Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01019/2014

THE IMMIGRATION ACTS

Heard at Field House
On 21st October 2015

Decision and Reasons Promulgated
On 30th October 2015

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EMIRCAN AYTAC
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Kandola, Senior Home Office Presenting Officer by
For the Respondent: Ms A Radford, Counsel, instructed by Turpin & Miller Solicitors

DECISION AND REASONS

Introduction

1. The claimant is a citizen of the Republic of Cyprus born on 15th October 1959. He arrived in the UK on 14th October 1991. On 13th July 1993 he was granted leave to remain as a spouse, and on 28th July 1994 he was granted indefinite leave to remain as a spouse. On the 1st May 2004 Cyprus became a member of the EU.

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2. The claimant was convicted of fraudulent use of a vehicle licence/trade licence/registration document and fined £100 on 28th January 2004. He was convicted on 7th December and 21st April 2008 of conspiracy to fraudulently evade the prohibition on the importation of class A controlled drugs, and on 27th June 2008 he was sentenced to 16 years imprisonment. The claimant was in custody and then immigration detention for 7 years and 8 months from December 2006 to August 2014.

3. On 29th January 2013 the claimant was served with notice of liability to deportation. On 10th May 2013 he was served with a decision that s.32(5) of the UK Borders Act 2007 applied. On 28th May 2014 the Secretary of State made a decision to make a deportation order under the Immigration (EEA) Regulations 2006. This decision accepted that the claimant had a permanent right of residence, and that he could only be deported if there were imperative grounds of public security. His appeal was allowed by First-tier Tribunal Judge Devittie in a determination promulgated on the 24th October 2015.

4. Permission to appeal was granted by Upper Tribunal Judge Eshun on the basis that it was arguable that the First-tier judge had erred in law in not considering that the test of imperative grounds of public security might be met even if there was no risk of re-offending given the seriousness of the claimant's conviction, in accordance with R v Bouchereau [1977] EUECJ R -30/77.

5. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submission on Error of Law by the Secretary of State

6. Mr Kandola argued firstly, in summary, that the First-tier Tribunal had erred in law as it had accepted the concession of the Secretary of State that imperative grounds of public security applied in this case, when in fact if the law was correctly applied this test did not apply to the claimant, see SSHD v MG [2014] EU ECJ C-400/12. It was clear that the claimant's residence had been broken by his period of imprisonment so he was not integrated.

7. Secondly it was contended, in summary, for the Secretary of State that in any case there was a failure to consider that the fact of the claimant's very serious conviction and the findings within the OASys report about his role and connections indicated that there was a serious risk of harm if the claimant reoffended, so even if the risk of re-offending was assessed as low he could be said to pose a present and sufficiently serious threat to public policy. This could not be characterised as an ordinary risk of reoffending, as is done at paragraph 10 of the decision, which diminishes the claimant's criminality.

8. Thirdly, if the above errors were made out it became relevant that the proportionality assessment at paragraph 11 of the decision was also unlawfully conducted as the matters mentioned were all arguably not accurately stated: the claimant should not been seen simply as someone who had lived in the UK for 23 years; he should not be seen as someone who was integrated; caring for his wife would not necessarily be a factor which would prevent offending behaviour; the

claimant would not find it difficult to relocate to Cyprus as he and his wife had family there; and although his wife was a British citizen that was not a factor as she was free to return to the UK.

Conclusions

9. It is not arguable that the First-tier Tribunal erred in law by accepting the concession of the Secretary of State in the decision letter setting out the reasons for finding that the claimant met the test for qualifying for the highest level of protection against deportation: namely that he could only be deport on imperative grounds of public security.

10. The decision letter clearly reaches this conclusion taking an approach which follows the law set out in SSHD v MG. The guidance in this case states that: "*Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that a period of imprisonment is, in principle, capable both of interrupting the continuity of the period of residence for the purposes of that provision and of affecting the decision regarding the grant of the enhanced protection provided for thereunder, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment. However, the fact that that person resided in the host Member State for the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken*." The decision letter correctly indicates at paragraph 18 that ten years residence prior to the index conviction does not automatically qualify the claimant for this protection. It plainly looks at the relevant issues in determining whether the claimant does have this protection, as outlined in Land Baden Wurtemberg vTsakouridis [2011] CMLR 11 C-145/09, which were summarised in the letter as the "integration test".

11. The concession of the Secretary of State that this claimant had sufficient integration to acquire the imperative level of protection was one which was in compliance with the law, and was open to the Secretary of State to make. It clearly could not amount to an error of law by the First-tier Tribunal in taking this as their starting point.

12. It is also clear that it was open to the First-tier Tribunal to rely upon the assessment of risk by the probation service in the OASys Report, which was when all matters were considered that the claimant was a low risk of reconviction (4%) and a low risk of harm. The First-tier Tribunal set out the full sentencing remarks of the judge in the criminal matter at paragraph 2 of the decision and an entirely accurate summary of the OASys Report at paragraph 7. The First-tier Tribunal then considered all the evidence and reached its conclusions regarding the issues of harm and re-offending risk, including with proper reference to the evidence of the claimant and his wife, at paragraphs 10(i)-(iv). The reference to the claimant in any case posing no more than an "ordinary risk to society" refers back to what is said at paragraph 9 of the decision, which in turn sets out guidance given by the Upper Tribunal in MG and VC Ireland [2006] UKAIT, whereby the Upper Tribunal expressed the opinion that whether or not imperative grounds must amount to suspicion of commission of terrorist offences it clearly needed more

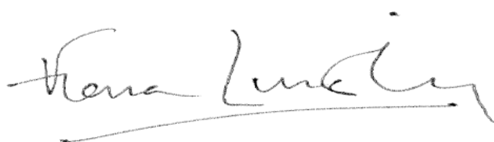
than the ordinary risk to society arising from the commission of offences by a convicted criminal.

13. The Secretary of State did not argue before the First-tier Tribunal that the claimant could pose an imperative risk to public security because R v Bouchereau meant that the fact of his original conviction absent any future risk of criminal behaviour met this test. What was said in R v Bouchereau was clearly addressing the lower test of whether a claimant could pose a present, genuine and sufficiently serious threat affecting a fundamental interest of society. It is also a case from 1977; the issue of whether a claimant might meet this test by having a past serious conviction has been revisited by the EUECJ in more recent decisions which clarify that a risk of new conduct threatening public security is required to justify expulsion in accordance with EU law: see for instance Nazli & Ors (External Relations) [2000] EUECJ C-340/97 at paragraph 61 where it is stated about a Turkish national who has the protection of the EU Association Agreement but who has been convicted in the trafficking of heroin: "*Accordingly, a Turkish national can be denied, by means of expulsion, the rights which he derives directly from Decision No 1/80 only if that measure is justified because his personal conduct indicates a specific risk of new and serious prejudice to the requirements of public policy*". This was also the approach taken by the Court of Appeal in SSHD v FV (Italy) [2012] EWCA Civ 1199, where the claimant had been convicted of a serious manslaughter with an assortment of previous less serious convictions.

14. As the First-tier Tribunal had properly and lawfully concluded that the claimant did not pose a genuine, present and sufficiently serious threat to public policy, at paragraph 10(v), let alone that his deportation was required on imperative grounds relating to public security, there was no need, in accordance with Regulation 21(5) of the Immigration (EEA) Regulations 2006 for there to have been any discussion of proportionality, so there can be clearly be no material error of law at paragraph 11 of the decision. In any case the factors indentified are all clearly relevant ones to proportionality, and there is no misdirection or law or irrationality in the assessment.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
2. The decision of the First-tier Tribunal allowing the appeal of the claimant is upheld.



Signed: Date: 26th October 2015
Upper Tribunal Judge Lindsley