Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00972/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 March 2017	**On 29 June 2017**

Before

HIS HONOUR JUDGE EYRE QC

Between

MR CEMAL AYDOGDU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Robinson, Counsel, Islington Law Centre
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. Cemal Aydogdu is a Turkish citizen of Kurdish origin. He was made subject to a deportation order in June of 2015 and was removed from this country in September 2015. That order and that removal followed his conviction in respect of an offence committed in 2003. The circumstances of that offence are not contentious and I take the summary of them from the decision of First-tier Tribunal Judge Macdonald.

2. On 11th February 2003 the Appellant went to Manchester Airport with his wife and his 7 year old daughter. At the entrance to the terminal building

he set various immigration papers alight and then when police officers arrived he poured petrol over himself, his wife and his daughter, splashed the police officers with petrol and threatened to set himself and his family on fire.

3. The current hearing results from the Appellant's application to revoke the deportation order. The Secretary of State refused that application in June of 2015, the effect being that by the time matters came before Judge Macdonald more than ten years had elapsed since the making of the deportation order.

4. The Appellant appealed against the refusal by the Secretary of State and that appeal was heard by Judge Macdonald in June of 2016 with his decision being dated 4th July 2016. It is in respect of that decision that this appeal takes place. Upper Tribunal Judge Pitt gave permission on ground 1 of the grounds of appeal but declined to give permission on other grounds.

5. Before me Ms Robinson sought to reopen the other grounds but I refused permission for that. Those other grounds being, in my assessment, directed to questions of findings of fact rather than matters of law. It was my view that Judge Pitt was entirely right to refuse permission in respect of them. I did not intend today's hearing to be complicated by the inclusion of those matters.

6. The law is not substantially in issue between the Appellant and the Respondent. The effect of Rule 391, shortly stated, is that with the passage of ten years from the making of a deportation order the proportionality of maintaining it in force must be assessed on a case by case basis. All are agreed that the relevant approach derives from the Court of Appeal decision in the case of *ZP (India) v The Secretary of State for the Home Department* [2015] EWCA Civ 1197. What it boils down to is that the proportionality of maintaining the deportation order in force must be assessed on a case by case basis having reference to the public interest but also to the particular circumstances of the particular applicant for a revocation.

7. The grounds on which Ms Robinson relies in this hearing are twofold. The first is the contention that although the First-tier Tribunal Judge stated the law correctly he did not apply it correctly. She says that the judgment and reasons for decision show that he had made up his mind based on the nature of the offending before looking at the particular circumstances of this particular appellant and so did not carry out the appropriate case specific assessment. The second element on which Ms. Robinson relies is to contend that the First Tier Tribunal Judge improperly took account of the public revulsion at offences of the kind with which we are concerned.

8. So, taking those in turn, did the First-tier Tribunal Judge apply a proper case specific assessment? By which I mean: did he in assessing the proportionality of maintaining the deportation order in the light of the

public interest take particular and proper account of the individual circumstances of the Appellant rather than applying a blanket approach determined by the desirability or appropriateness of deportation?

9. Ms Robinson's argument centres on the Judge's comments at paragraphs 100 to 103 of his decision and their position in the decision itself. At paragraph 100 the First-tier Tribunal Judge said this:

> "100. I have considered whether or not the passage of time lessens the Appellant's offence. It is now over thirteen years since he was sentenced. The Appellant was, literally, a spark away from killing or seriously injuring himself, his wife, his son, his daughter, two police officers and any members of the public who were nearby. A fire could have spread to the terminal building.
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> 101. I bear in mind that since 2003 there have been similar violent instances (but not identical) in the United Kingdom and in Europe at railway stations, airports and other public meeting places such as Members of Parliament surgeries. Some of those have been caused by terrorist groups and others by persons like the Appellant who might have carried out their acts in a moment of desperation and agitation. I find, if anything, looking at the Appellant's behaviour in 2016 that the passage of time shows the offence to be as serious (if not more serious) than it was in 2003 and that members of the public would still view the Appellant's offending with 'revulsion'.
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> 102. Members of the public are entitled to know that they are protected against such acts as those committed by the Appellant. Further, as a matter of deterrence, those who seek to remain in the United Kingdom or to enter the United Kingdom must be deterred from behaving in a similar fashion and be shown that by committing such acts they cannot circumvent legitimate immigration control."

At paragraph 103 the First-tier Tribunal Judge simply said that the fact that the conviction was spent had not changed his view.

10. He then went on, at 104, to say that the deportation order was made on 24th June 2005. He noted that the eleventh anniversary would be on 24th June 2016 and then said: "Rule 391 makes it clear that after ten years have elapsed consideration should be given on a case by case basis to whether the deportation order should be maintained." Then at paragraph 105 he added: "I have considered the matters raised on behalf of the Appellant both by himself and his family as to why the deportation order should be revoked."

11. Ms Robinson's contention is that the passages I have just read from paragraphs 100 to 103 show the judge having taken account of the nature

of the offending and having come to a conclusion based on that before taking account of the circumstances of the Appellant rather than, as he should have done, looking at matters in the round.

12. I do not accept that argument. Ms. Robinson's interpretation of the decision is an artificial interpretation of the decision with which we are concerned. The decision must be seen as a whole and construed as a whole. The judge set out the law correctly and at some length. He said that he was applying that law. He carried out a detailed assessment of the various factors raised on behalf of the Appellant and his family, that assessment being set out at paragraphs 105 and following.

13. At paragraph 119 the judge made an express comparison between the effect on the family life of the Appellant and the proportionality of the public interest deriving from the offence and the relevant public interest. That is the balancing exercise that he should have been carrying out and which he was in fact undertaking. That assessment of the contentions made by and on behalf of the Appellant continues from paragraph 105 through to paragraph 133 of his judgment.

14. Moreover, at paragraph 134 the judge said, in terms, that he had "looked at all the above factors in an overall and broad way and set them against the very clear public interest in maintaining the deportation order and I find it is still appropriate", he said, "to maintain the deportation order".

15. The contention of Ms Robinson involves an artificial construction or interpretation of this decision. It is clear that when the decision is seen as a whole the judge did not err in law because he was applying the public interest and the proportionality arising from it in the light of the particular circumstances of the particular Appellant and considering those circumstances with care. That was the exercise which he was required by law to perform.

16. The second line of attack Ms Robinson mounts is based on the reference in paragraph 101 of the decision namely that members of the public would still view the Appellant's offending with "revulsion". One needs in considering this line of argument to see where that phrase potentially derives from.

17. In the decision of *OH (Serbia) v Secretary of State for the Home Department* [2008] EWCA Civ 69**4** Lord Justice Wilson, as he then was, set out at paragraph 15 a number of propositions of matters which were relevant in such cases. One of those was at (c) where he said: "A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes." So that was Lord Justice Wilson in the Court of Appeal in *OH (Serbia).*

18. However, in the Supreme Court in the case of *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 those propositions were

revisited. At paragraph 70 Lord Wilson, as he had become, set out paragraph 15(c) of the *OH (Serbia)* propositions and said this:

> "I regret my reference there to society's revulsion at serious crimes and I accept Lord Kerr's criticism of it at paragraph 168 below. Society's undoubted revulsion at certain crimes is, on reflection, too emotive a concept to figure in this analysis. But I maintain that I was entitled to refer to the importance of public confidence in our determination of these issues. I believe that we should be sensitive to the public concern in the UK about the facility for a foreign criminal's rights under Article 8 to preclude his deportation. … Laws serve society more effectively if they carry public support."

19. Lord Kerr's comments were at paragraph 168. He commented on the *OH (Serbia***)** propositions saying this:

> "Expression of societal revulsion, the third of the factors applied in *OH (Serbia)*, should no longer be seen as a component of the public interest in deportation. It is not rationally connected to, nor does it serve, the aim of preventing crime and disorder. Societal disapproval of any form of criminal offending should be expressed through the imposition of an appropriate penalty. There is no rational basis for expressing additional revulsion on account of the nationality of the offender, and indeed to do so would be contrary to the spirit of the Convention."

20. It follows that there remained a difference of emphasis between Lord Wilson and Lord Kerr notwithstanding Lord Wilson's acceptance that revulsion as such is too emotive a concept to figure in this analysis. Lord Wilson made it clear that he was maintaining his support for the third *OH (Serbia)* proposition shorn of the reference to revulsion. Shorn of that reference the third *OH (Serbia)* proposition would read thus: "A further important facet is the role of a deportation order in building public confidence in the treatment of foreign citizens who have committed serious crimes."

21. Did First-tier Tribunal Judge Macdonald's reference in paragraph 101 of his judgment to revulsion, a reference which he put in quotation marks, taint his approach? Did it mean that he was taking account of revulsion or the public revulsion at such offending in a way which Lord Wilson now regards as inappropriate? My conclusion is that he was not. Paragraph 101, as each part of this decision must be, must be read in the context of the decision as a whole. In context it is a description of the seriousness of the offence and the relevance or otherwise of the passage of time to that seriousness.

22. That reference to revulsion at the end of paragraph 101 is also to be read in the context of 102. That paragraph begins by saying: "Members of the public are entitled to know that they are protected against such acts as

those committed by the Appellant", and it then goes on to deal with the question of deterrence.

23. It is very significant that, when seen in context, paragraph 101 is a consideration and assessment of the gravity of the offence. Revulsion is not said by the judge to be a factor being taken into account separately. The judge took account of the gravity of the offence. That was an appropriate thing to do. But he did not treat revulsion as a separate element over and above that gravity.

24. It seems to me that what the judge was doing was applying *OH (Serbia)* criterion or factor (c) properly because he was having regard to the building of public confidence. This is made apparent by reading paragraph 102 and in particular the opening words thereof. Lord Wilson despite rowing back from the use of the word "revulsion" maintained his preference for *OH (Serbia)* factor (c) as revised. It follows that in taking account of that factor the First Tier Tribunal Judge had not erred in law. It would have been an error of law if the First-tier Tribunal Judge had allowed taking account of public revulsion to taint his whole approach but it is clear, looking at the decision as a whole, that he did not.

25. It follows that neither of Ms McIntosh's arguments, elegantly expressed though they were, can be sustained and the appeal is dismissed.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Stephen Eyre
Date 24th March 2017

Judge Eyre QC

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 24th March 2017

Judge Eyre QC