclusion that he was socially and culturally integrated into the UK.

30. The considerations in schedule 1 were necessarily relevant to the judge's assessment of the appellant's familial and employment ties to the United Kingdom. It is clear from [46] of the judge's decision that she was struck by the limited evidence of ties outside the appellant's family. She noted in that paragraph that there was 'only a single letter of support from anyone other than his family' and she questioned 'the level of the appellant's integration within the wider society of the United Kingdom'. There was 'no evidence', she noted, to support the assertion that the appellant and his wife had English friends, and there was little evidence of the parent's interaction with the children's school. That was surprising, the judge observed, given that the children were performing either below or seriously below the expected level.

31. The judge nevertheless went on to attach particular significance to the fact that all of the appellant's close family live in the United Kingdom when concluding that he had 'strong links to the United Kingdom'. Paragraph 2 of schedule 1 was necessarily relevant to these findings, however, and there is no indication in the judge's decision that she had regard to that provision. The only reference to schedule 1 is at [38] of the judge's decision, within which she failed to make any reference to the principles in paragraph 2 (or, for that matter,

paragraph 4). The judge erred, in our judgment, in failing to consider and apply paragraph 2. To express the same conclusion in a slightly different way, the judge erred in failing to give adequate reasons for concluding that the appellant was socially and culturally integrated to the UK notwithstanding paragraph 2.

32. The judge also erred in failing to consider the import of paragraph 4 to her conclusion that the appellant has strong links to the United Kingdom. It is clear that she attached weight to the appellant's employment in the UK in reaching that conclusion. In doing so, however, the judge failed to consider the fact that the appellant was offending between 2013 and 2018 by recruiting workers from the Czech Republic who were housed in squalid conditions, paid tiny sums for excessively long shifts and coerced into remaining in these conditions by actual and threatened violence. By the age of 20, therefore, the appellant's conduct during his employment in the United Kingdom might properly have been thought to show that he was not socially and culturally integrated to a country in which such exploitation is anathema. The appellant's employment links to the UK were formed at a time when he was committing serious criminal offences connected to that employment, therefore, and it was necessary for the judge to take account of paragraph 2 of schedule 1 in evaluating the extent to which that employment could properly be said to be evidence of integration. She failed to do so, and her reference to schedule 1 at [38] of her decision demonstrated no awareness of the principle reflected in that paragraph.

33. In summary, the judge erred in failing to have regard to paragraphs 2 and 4 of schedule 1 to the 2016 Regulations when she concluded that the appellant's deportation would be disproportionate. She was persuaded, in large part, to reach that conclusion because of the appellant's family and other ties to the United Kingdom. The weight which could properly be attached to those considerations was to be gauged with reference to paragraphs 2 and 4, however, and the judge failed to adopt that approach. Given the judge's concerns about the paucity of evidence that the appellant had other meaningful ties to the UK, we are satisfied that this error was material to the proportionality assessment and, ultimately, to the outcome of the appeal.

34. In reaching that conclusion, we have not lost sight of the Ms Patyna's observation that the EEA Regulations cannot put a gloss, as she put it, on the provisions of the Directive. That submission is particularly important after the UK's withdrawal from the European Union because the sole ground of appeal which was available to the appellant in this case was that the decision to remove him breached his rights under the EU Treaties (the significance of which has been considered by UTJ Rintoul in another context in Geci (EEA Regs: transitional provisions; appeal rights) [2021] UKUT 285 (IAC).

35. There was no written or oral submission made by Ms Patyna, however, that paragraphs 2 and 4 of schedule 1 to the 2016 Regulations actually represent an impermissible gloss on the protections envisaged by the Directive. We have not therefore received

full (or any) argument on the point but, as presently advised, we do not consider paragraphs 2 and 4 of schedule to require a court or tribunal to adopt an approach which reduces the protections recognised by the EU Treaties.

36. It remains for us to consider the relief which should follow from our conclusion that the judge erred in her assessment of proportionality. It is at this point that we acknowledge the submission made by Ms Patyna at [11] of her rule 24 response. There, she submitted that the judge erred in directing herself that the burden of proof in such a case is on the appellant. Ms Patyna is undoubtedly correct in that submission, since it is well established that the burden of proving that the appellant represents a genuine, present and sufficiently serious threat to the fundamental interests of the UK lies on the respondent: SSHD v Straszewski [2015] EWCA Civ 1245; [2016] 1 WLR 1173.

37. There is a further difficulty with the judge's conclusion that the appellant represents a genuine, present and sufficiently serious threat to the fundamental interest of the UK. On first reading, we had assumed that this finding was straightforwardly based on the appellant previous criminal convictions, contrary to regulation 27(5)(e) and the need, as recognised in SSHD v Straszewski, to look to the future: [17] of Moore-Bick LJ's judgment, with which Davis and Sharp LJJ agreed.

38. At the hearing, however, we were given cause to reflect further on the analysis of [49] of the judge's decision. As we suggested to Ms Patyna during argument, that finding might reflect a conclusion on the part of the judge that the appellant's conduct was sufficient to engage what has come to be known as the Bouchereau exception, so called because of the case in which it was first said that it was possible that past conduct *alone* may constitute such a threat to the requirements of public policy.

39. If that was the judge's finding, we are satisfied that it was reached improperly. In her impressive written submissions filed after the hearing, Ms Patyna examined the domestic and European authorities in which the Bouchereau exception has been considered. We do not consider it necessary to conduct a review of those authorities. It suffices to note for the purposes of this part of our decision that we accept that the application of the exception is rare and that a person must be given proper notice that it is to be considered. We are satisfied that no notice was given in this case and that the finding that the appellant's crimes engaged the Bouchereau exception (if that is what we see in [49]) was reached in a procedurally improper fashion. Neither the respondent's decision nor the submissions of the Presenting Officer below gave any indication that this was a matter which the judge was to be invited to consider. Given the significance of such a finding, we consider that the judge erred in proceeding to consider the point without notice to the appellant. Had notice been given, it is clear that detailed submissions would have been made on the point.

40. It is apparent from Ms Cunha's submissions before us that the respondent does now seek to pursue a Bouchereau submission. We

have not considered that submission on its merits other than to make the following observation. There will be cases in which the exception is obviously arguably applicable. We have in mind the sort of cases mentioned by Singh LJ at [85] of SSHD v Robinson [2018] EWCA Civ 85; [2018] Imm AR 892: those involving "grave offences of sexual abuse or violence against young children." Equally, there will be cases in which the exception is obviously inapplicable: those involving a single instance of minor drug possession might fall into that category. In our judgment, it is at least arguable that the appellant's offending engages the Bouchereau exception, based as it was on the trafficking and exploitation of vulnerable people, for the sake of financial gain, over the course of years.

41. We also note that the appellant has adduced further evidence, by way of his application under rule 15(2A), of his residence during the contentious years, 2009-2011.

42. In all the circumstances, and bearing in mind all of the difficulties with the decision of the FtT, we are satisfied that the appropriate course is that which was urged upon us by both advocates in the event that we were to set aside that decision. The appeal will be remitted to the FtT to be heard afresh by a judge other than Judge Herlihy. That course will permit the FtT to consider the new evidence of residence between 2009 and 2011. It will also permit the FtT to apply the correct burden of proof to the threat posed by the appellant and to consider any submission on the Bouchereau exception which the respondent chooses to make upon remittal.

Notice of Decision

The respondent's appeal is allowed. The decision of the First-tier Tribunal is set aside in full. The appeal is remitted to the First-tier Tribunal to be heard de novo by a different judge.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 June 2022