

ENGLAND AND WALES / JUDGMENT

Kluxen, R v

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Case No: 200906205 A9 (KLUXEN) 200903011 A2 (ADAM) & 200903013 A2 (ROSTAS) Neutral
Citation Number: [2010] EWCA Crim 1081 IN THE HIGH COURT OF JUSTICE COURT OF APPEAL
(CRIMINAL DIVISION) ON APPEAL FROM : MISS RECORDER CUTTS QC T20090309 (KLUXEN)
HIS HONOUR JUDGE CURRAN T20087093 -1 (ROSTAS) & T20087093 - 2 (ADAM) Royal Courts of
Justice Strand, London, WC2A 2LL Date: 14/05/2010 Before LORD JUSTICE THOMAS and MR
JUSTICE MADDISON SIR GEOFFREY GRIGSON

- ----- Between : Respondent Regina
- and - Patricia Kluxen And Between Regina
- and - German Rostas and Superman Adam
- -----
- ----- Mr E Boateng-Addo (instructed by Hanson Woods Solicitors LLP)
for the Appellant (Kluxen) Miss C Laing QC and Miss Flavia Kenyon (instructed by Johl &
Walters) for the Appellant s (Adam & Rostas) Appellant Appellant Respondent Miss E
Pearson (instructed by The Crown Prosecution Service) for the Respondent Hearing dates:
23 February 2010
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Judgment

Mr Justice Maddison: 1. This is the judgment of the Court to which we have all contributed.

Introduction

2. 3. These appeals were listed together to enable the court to consider the circumstances in which a court should recommend an offender's deportation and whether or not different principles should be applied in this regard to offenders who are and are not citizens of the European Union (EU). The appellants Adam and Rostas, Romanian nationals, pleaded guilty on 1 May 2009 to an offence of conspiracy to steal and on 22 May 2009 they were sentenced to two years detention and recommended for deportation. When their appeal came on for hearing in August 2009, the appeal was adjourned to enable full argument to be presented on the approach to be adopted when a court considered recommending for deportation an offender who was a citizen of the EU. The appellant Kluxen, a Ghanaian national was

convicted on 29 September 2009 of immigration offences and on 6 November 2009 was sentenced to a total of 30 months imprisonment and recommended for deportation. The effect of the United Kingdom Borders Act 2007 4. We will first consider whether recommendations should have been made for the deportation of any of the appellants. In our judgement, they should not. This conclusion is based not on the merits of their individual cases (to which we turn at paragraph 49 below), but on the effect of the United Kingdom Borders Act 2007 (the 2007 Act). (a) The provisions of the Act 5. 6. 7. The relevant provisions of this Act were brought into force on 1 August 2008 by the United Kingdom Borders Act 2007 (Commencement No.3 and Transitional Provisions) Order 2008 (2008 SI No.1818). They apply to all convicted persons who are not British citizens, whether they are citizens of the EU or not. Section 32 (5) provides that the Secretary of State must make a deportation order in respect of a “foreign criminal” unless one of the exceptions in section 33 (to which we refer at paragraph 8 below) applies. Section 32(1) defines a “foreign criminal” as a person who is not a British citizen, is convicted in the United Kingdom of an offence, and “to whom Condition 1 or 2 applies”. Condition 1, defined in section 32(2), is much the more likely to arise in practice, and is the condition that applies in the cases of all three appellants. It is that “...the person is sentenced to a period of imprisonment of at least 12 months”. By section 38(1)(c) imprisonment for this purpose includes detention. A custodial sentence of at least 12 months must attach to a single offence before Condition 1 applies. This is because section 38(1)(b) provides that Condition 1 does not apply to “...a person who is sentenced to a period of imprisonment of at least 12 months only by virtue of being sentenced to consecutive sentences amounting in aggregate to more than 12 months”. (The emphases are ours). In our judgement, the last four words of this extract must be read as meaning “12 months or more”. Such a reading would avoid an inconsistency with the words ‘at least’ in section 32(2) and earlier in section 38(1)(b). 8. The five exceptions within section 33 include cases where the removal of the “foreign criminal” pursuant to a deportation order would breach his rights under the European Convention on Human Rights, or the United Kingdom’s obligations under the Geneva Convention relating to the Status of Refugees; where the Secretary of State thinks that the “foreign criminal” was under 18 on the date of conviction; and where specified orders under the Mental Health Act, 1983 (including orders under section 37) are in force in respect of the “foreign criminal”. (b) The making of recommendations 9. In our judgement, since the 2007 Act came into force it is no longer appropriate for a court to recommend the deportation of a “foreign criminal” as defined in section 32. This is so for two reasons. i) ii) No useful purpose would be served by doing so. The Secretary of State is obliged by section 32(5) to make a deportation order unless one or more of the exceptions specified in section 33 applies, and it is for the Secretary of State to decide whether any of those exceptions does apply. Although section 32 of the 2007 Act does not expressly prevent the Court from recommending the deportation of a “foreign criminal” it does expressly remove any need for the Court to do so. To explain this, it is necessary to turn to the Immigration Act 1971 (1971 Act). The power of the Secretary of State to order the deportation of a person who is not a British Citizen derives from section 5(1) of that Act. This provides that “where a person is under section 3(5) or (6)

above liable to deportation... the Secretary of State may make a deportation order against him...". Sections 3(5) and (6), in their present form, provide that a person who is not a British Citizen shall be liable to deportation if: 1. the Secretary of State deems his deportation to be conducive to the public good (section 3(5)(a)); or

2. another person to whose family he belongs is or has been ordered to be deported (section 3(5)(b)); or
3. after he has obtained the age of 17, he is convicted of an offence punishable by imprisonment and is recommended for deportation by a court empowered by the 1971 Act to do so (section 3(6)): that is by any court having power to sentence a person to whom section 3(6) applies unless the court commits him to be sentenced or further dealt with for the offence by another court (section 6(1)). Returning to the 2007 Act, section 32(4) provides that "for the purpose of section 3(5)(a) of the 1971 Act the deportation of a foreign criminal is conducive to the public good". Thus any "foreign criminal" is liable to deportation under section 3(5)(a) of the 1971 Act and must be deported under section 5(1) of that Act by Draft 18 February 2025 13:36 Page 3 virtue of section 32(5) of the 2007 Act. There is no need for a court to be involved in this process at all.
10. We have considered whether, when sentencing a "foreign criminal", it is necessary for the court to explain during its sentencing remarks that it is not recommending his or her deportation because the 2007 Act applies. In our judgement this is not necessary, though of course a court may do so if it wishes. Offenders to whom the 2007 Act does not apply 11. Although that conclusion will, as we shall explain, dispose of the three appeals, as the hearing of the appeals in the case of Rostas and Adam was adjourned to consider the position of EU citizens, we will set out our views on the exercise of the Court's power to recommend deportation in the case of an offender who is not a British Citizen, but to whom the 2007 Act does not apply. This will arise if the offender concerned does not receive any single custodial sentence of 12 months or more, or receives a non- custodial sentence, and is therefore not a "foreign criminal" as defined in section 32 of the 2007 Act. (a) The Nazari test 12. The test to be applied by a court when deciding whether or not to make a recommendation for an offender's deportation has been expressed differently in different cases. We begin with the familiar case of Nazari and others (1980) 71 Cr. App. R. 87, in which Lawton LJ said at page 95: "First the Court must consider...whether the accused's continued presence in the United Kingdom is to its detriment. This country has no use for criminals of other nationalities, particularly if they have committed serious crimes or have long criminal records... The more serious the crime and the longer the record the more obvious it is that there should be an order recommending deportation. On the other hand, a minor offence would not merit an order recommending deportation...". We will refer to the test "...whether the accused's continued presence in the United Kingdom is to its detriment" as "the Nazari test". In Nazari, none of the appellants were EU citizens. They were Iranian, Sri-Lankan and Spanish nationals. Spain had not yet acceded to the EU. (b) 13. The Bouchereau test In subsequent cases, in which this Court was dealing only with EU citizens, it was said that the

court must consider whether the offender's conduct (including the instant offence and any earlier ones) constituted "...a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society". These were the cases of *R. v. Kraus* (1982) 4 Crim. App. R. (S.) 113; *R. v. Compassi* (1987) 9 Crim. App. R. (S.) 270; *R. v. Escauriaza* (1988) 87 Crim. App. R. 344; and *R. v. Spura* (1988) 10 Crim. App. R. (S.) 376. In all of these cases the Court adopted the reasoning of the European Court of Justice in *R. v. Bouchereau* [1987] Draft 18 February 2025 13:36 Page 4 (c) 14. 15. QB 732 (a case to which we will return). Accordingly we will refer to this second test as "the Bouchereau test". Is the Bouchereau test still valid? The Bouchereau test was based on a European Directive which has since been replaced. It is therefore necessary to consider if it is still valid. In *Bouchereau*, the ECJ considered the former Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. We will refer to this as "Directive 64/221". Article 3 of Directive 64/221 provided: "(1) Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned.

- (2) Previous criminal convictions shall not in themselves constitute grounds for the taking of such measures." Article 3 was intended to amplify what was then Article 48 of the Treaty of Rome, which provided for the security of freedom of movement for workers "...subject to limitations justified on grounds of public policy [or] public security..." 16. In the case of *Van Duyn* [1974] E. C. R. 1337 the ECJ had held that Article 3 of Directive 64/221 conferred on individuals rights which were enforceable by them in the courts of Member States and which the national courts must protect. 17. In *Bouchereau*, the ECJ held, in answer to the three questions asked of it, that: i) ii) iii) a recommendation for deportation was a "measure" within Article 3(1) since it was a pre-condition for the making of a deportation order under section 3(6) of the Immigration Act 1971; the effect of Article 3(2) was that a previous criminal conviction could be taken into account only if it was evidence of personal conduct constituting a present threat to the requirements of public policy; and "recourse by a national authority to 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." 18. 19. It will be apparent that the Bouchereau test was formulated by reference to the answer of the ECJ to question number 3. Directive 64/221 was repealed and replaced by Directive 2004/38/EC of 29 April 2004 on the right of Citizens of the Union and their family members to move and Draft 18 February 2025 13:36 Page 5 reside freely within the territory of the Member States. We will refer to this as "Directive 2004/38". In explaining why, in our judgement, this development has not affected the validity of the Bouchereau test, we begin by setting out extracts from Directive 2004/38. 20. Article 3(1) of Directive 2004/38 provides: "This Directive shall apply to all Union Citizens who move to or reside in a Member State other than that of which they are a national...". Article 27(1) provides that: "...Member States may restrict the freedom of movement and residence of

Union Citizens... on grounds of public policy [or] public security...". Article 27(2) provides: "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 convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat effecting one of the fundamental interests of society...". 21. In our judgement, Article 27(2) of Directive 2004/38 was clearly intended substantially to re-state Article 3 of Directive 64/221 as interpreted and explained in Bouchereau, and to refer to the requirement of proportionality.

22. Moreover, in our judgement the decision in Bouchereau that a recommendation for deportation was a "measure" within Article 3 of Directive 64/221 applies equally to the word "measure" within Article 27 (2) of Directive 2004/38. True it is that there is some difference in wording between the 1964 and 2004 Directives, but they refer in identical terms to "measures taken on grounds of public policy or of public security". Moreover, there has been no relevant amendment to sections 3(6), 5(1) or 6(1) of the 1971 Act since Bouchereau was decided. We can find no justification for holding that the word "measures" in Article 27 of Directive 2004/31 has a different meaning from that of the same word in Article 3 of Directive 64/221.
23. With effect from 30 April 2006 the Immigration (European Economic Area) Regulations 2006 (S. I.2006 No.1003), to which we will refer as "the 2006 Regulations", transposed into the law of the United Kingdom the main elements (but not all) of Directive 2004/38. The 2006 Regulations do not refer to "measures" at all, and to that extent Article 27 of the Directive is not reflected in the Regulations. However, as a result of the decision of the ECJ in Van Duyn, Article 27 has effect in the law of the United Kingdom. Draft 18 February 2025 13:36 Page 6 24. (d) 25. For these reasons we conclude that the Bouchereau test has survived the replacement of Directive 64/221 by Directive 2004/38. Comparing the Nazari and Bouchereau tests On first reading the Bouchereau test might seem to be more exacting than the Nazari test, resulting in a higher threshold for offenders who are EU citizens than for those who are not. However, in a number of cases, this Court has accepted that for all practical purposes the tests are the same. In Escauriaza at pp. 348–9 it was said: "Thus under EEC Law a valid recommendation for deportation can only be made if at least two conditions are fulfilled: first, that there exists a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society – in our judgment, that is simply a somewhat fuller way of saying that the appellant's continued presence in the United Kingdom would be to its detriment – and secondly, that the reasons are given to the appellant for making the recommendation. Mr Turner who appeared before the Court as amicus curiae submitted that EEC law here simply mirrors the law and practice of this country. With that submission we agree." In Spura at p 378 the Court referred the Bouchereau test and continued: "...in the case of Escauriaza... the Court...concluded, accepting a submission from an amicus experienced in these matters, that EEC law simply mirrored the law and practice of the United Kingdom. On that basis, one goes back to the

test originally laid down in Nazari...where the test was said to be “does the potential detriment to this country justify the recommendation for deportation of this Appellant?... The overall test, as distilled by the European Court in Bouchereau is whether [a full enquiry into the circumstances] reveals that a genuine and sufficiently serious threat to the requirements of public policy has affected the fundamental interests of society.” This part of the judgment of the Court in Spura was adopted in R. v. Cravioto (1990) 12 Cr. App. R. (S.) 71, 74-5. More recently in R. v. Benabbas [2006] 1 Cr. App. R. (S.) 550(94) this Court was considering a recommendation for the deportation of an Algerian national. Giving the judgment of the Court, Rix LJ referred to both the Nazari and the Bouchereau tests. He continued at paragraph 16: “The Appellant is not of course an EU national, but we refer to Bouchereau because English authority (see below) has said that the “detriment” principle in English law works on the same basis.” Later Rix LJ referred to the cases of Escauriaza and Cravioto. Draft 18 February 2025 13:36 Page 7 26. 27. Thus there is a consistent line of authority from this Court to the effect that the Nazari and Bouchereau tests are substantially the same; and thus that a court considering recommending an offender’s deportation should apply substantially the same test whether the offender is or is not a citizen of the EU. This court has not yet been required to decide whether this approach should be varied, given that Article 27(2) of Directive 2004/38 includes the concept of proportionality not expressly referred to either in Article 3 of Directive 64/221 or in the case of Bouchereau. In any event, in our judgement, both the Nazari and the Bouchereau tests set at a high level the bar that must be cleared before a recommendation for deportation can be made. Lawton LJ did not go so far as to say in Nazari that it was only defendants convicted of serious crimes or having long criminal records whose continued presence in the United Kingdom would be to its detriment, but he clearly had such persons particularly in mind. The terms in which the Bouchereau test is expressed themselves indicate its demanding nature. In our view it will rarely be that either test is satisfied in the case of an offender none of whose offences merits a custodial sentence of 12 months or more. An offender who repeatedly commits minor offences could conceivably do so, as could a person who commits a single offence involving for example the possession or use of false identity documents for which he receives a custodial sentence of less than 12 months (as in Bennabas above). But we repeat that such cases will be rare; and we observe that even if a court makes no recommendation for an offender’s deportation, the Secretary of State may nevertheless deport him if he deems this conducive to the public good. (e) Offenders to whom the 2007 Act does not apply: conclusion

28. We conclude that it will rarely be appropriate to recommend the deportation of an offender who is not a British Citizen, but to whom the 2007 Act does not apply because he is not a “foreign criminal”; and that this is so whether or not the offender is a citizen of the EU. (f)
29. Matters not to be taken into account Before concluding, we will refer to five matters which in our judgement should not be taken into account on the rare occasions when a recommendation for deportation is being considered. The first three can be shortly stated and the same reasoning applies to the three: i) ii) The rights of the offender under the European Convention on Human Rights, of which Articles 2, 3 and 8 are those most likely to

be engaged. This is for the reasons explained in paras 15 – 22 of the judgment of this Court delivered by Stanley Burnton J. in *R. v. Carmona* [2006] 2 Cr. App. R. (S.) 662: in essence that the Secretary of State and, in the event of an appeal against a deportation order, the Asylum and Immigration Tribunal, are able and better placed than a sentencing court to consider the offender's Convention rights. The effect that a recommendation for deportation might have on innocent persons not before the Court, such as members of the family of the offender concerned (see *Carmona* at paragraphs 18 and 21, disapproving the remarks of Lawton LJ in this regard in *Nazari* at page 95.) Draft 18 February 2025 13:36 Page 8 The extent to which the approach of the Court in *Carmona* to the first and second factors would have been different had the Court been referred to the incorporation within Article 27(2) of Directive 2004/38 of the principle of proportionality is a matter which may fall to be considered in future cases. It does not arise for decision in these appeals. iii) The political situation in the country to which the offender may be deported (see *Nazari* at page 95 and *Carmona* at paragraphs 18 and 19). 30. The fourth and fifth matters apply only to EU citizens, They may, in the light of the 2007 Act be wholly academic given the Secretary of State's policy that no citizen of the European Economic Area will be removed unless the prison sentence imposed is two years or more. However both matters were argued before us and we will express our view, though unfortunately it cannot be done as shortly as we would like. 31. The fourth matter is Article 28 of Directive 2004/31. i) This Article has been relied on on behalf of the Appellant Kluxen. It was also referred to in *Carmona*, at paragraph 3, and is mentioned in paragraph 5-919 of Archbold (2010) where the criteria for the exercise of the power to recommend an offender's deportation are discussed. Article 28(1) provides: "Before taking an expulsion decision on grounds of public policy or public security the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin". ii) By Articles 28(2) and (3), the host Member State may take an expulsion decision against a Union Citizen who has the right of permanent residence on its territory only on serious grounds of public policy or public security; and against a Union Citizen who has resided in the host Member State for the previous ten years or is a minor (unless expulsion is necessary in the minor's best interest) only on imperative grounds of public security. (The emphases in this paragraph are ours). Article 28 applies only to EU citizens. If it governed the decision of a court to recommend an offender's deportation, it would clearly require the court to approach that decision differently according to whether the offender was or was not an EU citizen. In our view, however, Article 28 does not govern such a decision. It governs only the decision of the Secretary of State to make a deportation order. It prescribes matters to be taken into account before an "expulsion decision" is taken. The courts of England and Wales have no jurisdiction to make an "expulsion decision". They may recommend an offender's deportation, but the decision whether or not actually to deport the offender is taken only by the Secretary of State though subject to appeal to the AIT. We consider it significant that Article 27, which does apply to deportation recommendations, refers only to "measures" whereas Article 28 refers only to

“decisions”. Draft 18 February 2025 13:36 Page 9 32. The fifth matter is the 2006 Regulations. These have been relied on by the Appellants and are referred to in paragraph 5-919 of Archbold (2010). i) They apply only to nationals of states within the “European Economic Area” (EEA) which by regulation 2(1) are states within the EU (other than the United Kingdom), together with Norway, Iceland, Liechtenstein and Switzerland. Regulations 19 and 21 govern decisions to remove such persons from the United Kingdom. Insofar as it is relevant, regulation 19 provides: “(3) ...a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these regulations may be removed from the United Kingdom if -...

- (3) he would otherwise be entitled to reside in the United Kingdom under these regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy [or] public security...in accordance with regulation 21.” ii) iii) Regulation 21 then sets out matters to be taken into account when a “relevant decision” is taken. By regulation 21(1) a “relevant decision” is an “EEA decision taken on the grounds of public policy [or] public security...”. The definition of an “EEA decision” in regulation 2(1) includes “a decision under these Regulations that concern a person’s...(c) removal from the United Kingdom”. This brings one back to regulation 19(3), and to the Secretary of State. (In the passages from the 2006 Regulations cited above, we have omitted references to public health which do not bear on the matters we are considering). By virtue of regulations 21(3), (4) and (6), the matters to be taken into account when a “relevant decision” is taken include those referred to in Article 28 of Directive 2004/38. If regulations 19 and 21 governed the decision of a sentencing court to recommend an offender’s deportation, they would clearly require that court to approach that decision differently according to whether the offender was or not an EEA citizen. In our view, however, these regulations do not govern such a decision. Like Article 28 itself, they govern only the decision of the Secretary of State to make a deportation order. The 2006 Regulations refer throughout to “decisions” rather than to “measures”. For the reason explained in paragraph 31.ii) above when we were considering Article 28, we regard this as significant. More importantly, when providing for the removal of EEA nationals from the United Kingdom, the 2006 Regulations refer expressly and exclusively to decisions to be taken by the Secretary of State. Nowhere in the 2006 Regulations is there any reference to any sentencing court. iv) Our conclusion that the 2006 Regulations govern only decisions to deport offenders taken by the Secretary of State is strengthened by reference to regulation 21(6). This substantially replicates Article 28(1) of Directive 2004/38 (see paragraph 31.i) above). Regulation 21(6) refers not only to a “relevant decision” but also to “the decision maker” (the latter in substitution for “the host Member State” in Article 28(1)). The definition of “decision Draft 18 February 2025 13:36 Page 10 maker” in regulation 2(1), insofar as it is material, refers to the Secretary of State. Again there is no reference to any sentencing court. v) For the sake of completeness, we should refer to one provision within the 2006 Regulations which on first examination might seem to run counter to our conclusion. This is regulation 21(5). It substantially replicates Article 27(2) of Directive 2004/38 which, as explained above, does apply to a deportation recommendation. In our view it does not

follow that a sentencing court should have regard to the 2006 Regulations. All that follows is that the matters which, by virtue of Article 27(2), a sentencing court must consider when deciding whether to recommend an offender's deportation are also matters which, amongst many others set out in regulation 21, the Secretary of State must also consider when deciding whether to order an offender's deportation. vi) We would add (by analogy to the reasoning in Carmona) that the Secretary of State is better placed than a sentencing court could be to assess the matters set out in Article 28 of Directive 2004/38 and in regulation 21 of the 2006 Regulations; and that, unlike a sentencing court, he is able to do so when an offender's deportation is actually being considered, which may be long after any recommendation for the offender's deportation that the sentencing court may have made. vii) It is to be noted that even before Directive 2004/38 came into force, this Court in Carmona doubted whether Article 28 of Directive 2004/38 would apply to a recommendation for deportation, a recommendation not being a "decision" within Article 28. However, the Court added that "we apprehend that the provisions of the new Directive will have a significant effect on the exercise by the courts of the power to make a recommendation for deportation, since it would not be right to make a recommendation for deportation in circumstances where the Directive precludes actual deportation". By way of comment on this passage it is said in Archbold (2010) at paragraph 5 – 919 that "it is likely, therefore, that courts dealing with persons covered by these regulations will apply the principles in Article 28 of the Directive, as elaborated by Regulation 21(5) of the 2006 Regulations". For the reasons we have given, we respectfully disagree. We would add that the passage from Carmona that we have cited did not refer specifically to Article 28, and that neither that Article nor any part of Regulation 21 precludes the making of a deportation order. Summary of the position under the 2007 Act and in relation to other cases 33. It may be helpful if we summarise the position: i) ii) In cases to which the 2007 Act applies, it is no longer necessary or appropriate to recommend the deportation of the offender concerned. In cases to which the 2007 Act does not apply, it will rarely be appropriate to recommend the deportation of the offender concerned, whether or not the offender is a citizen of the EU. iii) If in a case to which the 2007 Act does not apply a Court is, exceptionally, considering recommending the deportation of the offender concerned, it Draft 18 February 2025 13:36 Page 11 should apply the Nazari test in tandem with the Bouchereau test, there being no practical difference between the two. This is so whether the offender is or is not a citizen of the EU. iv) However, the Court should not take into account the Convention Rights of the offender; the political situation in the country to which the offender may be deported; the effect that a recommendation might have on innocent persons not before the Court; the provisions of Article 28 of Directive 2004/38; or the 2006 Regulations. 34. The powers of the Secretary of State to make deportation orders if appropriate are unaffected by the approach that we have adopted. Offenders to whom the 2007 Act applies will be deported in any event unless one of the exceptions under section 33 applies; and where the 2007 Act does not apply, the Secretary of State has the power to deport offenders under section 3(5)(a) of the 1971 Act if he deems this to be conducive to the public good. Neither are the rights of offenders affected by our approach. In the event that a deportation order is made an offender may if

appropriate apply to the Secretary of State to revoke the Order (see section 5(2) of the 1971 Act and section 32(6) of the 2007 Act). Alternatively he may appeal against the decision to make the deportation order to the Immigration and Asylum Tribunal, pursuant to Regulation 26 of the 2006 Regulations. The appeal in Kluxen 35. 36. 37. The appellant Patricia Kluxen, who was born on 21 August 1964, is not a citizen of the EU. She is a Ghanaian national. On 25 September 2009 she was convicted by a jury in the Crown Court at Lewes of two counts of assisting the unlawful entry into the United Kingdom of another person, contrary to s.25(1) of the 1971 Act, and two counts of possessing false identity documents contrary to s.25(5)(c) of the Identity Cards Act, 2006. On 6 November she was sentenced by Miss Recorder Cutts QC to serve 30 months' imprisonment on the first two counts, and eighteen months' imprisonment on the other two counts, all the sentences to run concurrently. A recommendation was made for her deportation. Her application for leave to appeal against the length of her sentences was refused by the Single Judge, and has been renewed. The Single Judge granted her application for leave to appeal against the recommendation that she be deported. The appellant had a co-accused, Leticia Garban, who was born on 16 February 1980. Leticia Garban was charged and convicted only on the first count of the indictment. She was sentenced to 51 weeks' imprisonment suspended for two years, with an unpaid work requirement. No recommendation was made for her deportation. On 8 November 2008 the appellant Kluxen arrived at Gatwick Airport from Ghana. She had with her two children, a boy and a girl. The boy's travel documents were German, giving his name as Bernard Schatz. The girl's documents were also German and gave her name as Gwen Kirchoff. The travel documents and the names given were false. When questioned by immigration officers the appellant said that the boy was her son and the girl her niece. The officers were not satisfied and called the police. To the police, the appellant said that the boy was her nephew and that the girl was a child of a friend living in London. In fact the boy was the son of the appellant's co-accused and he, like the girl, who was ten years of age, was a Ghanaian national. Draft 18 February 2025 13:36 Page 12 38. 39. 40. 41. 42. It transpired that the co-accused had sent money to the appellant to fund the illegal entry of her son into the United Kingdom. The Recorder took the view that the appellant not only escorted the two children to the United Kingdom but had provided the false travel documents, and had done so for money. The appellant was of previous good character. She had lived in Germany for 14 years and had been married to a German national. She had three children aged 17, 13 and 12, two of whom lived in Germany with an aunt, and one of whom lived in Ghana with the appellant's extended family. A pre-sentence report assessed the appellant's risk of re-offending as 1 in 10. The co-accused was 29 years of age, of previous good character, and living legitimately in the United Kingdom. On the appellant's behalf, her counsel submits that there was an unjustifiable discrepancy between the custodial sentence received by the appellant and the suspended sentence imposed on the co-accused. In our judgement, however, the difference between the sentences was entirely justified. The co-accused was younger. She was convicted of only one offence, and that was in relation to her own son. The appellant on the other hand was involved professionally in that the children were unrelated to her, she acted for money and she

supplied the false documents. Counsel further submits that this was a case in which none of the aggravating features identified in the case of *R. v. Stark* [1999] 1 Cr. App. R. (S.) 422 was present. We disagree. The Recorder found that the offences were planned, that the appellant acted for money, and that the children were strangers to her. All these are amongst the aggravating factors identified in *Stark*. Counsel further submits that the Recorder failed to give sufficient weight to the mitigation available to the Appellant. In fact, save for her good character which the Recorder acknowledged, there was no mitigation. These were serious offences and a total sentence of 30 months' imprisonment cannot be regarded even arguably as manifestly excessive. Accordingly, we refuse the renewed application for leave to appeal against the sentences of imprisonment. We deal with the appeal against the recommendation for deportation at paragraph 49 and following below. The appeal in *Rostas and Adam* 43. The appellants German Rostas, who was born on 2 July 1990 and Superman Adam, born on 6 June 1988 are Romanian nationals and citizens of the EU. Romania acceded to the EU in January 2007. On 1 May 2009 in the Crown Court at Merthyr Tydfil they pleaded guilty to a single count of conspiracy to steal. On 22 May they were each sentenced by His Honour Judge Curran to serve two years' detention in a young offender institution, and recommendations were made for their deportation. They appealed against their sentences, including the recommendations for their deportation, by leave of the Single Judge. The appeals were heard by a different constitution of this Court on 4 August 2009. The appeal of Rostas against his two year sentence was dismissed, but Adam's sentence was reduced to eighteen months. 44. The conspiracy to steal of which these two appellants were convicted ran from 15 September 2007 to 12 November 2008. The appellants were part of a group of at Draft 18 February 2025 13:36 Page 13 least four Romanians who, in different combinations, would visit shops, banks and post offices, mainly in South Wales but occasionally in other parts of the United Kingdom. There they would use sleight of hand techniques to steal or attempt to steal money. The method most commonly used involved entering the premises concerned with a large amount of bank notes (the first notes); requesting that these be changed into notes of a different denomination (the second notes); having been handed the second notes, asking that the transaction be cancelled; skimming off some of the second notes before handing back a depleted bundle; retrieving the first notes from the cashier; and making off before the cashier realised that he or she had been left short, often by some hundreds of pounds. Numerous premises were targeted during the period of the conspiracy. On some occasions no money was taken. The total sum actually stolen was £2259. Though the evidence did not show that the appellants were present on every occasion relied on by the prosecution to establish the conspiracy, it did show that they were involved at regular intervals. There was evidence directly implicating Rostas on 8 May 2008, 28 July 2008, 2 October 2008 and 6 November 2008; and Adam on 16 September 2007 and 2 October 2008. Rostas had twice previously been convicted of offences committed in a similar manner, though charged contrary to sections 1 and 2 of the Fraud Act 2006. He had been fined on each occasion. The pre-sentence report in his case stated that he lived in Birmingham with his parents, his two sisters and his two children aged 2½ years and 7 months. He was married, but his wife had left him and his children were being looked after by his parents.

He had not worked since leaving school. His English was poor. His risk of re-conviction was assessed as medium to high. Superman Adam had been made the subject of a referral order for shoplifting in 2003, and fined for attempted shoplifting in 2007. The pre-sentence report in his case stated that he had never attended school and had a sporadic work record. He was married. He lived with his wife and his two year old daughter in Birmingham. His mother, sister and brother also lived in Birmingham. His grasp of the English language appeared to be poor. He said that he had no ties in Romania and had only dim memories of that country. He was extremely distressed and anxious about the possibility of being deported. His risk of re-offending was assessed as moderate to high. 45. 46. 47.

48. When passing sentence, His Honour Judge Curran referred to the planned nature of the offending, and commented that the sum of money actually obtained did not provide a measure of its serious nature. These remarks were echoed by Goldring LJ when delivering the judgment of this Court on 4 August 2009. The appeals on deportation 49. All three appellants fall squarely within section 32 of the 2007 Act. None is a British Citizen. All received sentences of imprisonment or detention of more than 12 months for a single offence. All three were convicted and sentenced after the 1 August 2008 on which date section 32 came into force. Kluxen's offences were committed between 13 October and 9 November 2008. The conspiracy charged against Rostas and Adam began before 1 August 2008 but it extended beyond that date and it is not disputed that both appellants were actively involved in the conspiracy after that date. Draft 18 February 2025 13:36 Page 14 50. Consistent with the approach we have indicated above, we quash the recommendations for the deportation of the Appellants, and allow all three appeals to that extent.
51. We are aware that this outcome will not have any practical effect. For the reasons we have explained the Secretary of State must in any event make a deportation order in respect of Kluxen unless he considers that one of the exceptions under section 33 of the 2007 Act applies in her case. We have been informed that Rostas has already been deported, and that Adam has been informed by the United Kingdom Border Agency, for reasons of which we are unaware, that he will not be deported. Draft 18 February 2025 13:36 Page 15

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