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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Flaneurs' (Siegnerella Elaine and Siegnette Elaine) Application [2011] NICA 72

IN THE MATTER OF APPLICATIONS BY SIEGNERELLA ELAINE FLANEUR AND SIEGNETTE ELAINE FLANEUR FOR JUDICIAL REVIEW

Before: Morgan LCJ, Higgins LJ and Sir John Sheil

MORGAN LCJ

[1] The appellants' appeal is against the judgment of Treacy J delivered on 24 September 2010 dismissing their applications for judicial review. They are Dutch nationals who are sisters. They seek to challenge deportation decisions made against them on the basis that the decisions contravene article 18 of the EC Treaty, now the Treaty on the Functioning of the European Union renamed by the Treaty of Lisbon and renumbered as article 21, guaranteeing them freedom to travel within the EU, Council Directive 2004/38/EC and the Immigration (EEA) Regulations 2006. Mr Lewis QC and Ms Connolly appeared on behalf of the appellant. Mr McGleenan appeared for the respondent in relation to the appeal by Siegnerella Flaneur and Mr Dunlop appeared for the respondent in relation to Siegnette Flaneur's appeal. We are grateful to all counsel for their helpful written and oral submissions.

Background

[2] On 12 April 2008 the appellants were apprehended at Belfast International Airport in connection with the attempted importation into the United Kingdom of 136g of cocaine. They pleaded guilty to the importation or attempted importation of the said quantity of drugs at Antrim Crown Court on 17 November 2008. Judge Smyth QC sentenced Siegnette to 3 years imprisonment. Siegnerella was sentenced to 2½ years imprisonment. The

distinction was made because it appeared that Siegnette had induced Siegnerella to be come involved in the enterprise.

[3] The pre-sentence report in respect of Siegnerella stated that she had no previous convictions in Northern Ireland. She, like her sister, had done well at school and gone on to study social work at college. She fell pregnant at 18 and left her course. She had no previous involvement with drugs. After the birth of her child she attempted to return to education and worked part time but found it difficult to cope financially. She was unemployed without any income at the time of the offence and was facing the possibility of eviction with her mother from the family home. The probation officer considered that her experience of the criminal justice system and her separation from her son had had a salutary effect upon her. The offence was committed for financial gain but she had been naïve in not recognising the consequences of her actions. She was considered to pose a low risk of re-offending and she did not pose any risk of harm to others.

[4] The pre-sentence report in respect of Siegnette recorded that she was a student at a college of higher education for 2 years studying interior design at the time of her arrest. She did not live with her mother but stated that she had been encouraged by her boyfriend to import drugs as her family was in significant debt. In light of the family's financial position she felt that she had no other option even though she appreciated the risks. She had no previous convictions. The probation officer considered that her involvement in this offence had had a salutary effect on her. Her only previous involvement with drugs was some recreational cannabis use. She was employed part time at the time of her arrest. She was considered to pose a low risk of re-offending. She presented as an intelligent woman and was assessed by the probation officer as not presenting any direct risk of harm to others.

[5] In his sentencing remarks Judge Smyth QC stated that importation of drugs was a serious offence, particularly so since the method of entry was through Northern Ireland's only international airport. He commented on the fact that this was a particular problem in Northern Ireland and stated that there was a need to pass deterrent sentences to discourage others. He noted that the appellants had pleaded guilty and had been helpful to police, although one of them had not been so at the point of apprehension. The offence involved a Class A drug although its value was not very considerable. The elder sister, Siegnette, was acknowledged to have persuaded Siegnerella to join in the offence but that was the only reason to differentiate between them. The drugs were intended for someone else and the offence had been carried out for financial reward. The learned judge noted that they were unlikely to reoffend because of their clear records, their assistance to the police and the fact that they had pleaded to the charges.

[6] Both appellants were advised by the UK Border Agency prior to the completion of their sentences that the Secretary of State was minded to make deportation orders in respect of them on public policy grounds in light of their convictions. The National Offenders Management Services (NOMS) carried out a risk assessment in respect of each of them and concluded that each posed a low risk of harm to the public and a low risk of re-offending. The risk related to continued contact with drug dealers.

[7] The Secretary of State made a deportation order in respect of Siegnerella on 23 June 2009 and the reasons for the decision are contained in a letter of that date. The legal framework set by the Immigration (European Economic Area) Regulations 2006 is set out in the decision letter and there is no issue with the legal basis for the test that was applied. It was noted that she had been convicted of an extremely serious offence and that the nature of the offence was such as to engage the Secretary of State's guidelines on public policy and public security. This is a reference to the fact that where a sentence of 2 years imprisonment or more is passed the case is considered for deportation on public policy or security grounds.

[8] The letter continued by noting the NOMS assessment on risk but noted that the harm from the importation of drugs on the public was profound. It was concluded that the offence was so serious that the applicant represented a genuine, present and sufficiently serious threat to the public to in principle justify deportation on public policy grounds. The risk of re-offending is then considered.

> "In completing your NOMS 1 assessment the offender manager found that you posed a low risk of re-offending. In reaching this conclusion your offender manager has taken into consideration those factors which originally led to your offending behaviour and whether those same factors continue to exist. However the overall score given on your report is in conflict with the written comments of the offender manager in particular the following issues have been highlighted within the NOMS 1 report. You stated that you lived in Amsterdam with your mother, siblings and son. You left school at an early stage as you became pregnant at the age of 18 years old and were unemployed. You further stated that your family was in substantial financial debt which led you to committing this offence for money. Whilst the risk of you re-offending is viewed as low the serious harm which would be caused as a result is such that it

> is not considered reasonable to leave the public vulnerable to the effects of your re-offending.
>
> It is considered that in view of your circumstances, unemployment, lack of education, parental responsibilities, debt should you find yourself in similar circumstances you would choose to re-offend. It is concluded that you committed the crime for financial gain and that you would re-offend for the same reason. "

[9] There are three criticisms which the appellant makes of this part of the letter. First it is by no means clear why the overall score in the NOMS assessment conflicts with the comments of the offender manager. The score recorded is 13 where the low risk band runs from 0-15. Secondly the reference to lack of education is in conflict with the assessment of the pre-sentence report which states that Seignerella did well at school. Thirdly the reference to her being unemployed did not appear to take into account the fact that she had been previously employed.

[10] The next portion of the letter sets out a passage from the sentencing remarks of the learned trial judge describing the seriousness of the offence and the need for a deterrent sentence. There is no criticism of these remarks but the appellant points out that there is omitted the passage immediately following that where the learned trial judge gives his reasons for concluding that the appellants are unlikely to re-offend. The letter concludes that the appellant has demonstrated a propensity to re-offend and represents a genuine, present and sufficiently serious threat to the public to justify her deportation.

[11] A deportation order in respect of Siegnette was made on 3 August 2009. Her decision letter was broadly in the same terms as her sister. It recorded the legal basis for the decision and the same issues about the seriousness of the offending and how it gave rise to sufficient reasons to deport on public policy grounds. It then went on to look at the appellant's circumstances to examine the propensity to re-offend.

> "In completing your NOMS 1 assessment the offender manager found that you posed a low risk of re-offending. In reaching this conclusion your offender manager has taken into consideration those factors which originally led to your offending behaviour and whether those same factors continue to exist. Whilst the risk of you re-offending is viewed as low the serious harm which would be caused as a result is such

> that it is not considered reasonable to leave the public vulnerable to the effects of your re-offending.
>
> It is considered that in view of your circumstances, unemployment, lack of education, should you find yourself in similar circumstances you would choose to re-offend. It is concluded that you committed the crime for financial gain and that you would re-offend for the same reason. "

[12] There are two specific criticisms that are made of this portion of the decision letter. First the reference to lack of education appears to ignore the fact that the appellant was a student at a further education college at the time of her arrest and had done well in the education system. Secondly although it is recorded that she was unemployed she was actually working part time at the time of her arrest. The letter went on to set out the passage in the learned trial judge's remarks about the seriousness of the offence but did not refer to his assessment that the appellant posed a low risk of re-offending. The letter concluded that she committed the crime for financial gain and would re-offend for the same reason.

Legal Framework

[13] The appellants were content that the learned trial judge had identified the correct legal framework. For ease of reference we set it out again here.

> **"Legal Framework**
>
> **EU Law**
>
> [13] Article 17 of the EC Treaty provides that every person holding the nationality of a Member State shall be a citizen of the European Union. Article 18(1) of the EC Treaty provides that:
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> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member State, subject to the limitations laid down in this Treaty and by the measures adopted to give it effect."

[14] Specific provisions are also contained in the EC Treaty dealing with free movement of workers, freedom to provide services and receive services

and freedom of establishment. Those freedoms may also be subject to restrictions.

[15] The relevant measures governing restrictions on freedom of movement for EU nationals are now contained in Directive 2004/38/EC. Articles 27.1 and 27.2 of the Directive provide:

> "1. Subject to the provisions of this Chapter, Member States may restrict the freedom of and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
>
> 2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
>
> The personal conduct of the individual must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."

[16] That provision is implemented by Regulation 21(5) of the Immigration (European Economic Area) Regulations 2006 ("the Regulations") which provides:

> "(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."

[17] The case law of the ECJ[1] established the following limitations on the ability of Member States to deport persons who have committed a criminal offence. These principles are reflected in the terms of the Regulations set out above. They can be summarised as follows:

(i) Derogations from free movement must be interpreted restrictively, particularly in the case of citizens of the EU.

(ii) Such measures must be based exclusively on the personal conduct of the person concerned. Previous convictions cannot *in themselves* justify deportation.

(iii) There must be a *genuine, present and sufficiently serious* threat to the requirements of public policy.

(iv) Such a (present) threat exists only where the personal conduct "indicates a specific risk of new and serious prejudice to the requirements of public policy"[2] which must, as a general rule, be satisfied at the time of the expulsion[3].

(v) EU law prevents the deportation of an EU citizen for general preventative reasons aimed at deterring other foreign nationals.

[18] In <u>*Bouchereau*</u> [1977] ECR 1999 the European Court of Justice said:

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[1] *Orfanopoulos* [2004] ECR I-5257 at paras 64-68; *Calfa* [1999] ECR 1-11 at paras 21-25; *Nazli* [2000] ECR I-957 at paras 57-64; *Bouchereau* [1977] ECR 1999 at paras 25-37.

[2] Case C-340/97 *Nazli* [2000] ECR I at para 61
[3] *Orfanopoulos* [2004] ECR I-5257 at paras 79

"27. The terms of Art 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 insofar 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 with the fundamental nature of the principle of the free movement of persons."

[19] In Orfanopoulous [2004] ECR 1-5257 the ECJ stated:

"64. ... derogations from that principle [i.e. freedom of movement for workers] must be interpreted strictly.

65. ... A particularly restrictive interpretation of the derogations from that freedom is required by virtue of a person's status as a citizen of the Union. As the Court has held, that status is destined to be the fundamental status of nationals of the Member States.

66. Concerning measures of public policy ..., in order to be justified, they must be based exclusively on the personal conduct of the individual concerned. ... Previous criminal convictions cannot in themselves justify those measures. As the Court has held, particularly in *Bouchereau,* the concept of public policy pre-supposes the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.

67. While it is true that a Member State may 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, the public policy exception must, however, be interpreted restrictively, with the result that the existence of a previous criminal conviction can justify an expulsion *only* insofar as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a *present* threat to the requirements of public policy.

68. ... Community law precludes the deportation of a national of a Member State based on reasons of a general preventative nature, that is one which has been ordered for the purpose of deterring other aliens, in particular, where such measure automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy.

...

79. ... And thus the requirement of the existence of a present threat must, as a general rule, be satisfied at the time of the expulsion."

The issues in the appeal

[20] It is argued on behalf of the appellants that the decisions in Orfanopoulos and Nazli establish two tests which should have been applied by the decision maker in determining whether deportations were justified. Those were whether the conduct gave rise to a present threat and whether it indicated a specific risk of new and serious prejudice. It was submitted that if those tests had been applied there was no evidential basis for concluding that the appellants posed a present threat of that kind. The learned trial judge in his sentencing remarks and the probation service both expressed the view that both appellants presented a low risk of re-offending. In addition the NOMS assessment carried out prior to release indicated there was a low risk of reoffending. The decision letters demonstrated, it was contended, that the decisions of June and August 2009 were based on the seriousness of the offences committed by the appellants in April 2008 not the risk they posed on release.

[21] For the respondent it was submitted that the appellant had overstated the effect of Orfanopoulos. The ruling of the court concerned national legislation mandating automatic expulsion following certain convictions. The ECJ held that national legislation that resulted in automatic expulsion was precluded but an expulsion based on an appraisal of the specific facts of the case would not, however, offend EC law. Nazli similarly concerned the expulsion of a Turkish worker on the basis of legislation which permitted expulsion on general preventative grounds. Neither established tests which ought to have been applied in this case.

[22] In the alternative it was submitted that the Secretary of State applied the correct legislative test. The state has a margin of appreciation in performing the role of decision maker. Bouchereau requires the decision maker to take into account the circumstances when the offence was committed. Applying Orfanopoulos, the respondent was entitled to find the circumstances which gave rise to the conviction were evidence of personal conduct giving rise to a present threat. The supply of illegal drugs into the UK is a risk to public security. Although the NOMS and probation assessments did not disclose a high risk of reoffending, the requirements of public policy and public security are different appraisals from the discrete tests applied by the probation officer and the NOMS assessor. Siegnerella's personal circumstances were difficult before the offence was committed and this position had not changed when the deportation decisions were taken. At the time of the offence Siegnette was a student. She and her family were living in poverty and the offence was committed for financial reasons. At the time of the decision she had lost her accommodation in Holland and her personal circumstances had therefore not improved.

Discussion

[23] I accept that the legal framework is as set out by the learned trial judge. Although Bouchereau, Nazli and Orfanopoulos were all cases concerned with automatic expulsion consequent upon conviction the steady theme of the decisions is the need for a present threat evidenced by personal conduct of new and serious prejudice. The Citizen's Directive and the implementing legislation carry this theme through. The tests set out in the legislation reflect the emerging case-law and in my view the restrictive approach to the interpretation of the exceptions to the exercise of community rights supports the conclusion that the tests should be approached as the appellants submitted.

[24] The appellants argued that in light of the assessments made by the learned trial judge, the probation service and NOMS that there was no evidential base for the conclusion that either appellant represented a genuine, present and sufficiently serious threat to the public to justify deportation, it is for the Secretary of State to reach his own conclusion on this issue while taking into account the opinions of the other statutory bodies (see YK (Bulgaria) v Secretary of State for the Home Department [2009] EWCA Civ 530). In this case the decision letters make it plain that this crime was motivated by the financial circumstances of the appellants. Each of them appreciated the risks they were taking. There was no dispute that if re-offending of this type occurred substantial new prejudice to the public would arise. There was nothing to indicate any improvement in the financial position of the family at the time of the decisions to deport and if anything it had worsened. The assessments by the learned trial judge, the probation service and NOMS all supported the view that this was financially motivated crime in full knowledge of the consequences if caught. In my view that together with the consequences of re-offending provided material which was relevant to the issue of whether there was a genuine, present and sufficiently serious threat.

[25] In order, however, to adhere to the strict approach to the exceptions to the exercise of the rights protected by the Citizen's Directive to which I have referred above the court must recognise the executive's role in the determination of the public policy considerations but is required to exercise strict scrutiny of the reasons for any restriction of the rights based on those policies. The decision letters acknowledged the assessment by the court, the pre-sentence report and NOMS that there was a low risk of re-offending in this case. Both NOMS and the author of the pre-sentence report further concluded that there was a low risk of harm to the public. There was no engagement within the decision letters with the reasons for those conclusions set out in the pre-sentence reports and the decision letters contain no satisfactory explanation for departing from the NOMS assessment. Where the court is exercising strict scrutiny of an important right to citizenship the

failure to explain how these assessments by agencies of the state charged with the responsibility of assessing personal risk were taken into account leaves the court without the information required to review the decision. On that basis alone, therefore, I am not satisfied that the decision has been based exclusively on the personal conduct of the appellants rather than the seriousness of the offence.

[26] Secondly, it is clear from the matters set out at paragraphs 9 and 12 above that there were material factual errors in the assessment by the Secretary of State. These were two women who had done well within the education system and who had succeeded in obtaining employment at various times. These were matters that were potentially material to the assessment of risk. The pre-sentence reports stated that the effect of imprisonment had been salutary on each applicant. Given their education and work background that conclusion needed to be assessed. The decision letter proceeded on a false basis so that the assessment did not take into account the matters that it should.

[27] In my view that is sufficient for the appellants to succeed in this appeal. There was also significant other material suggesting that the decision maker may only have taken into account the seriousness of the offence in making this decision. That appears from paragraph 9 of the affidavit of Mr Srikantharajah sworn on 22 September 2009 in Seignerella's case and a letter written by him on 5 October 2009 in Seignette's case where he stated that her offence was so serious that she represented a genuine, present and sufficiently serious threat to the public to in principle justify her deportation. On the most favourable view for the respondent the reference to principle may simply indicate that the public policy exception has been engaged by the offence and the next stage is the assessment of personal conduct and risk. In a case where the court has to exercise strict scrutiny the respondent may not be entitled to a favourable view. In any event it is not necessary for me to determine that issue.

[28] For the reasons set out I consider that this appeal should be allowed and the decisions quashed.

HIGGINS LJ **HIG8338**

[1] The appellants appeal against the decision of Treacy J whereby he dismissed their applications for judicial review of decisions by the Secretary of State for the Home Department to deport each of them from the United Kingdom to the Netherlands. The appellants are sisters and of Dutch

nationality. Siegnette is the elder of the two. They challenge the deportation decisions made against them on the basis that the decisions contravene Article 18 of the EC Treaty (now Article 21 of the Treaty on the Functioning of the European Union, the Treaty of Lisbon), Council Directive 2004/38 and the Immigration (EEA) Regulations 2006, which guarantee freedom to travel within the EU. Mr Lewis QC and Ms Connolly appeared on behalf of the appellants. Mr McGleenan appeared for the respondent in relation to the appeal by Siegnerella Flaneur and Mr Dunlop appeared for the respondent in relation to Siegnette Flaneur's appeal.

[2] On 12 April 2008, on arrival at Belfast International Airport on a flight from Amsterdam the appellants were apprehended in possession of 136 grammes of a Class A controlled drug, namely cocaine. They were prosecuted at Antrim Crown Court for illegal importation of controlled drugs into the United Kingdom. They pleaded guilty and on 17 November 2008 were sentenced to terms of imprisonment. Prior to sentence the Crown Court obtained a pre-sentence report in the case of both applicants. In Siegnette's case, the pre-sentence report noted that she had achieved well within the education system, had gone on at a higher level and had been studying for the past 2 years. On the risk of harm to the public and likelihood of re-offending she was assessed as being within the low range. She had no previous convictions and custody pending trial had had a salutary effect on her. The author of the report concluded that she did not present any direct risk of harm to others.

In Siegnerella's case the report referred to her personal circumstances, her education and the effect of separation from her son and family. On the risk of harm to the public and likelihood of re-offending she was assessed as within the low range of risk of re-offending. She had no previous convictions, was not involved in the drug culture in her home town, and like her sister custody pending trial and separation from her son and family had had a salutary effect on her. The author concluded that her behaviour in general did not present any risk of harm to others.

[3] In his sentencing remarks the learned trial Judge stated as follows:

> "This is a Class A drug. The offence is one of importation, and therefore both because of its Class and also because of the manner of it being brought in, its importation, this is a serious offence ... The Court looks first of all at the quantity of drug and the nature of the problem. It's in total 136gms at 100% purity. ...
>
> This is a particular problem in Northern Ireland. Northern Ireland has principally two main airports.

> One that does these cross country flights and no doubt the rate of protection, the scale of problem and the inevitably of prison sentences are all matters to be taken into account ... You have pleaded guilty. You ultimately were helpful. One of you certainly wasn't at the point of apprehension. The value of the drug was not very considerable. The quantity was 136gms. It however is a Class A drug. Both of you were willingly used. Your backgrounds are very similar because you are sisters. No distinction really is made between the two of you except for this. That it is acknowledged that the elder sister, who is Siegnette, persuaded you, Siegnerella, to join in and I think that is certainly a reason for some differentiation between you, otherwise there's none. As to probation, obviously it's not available as you're from Holland and I accept that these drugs were intended for somebody else. The financial reward to you was not great. Nonetheless, the problem has to be met with custodial sentences that are long enough to make sure that the risks involved are brought home to people who are in vulnerable situations…….. I'm taking into account that you pleaded guilty. You were ultimately helpful to the Police insofar as you could be, and also that you have clear records, and that based with your plea, means that you are unlikely to re-offend. I regard these sentences as sufficient to make it clear to anybody who is using this means of importation that there are serious risks and prison sentences are inevitable. ..." (my emphasis)

Siegnette was sentenced to 3 years imprisonment and Siegnerella to 2 ½ years imprisonment. HHJ Smyth Q.C. did not make any recommendation for their deportation. While serving their sentences a National Offender Management Service assessment (NOMS 1) was carried out in respect of both sisters. In the case of each the Offender Manager found that they posed a low risk of harm to the public and of re-offending. Both served their sentence but before completion they were each served with a deportation order together with a statement of reasons for the decision to deport. Neither appealed the decision to deport, though Signerella lodged an appeal that was later marked 'abandoned'. Siegnette indicated that she would depart the UK voluntarily. Judicial review proceedings challenging the deportation orders were commenced on behalf of both sisters.

[4] The deportation decision letters were in broadly similar terms. The following is common to both except for the ages –

> "... Residence Consideration
>
> At the time of your arrest on 12 April 2008, aged …… [Signerella was aged 21 and Siegnette aged 25], your status was that of an EEA national exercising the right to freedom of movement. You did not have any formal permanent residence in the United Kingdom at that stage. You have remained in custody since that date. Accordingly, you have not obtained a permanent right to reside in the UK under the 2006 Regulations. You do not benefit from the serious or imperative grounds of public policy or public security test. Consequently, the appropriate test to apply that your removal is justified on the basis of public policy or public security (sic) is still ... .
>
> Consideration of Propensity to Re-offend
>
> You have been convicted of an extremely serious offence namely importation of Class A controlled drug. It is considered that whichever test applies, the nature of your offence is such as to be a sufficiently serious threat to public policy or public security in accordance with the Secretary of State's current guidance on the application of these tests. In reaching the decision in your case consideration has been given to the question whether you represent a genuine, present and sufficiently serious threat to the public in light of either the seriousness of your offence or a demonstrated propensity to reoffend, subject to the consideration of proportionality under Reg21(5)(a) and the factors set out in Reg21(6).
>
> In completing your NOMS 1 assessment the offender manager found that you posed a low risk of harm to the public and you posed a low risk of reoffending. In reaching this conclusion your offender manager has taken into consideration those factors which originally led to your offending behaviour and whether those same factors continue to exist. Should you have been successful in the importation of Class A drugs this would most

> certainly have had a negative effect on society, not only on the drug users but on their families as well. This is a process causing misery and sometimes death to the many thousands of people who are unfortunate enough to become addicted to them.
>
> This addiction drives many of them to commit crimes sometimes serious crimes in order to finance their addiction. Therefore, actions by those involved in the importation and supply of drugs have widespread, detrimental and damaging effect on drug users, their families and friends and society in general. You were fully aware of the risk you were taking and that it is illegal to import or supply drugs into the United Kingdom. It is assumed that you were fully aware of your actions and the consequences should you be caught. Therefore it is considered that the harm you could have caused to the public would have had a profound effect on the public at large. Accordingly, the professional assessment is indicative of the continued threat it is considered that you pose to the public. It is concluded that your offence was so serious that you represent a genuine, present and sufficiently serious threat to the public to, in principle, justify your deportation. In the terminology of the 2006 Regulations, it is considered that there are sufficient grounds for deporting you on public policy grounds. Notwithstanding this, consideration has been given to whether you have demonstrated a propensity to re-offend and whether you represent a genuine present and sufficiently serious threat to the public to justify your deportation (subject to the consideration of proportionality under Reg21(5)(a) and the factors set out in Reg21(6)."

[5] The author then referred to the NOMS 1 assessment in respect of each sister and the reasons for the decision to deport. While the letter sets out a portion of the Judge's sentencing remarks it does not refer to the Judge's comment that she was "unlikely to reoffend" nor does it refer to the pre-sentence reports.

[6] A UK Border Agency case worker took the decisions in respect of each sister. In an affidavit in respect of Siegnette she said that she considered Siegnette's residence status within Northern Ireland and her personal conduct. She also considered whether this conduct represented a genuine,

present and sufficiently serious threat affecting a fundamental interest of society and also had regard to the fact that matters related to general crime prevention could not justify the decision. In her affidavit in respect of Signerella she set out at paragraph 8 what she considered to be the correct test to be applied as well as noting that a criminal conviction did not of itself justify a decision to deport. She averred that Signerella's personal circumstances were taken into account. At para 9 she considered the applicant's propensity to re-offend and in particular considered the impact of the applicant's offence on public security concluding that her offence was so serious that it represented a genuine, present and sufficiently serious threat to the public to justify deportation.

[7] In an affidavit the Operation Manager averred that in consultation with senior casework colleagues it was clear that Siegnerella met the criteria to consider her deportation and that whilst the respondent's (offender manager) indicated a low risk of reoffending "there was little substantive evidence provided by the offender manager to support this assertion". It was therefore felt that there were sufficient grounds to pursue her deportation on public policy grounds.

[8] Article 17 of the EC Treaty provides that every person holding the nationality of a Member State shall be a citizen of the European Union. Article 18(1) of the EC Treaty specifies the rights of movement and residence of EU citizens –

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member State, subject to the limitations laid down in this Treaty and by the measures adopted to give it effect."

[9] In defined circumstances restrictions may be placed on these rights. The relevant measures for such can be found in Article 27 of Directive 2004/38/EC2.

> "27.1. Subject to the provisions of this Chapter, Member States may restrict the freedom of and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
>
> 2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on

> the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."

[10] Directive 2004/38/EC2 is transposed into domestic law by the Immigration (European Economic Area) Regulations 2006 ("the Regulations") Article 21 (5) of which provides:

> "(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."

[11] At paragraph 17 of his judgment the learned trial judge summarised the limitations imposed on the ability of Member States to deport persons who have committed a criminal offence as established in several cases based on current or earlier similar Directives of the EU. These include Bouchereau [1977] ECR 1999 at paras 25-37, Calfa [1999] ECR 1-11 at paras 21-25; Nazli

[2000] ECR I-957 at paras 57-64 and Orfanopoulos [2004] ECR I-5257 at paras 64-68.

> [17]
> (i) Derogations from free movement must be interpreted restrictively, particularly in the case of citizens of the EU.
>
> (ii) Such measures must be based exclusively on the personal conduct of the person concerned. Previous convictions cannot in themselves justify deportation.
>
> (iii) There must be a genuine, present and sufficiently serious threat to the requirements of public policy.
>
> (iv) Such a (present) threat exists only where the personal conduct "indicates a specific risk of new and serious prejudice to the requirements of public policy"4 which must, as a general rule, be satisfied at the time of the expulsion.
>
> (v) EU law prevents the deportation of an EU citizen for general preventative reasons aimed at deterring other foreign nationals.

[12] At paragraph 18 of his judgment the learned trial judge set out several passages from the judgments in the cases referred to above.

> "[18] In Bouchereau [1977] ECR 1999 the European Court of Justice said:
>
> > 27. The terms of Art 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 insofar 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 concern 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 with the fundamental nature of the principle of the free movement of persons.

[19] In Orfanopoulous [2004] ECR 1-5257 the ECJ stated:

> '64. ... derogations from that principle [ie freedom of movement for workers] must be interpreted strictly.
>
> 65. ... A particularly restrictive interpretation of the derogations from that freedom is required by virtue of a person's status as a citizen of the Union. As the Court has held, that status is destined to be the fundamental status of nationals of the Member States.
>
> 66. Concerning measures of public policy ..., in order to be justified, they

must be based exclusively on the personal conduct of the individual concerned. ... Previous criminal convictions cannot in themselves justify those measures. As the Court has held, particularly in Bouchereau, the concept of public policy presupposes the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.

67. While it is true that a Member State may 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, the public police exception must, however, be interpreted restrictively, with the result that the existence of a previous criminal conviction can justify an expulsion only insofar as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy.

68. Community law precludes the deportation of a national of a Member State based on reasons of a general preventative nature, that is one which has been ordered for the purpose of deterring other aliens, in particular, where such measure automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy.

...

> 79. ... And thus the requirement of the existence of a present threat must, as a general rule, be satisfied at the time of the expulsion'."

[13] No complaint is made of this summary of the applicable legal principles nor was any made of the summary contained in the decision letter. It was contended that the decision maker did not apply them to the facts of the present case. The trial judge did not agree. He found that the decision maker was conscious of the correct legal test and he set out his conclusions at paragraph 25 of his judgment -

> "[25] The operative part of the letters identified the "continued" threat they were said to pose. This arose from the fact that for financial gain and fully aware of the risks they were taking both for themselves and for others as a consequence of importing Class A drugs they nevertheless committed the offences. It was thus considered that should they find themselves in similar circumstances they would reoffend for the same reason. Whilst the risk of reoffending may have been assessed as low the harm that would arise, if the threat crystallised, was so serious it was not considered reasonable to leave the public vulnerable to the effects of their reoffending. Given the pernicious effects of the importation and use of class A drugs which devastate individuals and communities the assessment that the public should not be left vulnerable to the consequences of their reoffending was plainly justified in the public interest. That judgment, in my view, is unimpeachable. It is clear that the decision maker was aware of the need for there to be a genuine, present and sufficiently serious threat and that is the analysis to which the operative part of the letter was directed. It was the indication of continued threat and the nature of that threat which enabled the decision maker to come to the judgment that each of the applicants posed a genuine, present and sufficiently serious threat to the public to, in principle, justify their deportation. Nor do I accept that the evidence indicates that the decision was based on general policy grounds rather than the personal conduct

> of the applicants. If this were so the earlier analysis in the letters of their personal conduct would have been superfluous."

[14] The learned trial judge then considered the alternative submission that the decision maker had proceeded on certain assumptions relating to the sisters which were incorrect. These related to their employment status and the level of their education. He concluded that reliance on these errors was misconceived as the point the decision maker was making was that should they find themselves in straightened circumstances again, they would chose to re-offend. He commented that the fact that Siegnette was better educated than the decision letter might indicate was hardly a point in her favour. He did not consider that the inaccuracies relating to their personal circumstances, including the reference to parental responsibility on the part of Siegnerella, adversely affected the outcome. What was material was the willingness to commit such offences for financial gain despite their seriousness and the likely consequences if detected, of which they were aware, and in the case of the Siegnerella, the consequences for her and her child.

[15] The arguments on behalf of the appellants mirrored to a large extent those placed before the learned trial judge. It was submitted that the decisions in Orfanopoulos and Nazli establish two tests applicable to deportation decisions. These are whether the conduct in questions gives rise to a present threat and whether it indicates a specific risk of new and serious prejudice should deportation not be ordered. It was submitted that if those tests had been applied the decision maker would have found no evidential basis on which to conclude that the appellants posed a present threat of the kind required. Reliance was placed on the sentencing remarks of the trial judge and the report of the probation service that both appellants presented a low risk of re-offending. In addition the NOMS assessment carried out prior to release indicated there was a low risk of re-offending. It was further argued that the letters communicating the decision to each appellant demonstrated that the decisions to deport were based on the seriousness of the offence committed by the appellants and not the risk they posed on release and in the case of each, there were significant factual errors which, if taken into account, would have affected the outcome.

[16] For the respondent it was submitted that the appellants had overstated the effect of the decision in Orfanopoulos. This case concerned automatic deportation following conviction of certain offences as provided for in domestic legislation. The ECJ held that it was not legitimate for national legislation to provide for automatic deportation. However deportation based on a consideration of the specific facts of a case would not offend EU law. The case of Nazli concerned the deportation of a Turkish worker under legislation which permitted deportation on general preventative grounds. Neither case established tests which were applicable in the instant cases. Alternatively it

was argued that the correct test had been applied and that a margin of appreciation is available to the decision maker whereby the circumstances pertaining at the time of the offence can be taken into consideration – see Bouchereau. The decision maker was entitled to find that the difficult personal circumstance of each appellant, which gave rise to the convictions, demonstrated evidence of personal conduct by the appellants from which a present threat could properly be inferred. Those difficult personal circumstances had not altered.

[17] In each decision letter the author accurately set out the legal requirements before deportation could be ordered in respect of EU nationals. In the case of Siegnette he continued –

> "In completing your NOMS 1 assessment the offender manager found that you posed a low risk of re-offending. In reaching this conclusion your offender manager has taken into consideration those factors which originally led to your offending behaviour and whether those same factors continue to exist. Whilst the risk of you re-offending is viewed as low the serious harm which would be caused as a result is such that it is not considered reasonable to leave the public vulnerable to the effects of your re-offending.
>
> It is considered that in view of your circumstances, unemployment, lack of education, should you find yourself in similar circumstances you would choose to re-offend. It is concluded that you committed the crime for financial fain and that you would re-offend for the same reason.
>
> [The author then quoted a portion of the Judge's sentencing remarks omitting his comment about re-offending]
>
> It is concluded that you have demonstrated a propensity to re-offend and that you represent a genuine, present and sufficiently serious threat to the public to in principle justify your deportation."

In the case of Siegnerella he stated –

> "In completing your NOMS 1 assessment the offender manager found that you posed a low risk of re-offending. In reaching this conclusion your offender manager has taken into consideration those factors which originally led to your offending behaviour and whether those same factors continue to exist. However the overall score given on your report is in conflict with the written comments of the offender manager in particular the following issues have been highlighted within the NOMS 1 report. You stated that you lived in Amsterdam with your mother, siblings and son. You left school at an early stage as you became pregnant at the age of 18 years old and were unemployed. You further stated that your family was in substantial financial debt which led you to committing this offence for money. Whilst the risk of you re-offending is viewed as low the serious harm which would be caused as a result is such that it is not considered reasonable to leave the public vulnerable to the effects of your re-offending.
>
> It is considered that in view of your circumstances, unemployment, lack of education, parental responsibilities, debt should you find yourself in similar circumstances you would choose to re-offend. It is concluded that you committed the crime for financial fain and that you would re-offend for the same reason.
>
> [The author then quoted a portion of the Judge's sentencing remarks omitting his comment about re-offending]
>
> It is concluded that you have demonstrated a propensity to re-offend and that you represent a genuine, present and sufficiently serious threat to the public to in principle justify your deportation."

[18] While those letters contain errors relating to employment and education, it is clear that in each instance the decision was made on the basis that the drugs offence was committed for financial gain and that the appellants would re-offend for the same reason. Of course financial gain can be prompted by need or by greed. At the time of the commission of the

offence it appears there was financial need. Yet, despite the degree of education and previous employment, and it might be added, in the knowledge of the likely consequences if detected, the appellants proceeded to travel to Northern Ireland and commit the importation offence.

[19] The illegal importation of drugs for supply to others poses a risk to public security. Although the NOMS and probation assessments did not disclose a high risk of reoffending, the requirements of public policy and public security are different appraisals from the discrete tests applied by the probation officer and the NOMS assessor. Siegnerella's personal circumstances were difficult before the offence was committed and this position had not changed by the time the deportation decisions were taken. At the time of the offence Siegnette was a student. She and her family were living in poverty and the offence was committed for financial reasons. At the time of the decision she had lost her accommodation in Holland and her personal circumstances had therefore not improved.

[20] The relevant legal framework is as set out by the learned trial judge in his judgment. Bouchereau, Nazli and Orfanopoulos were all cases concerned with the legality of automatic expulsion consequent upon conviction. Nonetheless they provided some assistance relating to the approach to be adopted in such cases. Orfanopoulos is the latest case and the following principles can be derived from it.

1. The principle of the freedom of movement of workers should be given a broad interpretation;

2. that exceptions to the freedom of movement of workers which justify deportation should be interpreted in a restrictive manner;

3. that deportation based on public security or public policy must be based exclusively on the personal conduct of the person concerned;

4. that the existence of a previous criminal conviction cannot of itself justify deportation but the state authority is entitled to consider the circumstances which gave rise to that conviction and the conduct of the person himself which lead to it;

5. that the relevant circumstances and conduct must provide sufficient evidence of a genuine, present and sufficiently serious threat to one of the fundamental interests of society.

[21] It is not disputed that the importation of drugs is a threat to one of the fundamental interests of society, namely the health and security of citizens. Any threat to the fundamental interests of society must be serious. The existence of a threat is not the same as a certainty that the threat will be

carried out. In this context it means a risk; not a fanciful risk, but a real risk. It is well recognised that past conduct is a good indicator of the existence or otherwise of a future risk.

[22] It is against that background that this court has to consider whether the decision maker was correct to conclude that there existed the present threat required, in order to justify deportation. In some cases the evidence which justifies the risk may be overwhelming. In others, it may be just sufficient. There will always be a broad spectrum of threat in cases of this nature. Some will fall within the test and others without. The evidence in this case was not overwhelming, but neither was it non-existent. There was no evidence that their financial position had improved. There was however, in my opinion, sufficient evidence, based on the conduct of the appellants in the commission of the offence of importation, together with their undisputed personal circumstances at the time of the offence, to justify the conclusion that there existed a genuine present threat that the appellants would re-offend should their financial situation require it.

[23] Much reliance was placed on the errors contained in the decision letters. These related to the extent of their education and employment. In my opinion these do not impinge on the reasoning of the decision to deport nor do they detract from it. I agree with the learned trial judge that they were not material. The decision letters do not refer to the judge's comments about the likelihood of re-offending, though they quote part of the judge's comments. What is clear from the letters however is, that the low risk of re-offending was in the mind of the decision maker as clearly were the sentencing remarks of the trial judge, who did not exclude the possibility of re-offending. I do not think therefore that it can be said, that the decisions were taken in the absence of the judge's view on that issue.

[24] It is for the Secretary of State to reach his own conclusion while taking into account the opinions of the other statutory bodies concerned (see YK (Bulgaria) v Secretary of State for the Home Department [2009] EWCA Civ 530). In his affidavit dated 22 September 2009 relating to the case of Signerella, the case worker deposed at paragraph 9 that –

> "9. I also considered the Applicant's propensity to re-offend and in particular I considered the impact of the applicant's offence on public security. I concluded that the applicant's offence was so serious that it represented a genuine, present and sufficiently serious threat to the public to justify the applicant's deportation."

[25] At paragraph 8 the case worker deposed that the decision to deport must be based exclusively on the applicant's personal conduct and that the conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. I do not consider that in paragraph 9 the case worker was stating that the decision was based on the seriousness of the offence. The 'it' in the second sentence referred to the offence and not the seriousness. I do not think the reasoning in the decision letters was based on the seriousness of the offence. In my opinion the decision was based on the offence and the conduct of the appellant in its commission.

[26] Accordingly I conclude that the decision of the trial judge was correct and I would dismiss the appeal.

SIR JOHN SHEIL **SHE8285**

[1] The appellants appeal against the decision of Treacy J dismissing their applications for judicial review of the decisions to deport them from the United Kingdom. The appellants, who are sisters, are Dutch nationals.

[2] On 17 November 2008 both sisters pleaded guilty to attempted importation to the United Kingdom of 136 grams of cocaine, following there being apprehended at Belfast International Airport. His Honour Judge Smyth sentenced Seignette, the older sister, to 3 years imprisonment and sentenced Siegnerella to 2 ½ years' imprisonment, which sentences were duly served by the sisters. The Secretary of State made deportation orders against the two sisters on 3 August 2009 and 23 June 2009 respectively.

[3] The relevant legislation is set out in detail in the judgment of the learned Chief Justice in this appeal. I refer only to Regulation 21(5) of the Immigration (European Economic Area) Regulations 2006 which provides:

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

[4] In Orfanopoulous [2004] ECR 1-5257 the European Court of Justice at paragraph 67 stated:

> "While it is true that a Member State may 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, the public policy exception must, however, be interpreted restrictively, with the result that the existence of a previous criminal conviction can justify an expulsion only 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."

[5] In its letter of 23 June 2009 to the first named appellant setting out the reasons for her deportation, the respondent stated that:

> "It is concluded that you have demonstrated a propensity to reoffend and that you represent a genuine, present and sufficiently serious threat to the public to in principle justify your deportation."

This conclusion is reached despite the following:

(i) In sentencing the appellants, both of whom had clear records, the learned trial judge stated:

> "The value of the drug was not very considerable. The quantity was 136

> grams. It, however, is a Class A drug. Both of you were willingly used . . . I accept that these drugs were intended for somebody else. The financial reward to you was not that great . . . I am taking into account that you pleaded guilty. You were ultimately helpful to the police in so far as you could be, and also that you have clear records, and that based with your plea, means that you are unlikely to reoffend. I regard these sentences as sufficient to make it clear to anybody who is using this means of importation that there are serious risks and prison sentences are inevitable."

(ii) The probation officer in his pre-sentence report in respect of Siegnerella, having stated that she was within the low range of risk of reoffending, concluded by stating that "I do not feel that her behaviour in general represents any risk of harm to others". In respect of Seignette, he stated that she was within the low range of risk of reoffending and concluded by stating that "she does not present any direct risk of harm to others".

(iii) The assessment of the National Offenders Management Service stated in respect of each of the sisters that she posed a low risk of harm to the public and a low risk of reoffending.

[6] Further, in its letter of 23 June 2009 to the first named appellant, the respondent stated that "it is concluded that you committed the crime for financial gain and that you would reoffend for the same reason." This sentence is immediately preceded by the sentence that "it is considered that in view of your circumstances, unemployed, lack of education, parental responsibilities, debt should you find yourself in similar circumstances you would choose to reoffend." The respondent's reliance on "lack of education" is factually erroneous; the same is true to a lesser extent in relation to lack of employment in the past. Her probation officer in the pre sentence report had stated:

> "The defendant like her older sister and co-defendant did well at school. She went on to study social work at college but at the age of 18 she fell pregnant and had to leave the course before qualifying. Her relationship with her child's father was a violent one. Miss Flaneur

> tells me that her ex-partner was often violent and abusive towards her and so they eventually separated. Once her son was born she returned to education for a short while. However she found it difficult to cope financially as she did not have any income and so she left education and began working part time in a shoe shop. This brought in some income, however she was giving the majority of her income to her mother leaving her with little for herself or her son. Miss Flaneur has been unemployed now since January 2008 and from January did not have any income at all. She reports that her mother is in extreme financial difficulties and may get evicted from her house as she has significant outstanding domiciliary debts."

That part of the deportation letter of 23 June 2009 stating that, as set out above, the first named appellant "would reoffend for the same reason", is followed immediately by an extract from the remarks of the sentencing judge. In that extract there is a serious omission, namely that His Honour Judge Smyth, who is a very experienced judge, had stated that the appellant in his opinion was "unlikely to reoffend".

[7] The reasons for deportation in respect of the second named appellant, as set out in the letter of 3 August 2009, are in almost identical terms and the same criticisms may be made in respect of it.

[8] I do not consider that there was a proper evidential basis for the conclusion by the respondent that either sister had demonstrated a propensity to reoffend or that there was a genuine, present and sufficiently serious threat to the public to in principle justify her deportation and I do not consider that the conclusion reached by the Secretary of State in either case is proportionate or reasonable. I would quash the two decisions.