Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00598/2016**

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice **Decision & Reasons Promulgated**
On 17 July 2017 **On 04 August 2017**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TARIQ TUFAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

1. The appellant (to whom I shall refer hereafter as "the respondent", as he was before the First-tier Judge) appeals to the Upper Tribunal against the decision of the First-tier Judge allowing the appeal of the respondent (hereafter referred to as "the appellant") against the decision of 16 November 2016 to exclude him from the United Kingdom.

2. The appellant is a Dutch national. He did not attend the hearing before the First-tier Judge on 20 February 2017 as he had been removed to the Netherlands on 4 January 2017 and had not exercised his right of entry to

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the United Kingdom for the purposes of attending the appeal hearing. There was no request for an adjournment and in the circumstances the judge concluded that it was appropriate to proceed to determine the appeal in his absence.

3. The judge noted the relevant provisions of the EEA Regulations. The appellant had come to the United Kingdom aged 15 in 2012. He had not shown that he had been exercising treaty rights for a continuous five year period and therefore did not have a permanent right to reside.

4. On 5 August 2016 the appellant was sentenced to sixteen months' imprisonment for conspiracy to intimidate a witness. He had pleaded guilty and was sentenced to the minimum sentence applicable. He had no other convictions in the United Kingdom but had received a caution on 4 February 2016 for soliciting the services of a prostitute in a public place.

5. The judge noted that the offence for which the appellant was convicted was serious. The appellant's co-defendant had aimed to frighten his ex-partner and with the appellant's assistance had poured petrol over her front door. The judge noted that the appellant had played an active part in that enterprise. The judge accepted that the appellant was full of remorse and took account of his age, the pre-sentence report, his guilty plea and his "effective good character" and imposed the minimum sentence applicable.

6. In the appellant's representations he said he was not present when the offence of dousing the door with petrol was committed, there was no challenge by the respondent to the appellant's claim that the victim had confirmed in evidence that she did not see the appellant at the time of the incident and he had been indicted and convicted of conspiracy to intimidate a witness rather than actual intimidation. He claimed to have no further contact with his co-defendant. The judge noted the consistency of the appellant's submissions which found support in the sentencing remarks in the absence of a direct challenge by the respondent, either in the decision letter or in submissions before him, and the judge therefore accepted the appellant's account of how and to what extent he was involved in the offence for which he was convicted.

7. It was clear that the appellant had demonstrated a propensity to offend which in itself, the judge said, raised a risk of reoffending. Witness intimidation, whatever role was played by the appellant, was a serious offence and contrary to public policy. The judge concluded that the appellant did not pose a genuine present and sufficiently serious threat. His culpability in the offence was reflected in the sentencing judge's remarks and the minimum sentence imposed. The judge had accepted that his remorse was genuine. He had no previous significant offending. He was young and had taken time whilst in custody to study. His family were all in the United Kingdom and prior to his conviction he had shared a home with them and the continuing existence and support from his family was a factor which weighed in his favour in assessing the likelihood of

further offending. He had no immediate family in the Netherlands. The judge considered that the respondent relied solely on the convictions to support a finding that the appellant had a propensity to reoffend and when weighed against the other evidence before him was unable to reach the same conclusion. He concluded that the appellant did not pose a threat sufficient to meet the criteria for exclusion. The appeal was allowed.

8. In her grounds of appeal the respondent argued first that the judge's conclusion that there was a small threat of the appellant committing an offence which entailed that the risk which was not sufficient to satisfy the Regulation 21(5)(c) test was misconceived in light of what had been said in Bouchereau Case 30-77 where it was concluded that a threat to public policy could exist even where there was no propensity on the part of the appellant to reoffend, though it was noted that this finding was limited to exceptional situations. The grounds quoted the sentencing judge's remarks as to the very frightening nature of the experience of the victim. It was argued that even a slight risk of the appellant reoffending could constitute a genuine, present and sufficiently serious threat.

9. It was also argued that the judge had failed to engage with the margin of appreciation that was to be afforded to Member States in the context of establishing their own public policy thresholds which should be tailored to the particular aspects of their territories and that Member States were best placed to assess such a risk and as such the judge had failed to take into account the seriousness of the offence or provide adequate reasons as to why the appellant's deportation was justified.

10. Permission was granted on all grounds.

11. There was no appearance by or on behalf of the appellant at the hearing. As noted above, he was removed to the Netherlands on 4 January 2017. Neither the Home Office nor, it seems, the Tribunal, had an address for him in the Netherlands. Like the judge at the First-tier hearing I concluded that, bearing in mind the interests of justice and the overriding objective it was appropriate to proceed to hear the appeal.

12. Mr Melvin accepted that perhaps the second ground was not the strongest, but founded his submissions on the first ground. The judge had found a propensity to offend and the offence was very serious and the sentencing remarks of the judge were to be noted. If the Tribunal agreed then it should remake the decision. There was no need for further submissions and it had the necessary documentation.

13. I reserved my decision.

14. I see no force to the second ground. It comes close to arguing that if the Secretary of State thinks a person ought to be deported then they ought to be and the Tribunal has no role to play. The ground is perhaps confusing the extent to which the public interest is now spelt out in primary legislation and Immigration Rules in the case of non-EEA offenders, but as

regards an EEA offender such as the appellant in this case, the issue of removal has to be addressed in the context of the EEA Regulations.

15. Not without some hesitation, I have concluded that the judge did not err in law in this case. It is not a decision that every judge would have come to, bearing in mind the nature of the offence and the fact that it was comparatively recent. But the judge bore these factors in mind, bore in mind what had been said by the judge in the sentencing remarks and the appellant's family circumstances and history and the support from his family unit and the fact that it was the only offence he had committed subject to the caution on 4 February 2016. It is not, as the judge noted, a question of it being appropriate to rely solely on the conviction to support a finding that the appellant has a propensity to reoffend. The case is not an exceptional one of the kind contemplated in Bouchereau. The personal conduct of the person concerned must represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society. The judge considered all the evidence and concluded that the appellant did not pose such a threat. In my view that conclusion was open to the judge and as a consequence I consider that the challenge to his decision is not made out and his decision allowing the appeal is maintained.

Signed Date 3 August 2017

Upper Tribunal Judge Allen

TO THE RESPONDENT
FEE AWARD

This is a fee exempt appeal.

Signed Date 3 August 2017

Upper Tribunal Judge Allen