IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006330

First-tier Tribunal Nos: DA/00088/2021
EA/03615/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14 December 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Secretary of State for the Home Department

Appellant

and

Nacim Rebani
(ANONYMITY DIRECTION REVOKED)

Respondent

Representation:
For the Appellant: Mr M. Parvar, Senior Home Office Presenting Officer
For the Respondent: Mr A. Bandegani, Counsel instructed by Fountain Solicitors

Heard at Field House on 14 September 2023

DECISION AND REASONS

1. By a decision dated 29 November 2022, First-tier Tribunal Judge G. Clarke ("Judge Clarke") allowed an appeal brought by the appellant, a citizen of France born on 17 November 1970, against a decision of the Secretary of State to deport him from the United Kingdom pursuant to regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The judge heard the appeal against the deportation order made under regulation 23(6)(b) of the 2016 Regulations under regulation 36 of the 2016 Regulations. There was a parallel challenge to a decision to refuse the appellant's application for pre-settled status pursuant to the EU Settlement Scheme ("the EUSS"). The appeals were linked and were both heard on 11 October 2022. The judge heard the EUSS appeal under regulation 3 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations"). The judge allowed that appeal also.

2. The Secretary of State now appeals against the decision of judge with the permission of First-tier Tribunal Judge Chohan.

3. I should observe that the Secretary of State has only submitted a notice of appeal by reference to the First-tier Tribunal appeal reference DA/00088/2021, concerning the decision under the 2016 Regulations, and not EA/03615/2021, concerning the EUSS decision. Consequently, there is only a single Upper Tribunal case reference, and it would appear that there is only one appeal before this tribunal, namely in relation to the deportation decision under the 2016 Regulations. Nothing turns on this since Mr Parvar abandoned ground 3, concerning the decision in EA/03615/2021, in any event.

4. For ease of reference, I will refer to the parties as they were before the First-tier Tribunal.

Anonymity order revoked

5. I indicated to the parties at the hearing that my preliminary view was that the anonymity order made by the First-tier Tribunal was not required. While the appellant has minor children, without more that is not a reason to make an order for anonymity: see *Walile (deprivation: self-incrimination: anonymity)* [2022] UKUT 17 (IAC) at para. (2) of the Headnote. Neither party invited me to maintain the anonymity order. I therefore revoke the order.

Factual background

6. The appellant has a number of French criminal convictions, the most serious of which are as follows. In March 2002, before the Assize Court of Paris, he was sentenced to ten years' imprisonment for armed robbery and a number of weapons offences. In November 2003, before the Criminal Court of Paris, Division 14, the was convicted of being a member of a proscribed organisation, for further weapons offences, and offences relating to false documentation. For those offences, he was sentenced to five years' imprisonment.

7. At Luton Airport on 14 November 2016, the appellant's admission to the United Kingdom was refused on grounds of public policy and public security. He was removed to France the next day. He appealed, and the appeal was heard by First-tier Tribunal Judge D. Ross ("Judge Ross") under the Immigration (European Economic Area Regulations) 2006. The appellant did not attend the hearing before Judge Ross since he had been removed to France. He had sought a direction from the First-tier Tribunal compelling the Secretary of State to admit him to the United Kingdom to attend the hearing in order to give evidence. Designated Judge Shaerf refused the application on the basis that the First-tier Tribunal did not have the power to give such a direction. The hearing took place in the absence of the appellant. His wife attended and gave evidence.

8. By a decision promulgated on 13 October 2017, Judge Ross dismissed the appeal. Judge Ross found that the appellant's personal conduct in committing the terrorist offences of which he had been convicted represented a genuine, present and sufficiently serious threat to one of the fundamental interests of society. The operative findings were at para. 14:

> "I consider that although the appellant's previous criminal convictions cannot in themselves justify the decision, nevertheless I consider that the personal conduct of the appellant represents a genuine, present and sufficiently serious threat to society. I must have regard to the very serious threat to UK citizens and institutions caused by terrorists as exemplified in the attacks in London. The appellant's behaviour in the past demonstrates that he has a propensity to commit terrorist

> offences. Although his last court appearance was in 2003, he was not let out of prison until 2008."

9. There was no successful appeal against the decision of Judge Ross.

10. On 16 December 2020, while the extant deportation order remained in force, the appellant re-entered the United Kingdom through Ireland. He was interviewed by Special Branch officers and appears to have informed them that he was only planning to remain in the United Kingdom for 48 hours, while visiting family, before returning to France. On 19 December 2020, he made an application for pre-settled status under the EU Settlement Scheme ("the EUSS"), in which he did not declare any of his previous convictions.

11. On 15 January 2021, the appellant was detained at an address in the UK and served with enforcement papers. On 28 January 2021, he submitted representations seeking to resist his proposed removal. Those representations were refused by a decision of the Secretary of State dated 8 February 2021 to make a deportation order under the 2016 Regulations. That was the decision that was under appeal before Judge Clarke.

12. In his careful and thorough 29 page decision, Judge Clarke addressed the findings reached by Judge Ross concerning the risk presented by the appellant. At para. 72, the judge addressed Mr Bandegani's submission that the decision of Judge Ross was "flawed". Judge Clarke said that, "I am careful to remind myself that this appeal before me is not an appeal against this earlier determination…" He noted that the appellant had not been present at the earlier appeal, although the appellant's wife had given evidence and was cross-examined.

13. Against that background, Judge Clarke reasoned as follows in relation to the decision of Judge Ross:

> "73. …I agree that the determination does not assist me in this appeal before me because, with all due respect to the previous judge, some of the findings appear to be inconsistent with the factors set out in Regulation 27(5). For example, part of the Judge's reasoning is based on the terrorist attacks in London. There is no mention whatsoever in the determination that any evidence was led that connected the Appellant with the London bomb attacks. In my view, this offends the principle in Regulation 27(5)(d), 'matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision.' It also offends Regulation 27(5)(e), namely that 'a person's previous criminal convictions do not in themselves justify the decision.' The Judge found that the Appellant has 'a propensity to commit terrorist offences' but fails to identify any evidence that would lead to such a conclusion.'"

14. Judge Clarke continued at para. 74 by stating that the decision of Judge Ross "does not help me at all". He proceeded to consider the remaining evidence in the case, and to determine afresh the issue of any risk arising from the appellant's presence. He found that, having heard oral evidence from the appellant, he did not represent the risk he was found by Judge Ross to present. None of the Special Branch officers involved in interviewing the appellant at previous "port stops" had attended to give evidence concerning the risk the Secretary of State claimed the appellant represented, and the interview records had not been disclosed, contrary to the tribunal's specific directions. If the appellant had posed a threat, reasoned the judge, it was "inconceivable" that no in-country action had been taken against him.

15. Judge Clarke also had before him an "Independent Psychological Risk Assessment Report" by Lisa Davies, a Chartered and Registered Forensic Psychologist, and a number of other materials. The judge accepted Ms Davies' opinion that the appellant did not pose a risk.

16. The judge found that the appellant did not pose a risk of reoffending, and so allowed the appeal under the 2016 Regulations. The judge said that the EUSS appeal under the 2020 Regulations stood or fell with that decision and allowed the appeal under the 2020 Regulations also.

Issues on appeal to the Upper Tribunal

17. On a fair reading of the grounds of appeal, as formulated by Mr Parvar, there were three grounds of appeal:

    a. First, it was not lawfully open to the judge to criticise the decision of Judge Ross in the way that he did at para. 73. Pursuant to *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* * [2002] UKIAT 00702, those unappealed findings should have served as Judge Clarke's starting point. The judge gave insufficient reasons for departing from them.

    b. Secondly, the judge should have dismissed the appeal pursuant to the decision of the Court of Justice of the European Union in *R v Bouchereau* (Case C-30/77) EU:C:1977:172; [1978] QB 732.

    c. Thirdly, the judge should have dismissed the EUSS appeal. The appellant's deportation order had not been revoked meaning that, by definition, his appeal could not have succeeded under Appendix EU of the Immigration Rules.

18. In relation to ground 1, Mr Parvar submitted that despite the judge directing himself that he was not hearing an appeal against Judge Ross's decision, Judge Clarke engaged in precisely that exercise. Moreover, his criticism of Judge Ross's reasoning cannot withstand scrutiny. Judge Ross did not purport to find that the appellant had been involved in the London bombings, as Judge Clarke assumed he did. Rather Judge Ross merely sought to refer to the London bombings as an indicative example of the horrors of terrorism, in order to calibrate the seriousness of the offences of which the appellant had been convicted. Mr Parvar accepted that Judge Clarke could have departed from the findings and reasons given by Judge Ross, but submitted that he gave insufficient reasons for doing so.

19. In relation to ground 2, Mr Parvar relied on the summary of *Bouchereau* at para. 25 of *Robinson v Secretary of State for the Home Department* [2020[UKSC 53, in which Lord Stephens said that *Bouchereau*:

> "…envisages that past conduct alone which has caused public revulsion and is therefore a threat to the requirements of public policy may be sufficient to justify deportation without there necessarily being any clear propensity on behalf of the individual to act in the same way in the future."

    Lord Stephens noted that, in the proceedings there under appeal, Singh LJ had said that *Bouchereau* remained "good law", and that finding had not been appealed to the Supreme Court.

20. Mr Parvar did not pursue ground 3.

21. Mr Bandegani resisted the appeal, relying on his written "reply" to the application for permission to appeal and the grant of permission to appeal dated 17 February 2023. The reply was helpful. It was essentially a rule 24 response.

22. Mr Bandegani submitted that Judge Clarke's decision was clear and detailed.

23. In relation to ground 1, Mr Bandegani submitted that Judge Clarke took all relevant factors into account, in a manner demonstrating that he was fully cognisant of the Secretary of State's case concerning the appellant's risk profile. The self-direction as to the law was correct. Judge Clarke expressly reminded himself that he was not hearing an appeal against Judge Ross's decision. In any event, Judge Clarke's observations about Judge Ross's decision were factually correct, and must be viewed against his, Judge Clarke's, findings that there was no additional evidence from the Secretary of State concerning the appellant's alleged risk. The appellant had last offended in 2001. Judge Clarke had the benefit of hearing the appellant give oral evidence, which Judge Ross did not. The reasons given by the judge for allowing the appeal were open to him.

24. In relation to ground 2, Mr Bandegani submitted that it could not sensibly be submitted that the judge did not have the seriousness of the appellant's offending at the forefront of his mind, in light of the numerous references to it throughout the decision. The judge recognised that the appellant enjoyed only the lowest level of protection under the 2016 Regulations, and properly applied that threshold. It was open to the judge to allow the appeal for the reasons he gave on the basis of the material before him. They can be no suggestion that the judge was obliged to dismiss the appeal pursuant to *Bouchereau*.

Relevant legal principles: 2016 Regulations

25. It is common ground that the 2016 Regulations continue to apply to these proceedings.

26. Regulation 23(6)(b) makes provision of the removal of certain persons from the United Kingdom where the Secretary of State "has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27…"

27. Where relevant, regulation 27 provides:

> "(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> […]
>
> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also 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 must represent a genuine, present and sufficiently serious threat affecting one of

> the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
>
> (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;
>
> (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.
>
> (6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin."

28. Schedule 1 to the 2016 Regulations sets out a number of considerations to which a court or tribunal must have regard when taking a decision under regulation 27.

Relevant legal principles: sufficiency of reasons

29. There are many authorities on the need for judges to give sufficient reasons. In *English v Emery Reimbold & Strick Ltd. (Practice Note)* [2002] EWCA Civ 605, Lord Phillips MR said, at para. 19:

> "It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied on."

30. In *Simetra Global Assets Limited v Ikon Finance Limited* [2019] EWCA Civ 1413 at para. 42, Males LJ adopted the language of the "building blocks of the reasoned judicial process" as a means to describe the essential ingredients of sufficient reasons.

Ground 1: any error concerning *Devaseelan* was immaterial

31. This ground was pleaded under the rubric of a reasons challenge on the basis that Judge Clarke failed to give sufficient reasons for departing from the findings reached by Judge Ross. Para. 6 of the grounds additionally contends that the

judge erred by "re-appraising" the decision of Judge Ross, on the basis that "it was not for her [sic] to do so".

32. In my judgment, the findings of Judge Ross had not been challenged on appeal and should have been adopted by Judge Clarke has the "starting point" for his analysis. That approach is required pursuant to *Devaseelan*, and a number of authorities pursuant to it, including *Djebbar v Secretary of State for the Home Department* [2004] EWCA Civ 804 and *BK (Afghanistan) v Secretary of State for the Home Department* [2019] EWCA Civ 1358. In *BK* at para. 31, Rose LJ summarised the relevant principles in the following terms:

> "The proper approach of the second tribunal should reflect the fact that the first adjudicator's determination stands as an assessment of the claim that the appellant was then making at the time of that determination. It is not binding on the second adjudicator but on the other hand the second adjudicator is not hearing an appeal against it. It is not the second adjudicator's role to consider arguments intended to undermine the first adjudicator's determination but the second adjudicator must be careful to recognise that the issue before him is not the issue that was before the first adjudicator."

33. I accept Mr Parvar's submission's in relation to paragraph 73 of Judge Clarke's decision, in which Judge Clarke was critical of Judge Ross's decision. Although Judge Clarke directed himself that he was not hearing an appeal against the decision of Judge Ross, his reasoning at para. 73 reads as though it is taken from an appellate decision which purported to scrutinise the decision of Judge Ross. Judge Clarke appeared to criticise Judge Ross on the basis that he had wrongly assumed that the appellant had been involved in the London bombings (presumably those that took place in 2005). I agree with Mr Parvar that it was not open to Judge Clarke to criticise the findings of Judge Ross in that way. Moreover, Judge Clarke appears to have misread Judge Ross's decision when doing so. Contrary to Judge Clarke's reading of Judge Ross's decision, Judge Ross did not purport to find that the appellant had been involved in the London bombings. Rather, Judge Ross used the example of the London bombings to "exemplify" the seriousness of terrorism, and the strong public interest in preventing those engaged in that sort of activity – not necessarily that specific activity – from entering the United Kingdom. No part of Judge Ross's reasoning involved a finding that the appellant had been involved in those attacks. There is no evidence to support that contention, and, indeed, the appellant was in prison in France at the time.

34. I therefore accept the submission of Mr Pavar that the judge fell into error in this respect. It is nothing to the point, as submitted by Mr Bandegani, that the judge directed himself that he was not hearing an appeal against the findings reached by Judge Ross. When one analyses Judge Clarke's operative analysis, that was precisely what he was doing. This was a misdirection in law, as contended at para. 6 of the grounds of appeal: the judge was obliged to take the findings reached by Judge Ross as the starting point for his own findings of fact and should not have criticised those findings.

35. It follows that Judge Clarke made an error of law.

36. Pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, if the Upper Tribunal finds that a decision of the First-tier Tribunal involved the making of an error of law it "may (but need not) set aside the decision of the First-tier Tribunal". As Brooke LJ put it in *R (Iran) v Secretary of State for the*

Home Department [2005] EWCA Civ 982 at para. 10, "[e]rrors of law of which it can be said that they would have made no difference to the outcome do not matter."

37. For the reasons set out below, I find that Judge Clarke would inevitably have reached the same overall conclusion even if he had approached the decision of Judge Ross correctly.

38. At para. 35 of *BK (Afghanistan)*, Rose LJ cited with approval extracts from the judgment of Judge LJ in *Djebbar*, including the following extract, at para. 30:

> "Perhaps the most important feature of the [*Devaseelan*] guidance is that the fundamental obligation of every special adjudicator independently to decide each new application on its own individual merits was preserved."

39. The guidance in *Devaseelan* itself is multifaceted and expressed as a number of principles: see para. 32. The second guideline is relevant to these proceedings:

> "Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator."

40. The sixth guideline states:

> "If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated."

41. There were a number of significant differences between the evidential landscape before Judge Clarke and that considered by Judge Ross. In *Devaseelan* terms, that meant that the "facts" were "materially different", thereby permitting Judge Clarke to reappraise the appellant's risk profile for himself.

42. First, Judge Ross had not had benefit of hearing the appellant give oral evidence (see para. 5 of Judge Ross's decision), whereas Judge Clarke did (see para. 40 of his decision). At para. 81, having heard the appellant's evidence tested under cross-examination, Judge Clarke concluded that the appellant's remorse was genuine. That was a finding of fact which has not been challenged by the respondent and which was rationally open to the judge on the material before him. At para. 85, Judge Clarke accepted the appellant's evidence that he had disassociated himself from his former criminal associates. At para. 86, the judge accepted the appellant's evidence that he had been volunteering at a mosque since 2013. While the period from 2013 to 2017 would undoubtedly have been considered by Judge Ross, the judge's findings were based on the entirety of the period from 2013 to 2022, thereby including an additional five years of positive conduct on the part of the appellant. At para. 87, Judge Clarke expressly referred to the appellant's post-2018 employment history in France, as set out at paras 94 to 96 of his witness statement, as supporting his claimed rehabilitation. Again, those matters all post-dated the finding reached by Judge Ross, and were not challenged by the Secretary of State in the grounds of appeal to the Upper Tribunal.

43. Secondly, Judge Clarke considered the evidence from late 2020 concerning the appellant being stopped for questioning under Schedule 7 of the Terrorism Act 2000 upon his arrival in Liverpool from Belfast, having travelled to Northern Ireland through the Common Travel Area. At para. 90, Judge Clarke noted that at

para. 102 of his witness statement, the appellant described giving the police full details about his former offending and said that the questioning officers ascribed significance to the appellant having been released from prison in France over ten years previously. The judge also summarised a witness statement provided by a police officer who subsequently visited the appellant at his wife's home in the UK. The judge noted at para. 93 that the appellant had always disclosed his convictions to the authorities in the UK and answered every question that was asked of him.

44. The judge said that a police officer, DC Bamber, who had provided a witness statement concerning the visit to the appellant's wife's address had not been called by the Secretary of State. DC Bamber's evidence did not go to the appellant's claimed risk, noted the judge, and there had been no other evidence from the Secretary of State pertaining to that issue: para. 95. The judge said at para. 96 that he had been involved in case managing the proceedings for "the past year" and that the Secretary of State had not at any point sought an adjournment, or otherwise indicated difficulties relating to securing the attendance of police witnesses.

45. There was some disagreement between what the appellant said that he told DC Bamber, and what DC Bamber said in his witness statement the appellant had told him, particularly in relation to why the appellant travelled in through the Common Travel Area, and whether it was to avoid immigration controls. At para. 97, the judge explained why he preferred the evidence of the appellant on this point, which had been "very detailed", and nothing arose in cross-examination to give doubt to the credibility of the appellant's evidence. That was a finding of fact Judge Clarke was entitled to reach. Not all judges would have reached it, but, as it was put in *Volpi v Volpi* [2022] EWCA Civ 464 at para. 2(ii):

> "It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

46. Thirdly, the Secretary of State had not produced the interview records from the appellant's Schedule 7 interview, contrary to the directions of the First-tier Tribunal. There was evidence from a Home Office official before the judge setting out the (unsuccessful) efforts the Secretary of State had made in an attempt to comply with the directions. In the absence of the directed additional evidence, the judge was entitled to state, as he did at para. 100, "if the appellant represented a threat, I am of the view that he would not have simply been able to enter England and continue from Liverpool to the family home in Leicester…" Judge Clarke acknowledged that the appellant's arrival to the United Kingdom via the Common Travel Area on 16 December 2020 "could be interpreted" as being an attempt to evade immigration control, but he noted that it was not until 15 January 2021 that he was taken into immigration detention. It was rationally open to the judge to conclude, on the basis of those developments, that if the appellant represented a risk, he would have been taken into custody earlier. Not all judges would have reached that conclusion, but it was not a conclusion that no reasonable judge could have reached.

47. Fourthly, Judge Clarke accepted the appellant's evidence that his laptop had, on a previous attempt to enter the UK, been seized and examined by the police, before being sent back to him in France. The judge was entitled to ascribe significance to the fact that there was no evidence before him of any incriminating material found on the laptop: para. 103. While the absence of such

evidence may have been apparent before Judge Ross giving the timing of when the laptop was seized, Judge Ross's decision is silent on the issue, meaning that Judge Clarke was rationally entitled to reach his own view on the matter without expressly addressing the starting point of any prior findings of fact on *Devaseelan* grounds.

48. Fifthly, the appellant relied on Ms Davies' report dated 2 February 2019. The judge set out a number of reasoned bases for accepting her opinion that the appellant no longer represents a risk: paras 106 and 107. The Secretary of State has not challenged that aspect of his reasoning.

49. Turning to the reasons-based limb of ground 1, I find that these reasons are sufficient to merit the judge's overall conclusion. They are clear and detailed. They explain why the judge reached a conclusion at odds with that reached by Judge Ross. The "building blocks" of the judge's reasoned judicial process are clear.

50. The only weakness in the judge's findings is that identified above, namely his failure to adopt Judge Ross's findings as his starting point.

51. I have considered whether the judge's findings would have been different had he expressly taken Judge Ross's findings as his starting point. Or, put another way, whether the "building blocks of the reasoned judicial process" were constructed on an erroneous foundation, such that the entirety of the judge's reasoning was like a house built on sand.

52. I consider that Judge Clarke would not have reached a different conclusion even if had he expressly acknowledged Judge Ross's conclusions as his starting point. This was not a case in which the judge's decision was finely balanced. See para. 108:

> "I have no hesitation in finding that the [respondent] has failed to discharge the burden that the appellant represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society."

53. The judge's findings were strong and unequivocal. Any suggestion that he would have reached the polar opposite conclusion if he had expressly taken Judge Ross's findings into account has an air of unreality to it.

54. The judge was entitled – moreover, obliged – to take the evidential developments post-dating Judge Ross's findings into account. Those evidential developments were all such that, even if the judge *had* taken the decision of Judge Ross concerning the risk posed by the appellant at the date of that hearing on 22 September 2017 as his starting point, he plainly would have reached precisely the same conclusion, for the reasons he gave. The judge had regard to the evidence as it stood when it was considered by Judge Ross (if not Judge Ross's analysis itself). Consistent with the second *Devaseelan* guideline, the emphasis of Judge LJ at para. 30 if *Djebbar*, and the summary of the principle at para. 31 of *BK (Afghanistan)* per Rose LJ ("the second adjudicator must be careful to recognise that the issue before him is not the issue that was before the first adjudicator…"), the judge performed his own overall assessment of the appellant's risk.

55. There was no material error on this account, therefore.

Ground 2: Judge Clarke not obliged to allow the appeal on *Bouchereau* principles

56. This ground is not made out for the following reasons.

57. First, it is by no means clear that Judge Clarke was invited to dismiss the appeal on *Bouchereau* grounds. *Bouchereau* was not cited by the Secretary of State in the decision under challenge, despite the decision mentioning five Court of Justice cases concerning decisions taken under Directive 2004/38/EC on grounds of public policy and public security. Judge Clarke's detailed and lengthy decision makes no reference to having heard any submissions concerning *Bouchereau*. The focus of the Secretary of State's decision, and the proceedings before Judge Clarke, was the risk of reoffending posed by the appellant. The Secretary of State effectively now seeks to criticise Judge Clarke for not adopting an approach which the judge was not invited to adopt below.

58. Secondly, this is not a case which irresistibly militates in favour of the *Bouchereau* exception being made out, such that the only rational conclusion open to the judge was to dismiss the appeal on *Bouchereau* grounds even though he was not invited to do so. I accept that the appellant's terrorism offences are very serious. They resulted in lengthy periods of imprisonment. But it is difficult to see how these 20 year old convictions, on the basis of the judge's analysis of the appellant's risk profile, are capable of causing such public revulsion that the only rational resolution of the case was to dismiss the appeal on *Bouchereau* grounds despite having not been invited to resolve the matter in that way by the Secretary of State. I have not been taken to any evidence of deep public revulsion having been caused by the appellant's crimes, or other material that was before the judge which demonstrated that the case met the *Bouchereau* threshold.

59. Drawing this analysis together, I find that Judge Clarke was rationally entitled to allow the appeal, for the reasons he gave. It was not an error for him not to consider submissions that the Secretary of State did not rely on in the deportation decision, nor advance before him. Properly understood, this ground is an attempt to reargue the case on the basis of a new point, not taken below.

Conclusion

60. This appeal is dismissed.

Notice of Decision

The appeal is dismissed.

The decision of First-tier Tribunal Judge Clarke did not involve the making of an error of law such that it must be set aside.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 November 2023