



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00328/2016

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons Promulgated

On 14 May 2018

On 24 May 2018

Before:
UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department Appellant

And

M K Respondent
(ANONYMITY ORDER MADE)

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the original appellant. I make this order due to his medical condition. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.

The parties at liberty to apply to discharge this order, with reasons.

Representation:

For the Appellant: Mr S Kotas, Senior Presenting Officer.
For the Respondent: Mr B Malik, of Counsel.

DECISION AND REASONS

Introduction and background facts:

1. MK (hereafter the “claimant”) is from Cyprus, born on 27 February 1948. He was convicted on 17 October 2003 of two counts of possessing Class A drugs with intent to supply. He received a sentence of 24 years’ imprisonment, reduced on appeal to 18 years. He was released from prison on 6 February 2012. He will be on licence until 6 February 2021. He has never exercised Treaty rights in the United Kingdom. At the

date of the hearing before Judge of the First-tier Tribunal A M Black (hereafter the “judge”) on 9 May 2017, he was 69 years old and in poor health.

2. The judge allowed the claimant’s appeal against a decision of the Secretary of State of 5 July 2016 to make a deportation order under regn 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 (the “2006 Regulations”) by reference to regn 21. The judge agreed with the Secretary of State that the claimant had not acquired a permanent right of residence. She did not agree with the Secretary of State that the claimant had a propensity to re-offend. She said that she was satisfied that the claimant’s personal conduct did not represent “*a genuine, present and indeed any threat affecting one of the fundamental interests of society*” (para 43). Her reasons were, in summary, as follows:

- (i) She was satisfied that the claimant was now insightful about his criminal behaviour and that he was contrite, regretful and ashamed (para 40).
- (ii) His health problems were such that he had poor mobility and was largely confined to his home. He had a chronic heart problem, diabetes, severe vascular problems, four toes had been amputated on one foot and he was at risk of further amputation. He was awaiting investigations with a view to further limb surgery. He did not live an active life (para 41).
- (iii) The judge accepted that the driver for the claimant's involvement in the possession and supply of drugs was a financial one, a driver which she found no longer existed because his needs were modest and largely related to his health. He lives on public funds and has access to free medical care. She said that, in any event, she accepted his evidence that he would not become involved in the possession and supply of controlled drugs (para 42).
- (iv) There was no evidence that the claimant had engaged in any form of criminal behaviour during the period of five years since his release from immigration detention in April 2012 (para 38).

(iv) She concluded that there was no discernable risk of re-offending (para 43).

Having found that the claimant did not pose a genuine, present and sufficiently serious threat, the judge said that there was no need for her to make a proportionality assessment (para 51).

3. At para 50, the judge said:

“50. However, it is not the respondent's case that the appellant's convictions, serious as they are, are sufficient, without more, to constitute a threat to one of the fundamental interests of society. She puts her case on the basis that there is a continuing risk of reoffending: in paragraph 37 of the reasons letter she refers to the appellant's crime being "sufficiently serious to warrant his deportation" but she goes on to refer to a "likelihood to re-offend for monetary gain". In the absence of a submission for the respondent that the appellant's offending was so serious, without more, as to justify deportation, I see no reason to deal with such a proposition.”

4. At an earlier hearing on 16 November 2017 in the Upper Tribunal, when the claimant was represented by Mr J Collins, of Counsel, instructed by Kilic & Kilic Solicitors (the claimant's then representatives), I raised the issue whether, given that it appears that the claimant had never exercised Treaty rights, the decision to make a deportation order should have been made under regn 19(3)(a) of the 2006 Regulations.

5. I record that the skeleton argument filed by Mr Kotas dated 11 April 2018 states that the Secretary of State's position is that regn 19(3) provides three different and possible routes for removing an EEA national providing the conditions under each sub-regulation are satisfied. In the skeleton argument, Mr Kotas submitted that there is nothing in the drafting of regn 19 that requires the Secretary of State to take a decision under regn 19(3)(a) before deciding to take a decision under 19(3)(b), and vice versa. If an appellant satisfies the criteria for a deportation order under regn 19(3)(b), the Secretary of State is entitled to proceed on that basis. Furthermore, there is a fundamental public policy reason for the Secretary of State to proceed under regn 19(3)(b) where this is possible because it entitles him to make a deportation order and exclude the person in question from re-entry for as long as the order remains in force pursuant to regulation 24A(1) which is not the case if removal takes place pursuant to regn 19(3)(a).
6. As a result of this explanation, I decided that there was no longer an issue as to whether the Secretary of State should have proceeded under regn 19(3)(a) in view of which Mr Malik said that he did not wish to address me on the point.

The grounds

7. The Secretary of State's grounds raise the following issues:
- (i) (ground 1) whether the judge materially erred in law in failing to consider and apply the principle in R v Bouchereau [1978] 1 Q.B. 732, Case 30/77, recently affirmed in SSHD v Robinson (Jamaica) [2018] EWCA Civ 85. At para 71 of Robinson (Jamaica), the Court of Appeal explained the principle as follows:

“71. It is important to recognise that what the ECJ [in *Bouchereau*] was there talking about was not a threat to "the public" but a threat to "the requirements of public policy". The latter is a broader concept. At para. 28 the ECJ said that past conduct can only be taken into account in so far as it provides evidence of personal conduct constituting a "present threat to the requirements of public policy." As the ECJ said at para. 29, "in general" that will imply that the person concerned has a "propensity to act in the same way in the future" but that need not be so in every case. It is possible that the past conduct "alone" may constitute a threat to the requirements of public policy. In order to understand in what circumstances that might be so, I consider that it is helpful and appropriate to have regard to the opinion of the Advocate-General in *Bouchereau*, when he referred to "deep public revulsion". That is the kind of extreme case in which past conduct alone may suffice as constituting a present threat to the requirements of public policy.”

I shall refer to this hereafter as the "Bouchereau exception", the word "*exception*" being a reference to the fact that, in cases in which it is applicable, it is not necessary to find that the individual presents a continuing risk of re-offending.

- (ii) (ground 2) whether the judge had materially erred in law in reaching her finding that the claimant did not pose a genuine, present and sufficiently serious threat. Ground 2 contends as follows:
- a) The judge's finding that the claimant had rehabilitated was inconsistent with her finding at para 38, that there was no understanding by the claimant that he understood the impact of his offending on the wider public.
- b) The judge had not adequately reasoned her finding in view of the claimant's total lack of insight and that he continued to downplay his crime.

- c) The judge had relied upon the claimant's health problems without acknowledging that his health was poor before he committed his crimes. The grounds contend that not only did the claimant's medical problems not prevent him from offending, they acted as the trigger. There was no evidence that his medical care was anything but free prior to his offending.
- d) The judge had erred in giving no weight to his central role in the drug trafficking offences.
- e) The judge had erred in considering rehabilitation because the claimant was not integrated into society in the United Kingdom, as it appears he does not speak English, does not work and is not self-sufficient and has spent the majority of the last two decades in prison.

Procedural background

8. Permission to appeal was refused by the First-tier Tribunal ("FtT"). Permission was granted by Upper Tribunal Judge Kekić in a decision signed on 14 September 2017.
9. The appeal before the Upper Tribunal was first listed for hearing on 14 November 2017 when, as stated above, the applicant was represented by Mr Collins. The Secretary of State was represented by Ms Z Ahmad. I heard submissions from both. At that hearing and as stated above, I raised the question of whether the claimant had ever exercised Treaty rights since 1 May 2004 and whether, if he had not, the deportation order should have made under regn 19(3)(a). Mr Collins informed me that he would wish to research the point. I therefore adjourned the hearing part-heard and issued certain directions concerned with the issue explained at paras 4 and 5 above. Eventually, by letter dated 31 January 2018, Kilic & Kilic Solicitors, informed the Upper Tribunal that the claimant had not submitted any documents to the FtT or the Upper Tribunal claiming that he had exercised Treaty rights since May 2004.
10. In response to my direction as to whether the Secretary of State should have made the deportation order under regn 19(3)(a) as opposed to regn 19(3)(b), the Upper Tribunal received a skeleton argument from the Secretary of State signed by Ms Ahmad dated 4 January 2018 and (as stated above) a skeleton argument signed by Mr Kotas dated 11 April 2018.
11. By a letter dated 23 February 2018, Kilic & Kilic Solicitors informed the Upper Tribunal that they had withdrawn from acting.
12. Mr Kotas first appeared before me on behalf of the Secretary of State at a hearing on 12 April 2018. The claimant did not attend and was not represented. Mr Kotas informed me that, according to his file, the claimant's address, as from 27 June 2017, was Flat 26, Rushleigh House, 11 Benjafield Close, London N18 2YW, whereas the Tribunal's records were that his flat number was 11 at the same building.
13. Mr Kotas was unaware that the Tribunal had already heard submissions on all issues and that the only outstanding matter was whether the Secretary of State should have proceeded under regn 19(3)(a). Given the recent judgment of the Court of Appeal in Robinson (Jamaica) which decided that Bouchereau continues to apply, Mr Kotas applied to re-open the hearing.
14. In view of the recent judgment in Robinson (Jamaica) and the fact that Mr Collins had relied upon Arranz (EEA Regulations – deportation – test) [2017] UKUT 00294 (IAC)

in which the Upper Tribunal decided, inter alia, that the Bouchereau exception was no longer good law, I decided that there was no option but to adjourn the hearing on 12 April 2018 to give the claimant an opportunity to address the Upper Tribunal on Robinson (Jamaica), albeit that this would will result in yet further delay.

15. This adjournment led to the appeal being re-listed for hearing on 14 May 2018 when the Secretary of State was represented by Mr Kotas and the claimant by Mr Malik. Since neither Mr Kotas nor Mr Malik had been present at the hearing when I heard submissions from Mr Collins on behalf of the claimant and Ms Ahmad on behalf of the Secretary of State, I decided to hear submissions afresh from Mr Malik and Mr Kotas on all issues. As far as I could see, this was the only fair way of proceedings. Neither party objected.

Assessment

Ground 1

16. Ground 1 distils into the following issues:

- (i) Whether the Secretary of State had relied upon the Bouchereau exception in the appeal before the judge and, even if not, whether the judge erred in law in failing to deal with it.
- (ii) Even if the judge should have considered the Bouchereau exception, Mr Malik submitted that, whilst this meant that a great deal of weight could be attached to the claimant's past offending, it is still necessary to consider all of the other evidence, such as age, health and the risk of re-offending, to the extent that the judge's findings on these issues were not vitiated by material error of law. He submitted that, if I accept his submission on this issue, it would be necessary for me to decide ground 2 irrespective of the outcome of my decision on ground 1.
- (iii) If the Bouchereau exception applies and I am against Mr Malik on his submission as summarised at (ii) above, then whether this is one of the extreme cases in which that exception applies.

17. I shall deal with (ii) first. Mr Malik submitted that the only basis put forward for the application of the Bouchereau exception is that the claimant's offences were so serious that the sentencing judge imposed a lengthy sentence. However, in Mr Malik's submission, the sentencing judge imposed a lengthy sentence for concerns which include deterrence which was a prominent consideration. Mr Malik submitted that the length of the sentence itself was not sufficient to lead to a finding that it was necessary to express public revulsion. In drugs-related offences, the Bouchereau exception is in principle engaged but it does not apply just because of the length of the sentence that is imposed. In his submission, it is still necessary to consider other factors such as age, health and the risk of re-offending.

18. I reject Mr Malik's submission that, even in cases in which the Bouchereau exception, it is still necessary to consider all of the other evidence, such as age, health and the risk of re-offending. The whole point of the Bouchereau exception is that it applies, in extreme cases, on the basis that past conduct alone is sufficient to show that the individual present a genuine, present and sufficiently serious threat to public policy. If it is still necessary to consider these other factors, there would be no difference in this regard between cases in which the Bouchereau exception applies and cases in which

it does not apply and therefore no need for an exception. In my judgment, Mr Malik's submission is misconceived.

19. In my judgment, if the facts of a case are extreme, such that the Bouchereau exception applies, the individual's past conduct alone constitutes a present threat to the requirement of public policy. That much is clear from, for example, para 17 of Robinson (Jamaica).
20. I turn to consider (i).
21. I consulted the judge's RoP at the hearing on 14 May 2018 and informed Mr Malik and Mr Kotas that there was no mention of the Bouchereau exception in the submissions of the Presenting Officer who represented the Secretary of State before the judge. The Presenting Officer did, however, rely upon the decision letter.
22. Mr Kotas relied upon paras 40, 41 and 79 of the decision letter. They read as follows:
 - "40. The [Crown Court] has determined that [the claimant's] crime is of such severity that he will always continue to be a threat to the community such that his release on licence means that he could be subject to recall to prison at any time for any breach of his conditions.
 41. All the available evidence indicates that [the claimant] has a propensity to re-offend and that he presents a genuine, present and sufficiently serious threat to the public to justify his deportation on grounds of public policy.
 79. It is also appropriate to note [the claimant's] failure to demonstrate that he has made any efforts to rehabilitate or address his offending behaviour. As such the Secretary of State is satisfied that the nature and severity of [the claimant's] offence are factors which fully engage the public interest in securing his removal from the United Kingdom, both in the interests of preventing further offending of this nature on [the claimant's] part, establishing a deterrent to others, expressing society's revulsion about serious drugs-related criminality and building and maintaining public confidence in the consistent treatment of foreign criminals."
23. Mr Kotas asked me to bear in that, in the judgment of the Court of Appeal in SSH D v Straszewski [2015] EWCA Civ 1245, Moore-Bick LJ said he could "see some force" in the submission on behalf of the claimant in that case that the decision in R v SSH D ex parte Marchon [1993] 2 C.M.L.R. 132 could no longer be regarded as representing Community law. As at the date of the decision letter, there was therefore some lack of clarity as to whether the Bouchereau exception continued to apply. The decision letter was issued in the period between the judgment in Straszewski and the judgment in Robinson (Jamaica). Bearing this in mind, Mr Kotas submitted that paras 41 and 79 show that the Secretary of State was saying that the claimant's offences were so serious that broader considerations of public policy were engaged.
24. Mr Malik submitted that a distinction needs to be drawn between the bare fact of conviction and the underlying conduct. He submitted that para 40 of the decision letter, which simply says that the fact that the claimant was released on licence means that he was a threat to the community, concerns the bare fact of the claimant's convictions. In his submission, para 40 was not sufficient to show that the Secretary of State had relied upon the Bouchereau exception. What was required was a fact-sensitive assessment of the circumstances of the offence.
25. Mr Malik submitted that the decision letter did not raise the Bouchereau exception but that, even if it did, the Secretary of State's consideration of its application was wrong.

It was therefore unfair to criticise the judge for not having dealt with the Bouchereau exception.

26. Mr Malik submitted that, if the decision letter did not rely upon the Bouchereau exception, then the judge was not obliged to deal with it.
27. Mr Malik informed me that, in the event that I decided that the Bouchereau exception was raised in the decision letter or that the judge should have dealt with it, he did not seek to argue that the judge did not materially err in law.
28. I agree with Mr Kotas that it is relevant to take into account the fact that the decision letter was written in the period when there was some lack of clarity as to whether the Bouchereau exception applied as a result of the comments of Moore-Bick LJ in Straszewski. In my judgement, it is clear from paras 41 and 79 of the decision letter that the Secretary of State was essentially saying that there were wider considerations of public policy which justified deporting him. This was sufficient, in my view, to show that the Bouchereau exception was relied upon.
29. Mr Malik also relied upon the fact that the decision letter did not engage with the specific circumstances of the instant case in order to assess whether the Bouchereau exception applied in support of his submission that the decision letter did not raise the Bouchereau exception. However, one can draw an analogy with, for example, an asylum claim in which the Secretary of State raises internal relocation as an issue but does not engage with the specific facts to explain why it is considered that internal flight alternative was a safe and reasonable option. The fact that internal relocation had been raised in principle would be sufficient to oblige the judge to consider the issue. By the same reasoning, the fact that the decision letter in the instant case raised the Bouchereau exception in principle was sufficient to oblige the judge to deal with the exception and decide whether it applied on the facts notwithstanding the Secretary of State's failure to engage with the specific facts and explain why it applied.
30. I have therefore concluded that the decision letter did raise the Bouchereau exception. The fact that it did not do so with the clarity that can now be expected in view of the fact that we now have the benefit of the judgment in Robinson does not detract from the fact that the issue was raised in principle in the decision letter.
31. However, even if I am wrong about that, the fact is that the judge was herself plainly aware of the Bouchereau exception, as she alluded to it at para 50 of her decision. Given that the Bouchereau exception relates to extreme cases in which the individual's past conduct alone is sufficient to constitute a genuine present and sufficiently serious threat to the requirements of public policy, it was not open to the judge to decline to deal with it simply because the Secretary of State had not raised the issue. This would be equivalent to a judge, for example, failing to consider the best interests of a child facing removal just because the representative had not mentioned it. The principle which is embodied by the Bouchereau exception is one of sufficient importance to public policy as to have given rise to an obligation on the part of the judge to deal with it whether or not it had been raised on behalf of the Secretary of State.
32. Accordingly, I concluded that the judge erred in law by failing to consider whether the Bouchereau exception applied in the instant case because the decision letter raised the issue; in the alternative, because she was obliged to do so in any event.

33. I turn to consider (iii), i.e. whether the facts of the present case are extreme such as to come within the Bouchereau exception. It is clear that, for the Bouchereau exception to apply, the facts must be “*very extreme*” (para 85 of Robinson (Jamaica)). In Straszewski, Moore-Bick LJ referred at para 17 to “*the most heinous of crimes*”.
34. Mr Malik relied upon the fact that, in its judgment in Robinson (Jamaica), the Court of Appeal mentioned offences such as offences against children and grave offences of sexual abuse or violence against children as examples of cases in which the Bouchereau exception may apply. However, these are examples. The Court of Appeal was not limiting the application of the exception to these types of cases.
35. Comparison with other cases may or may not be helpful. In the end, one has to reach a judgment based on the facts of the individual case. Insofar as any comparison with other cases may be helpful, the facts in Marchon were summarised by the Court of Appeal in Robinson (Jamaica) at para 86, as follows:
- “86. ... in *ex p. Marchon*, the defendant was convicted of an offence of conspiracy to import 4½ kg of a Class A drug (heroin); he was a doctor; and he was sentenced to 11 years' imprisonment. As Moore-Bick LJ observed in commenting on that case in *Straszewski*, at para. 18, the offence had been described by this Court in *ex p. Marchon* as being “especially horrifying” and “repugnant to the public” because it had been committed by a doctor.”
36. In the instant case, the sentencing remarks of the sentencing judge show that the claimant was convicted of two offences, as follows: one count of conspiracy to supply 28.87 kilos of heroin and one count of “*being concerned with 19.7 kilos of heroin, ... intending to supply it*”. The sentencing judge said that this was all equivalent to something like 24.5 kilos at 100 per cent purity, which he described as “*an enormous amount of heroin*”.
37. The sentencing judge then said:
- “You were at the centre of the supply of these drugs. You were in contact with the supplier in Turkey. Not only did you pick it up from Huddersfield, but you brought it down to London and then you kept it in an empty house to which you had access and it was you who divided it up to be supplied to different people.”
38. I have noted that the Court in Marchon described the offence in that case as “*especially horrifying*” and “*repugnant to the public*” because it had been committed by a doctor. Nonetheless, such is the scale of the offences committed by the claimant in the instant case and the harm caused to society by addiction to heroin, that I have concluded that the offences committed by the claimant in the instant case are just as horrifying and repugnant to the public. The total quantity of drugs was huge, being equivalent to something like 24.5 kilos of heroin at 100 per cent purity. The sentencing judge described it as “*an enormous amount of heroin*”. The public policy element is reflected by the need, as the sentencing judge said, to deter people from supplying heroin which he said was “*so dangerous to those who use it and so corrosive to society in our country*”. These considerations are relevant in deciding whether the Bouchereau exception applies. Also relevant is the length of the final sentence that was imposed. The claimant was given a sentence of 24 years by the sentencing judge but this was reduced to 18 years.
39. Also relevant was the fact that the claimant played a leading role in the supply of the drugs. As the sentencing judge said, he was in contact with the supplier in Turkey; he picked the drugs up from Huddersfield, brought the drugs down to London and kept

them in an empty property to which he had access and it was he who divided it up to be supplied to different people.

40. Given these circumstances, I have concluded that this *is* one of those very extreme cases in which the Bouchereau exception applies. It is necessary to express public revulsion at the offences that the claimant committed. His past conduct alone *does* present a genuine, present and sufficiently serious threat affecting public policy, this being one of the fundamental interests of society. Accordingly, the claimant's past offences come within the Bouchereau exception.
41. If the judge had considered whether the Bouchereau exception applied, she would inevitably have concluded, on any reasonable view, that it applies in the instant case because the claimant's past conduct criminal convictions taken on their own do present a genuine, present and sufficiently serious threat affecting public policy, for the reasons given above.

Ground 2

42. In view of my conclusion on ground 1, it is not necessary for me to deal with ground 2.

Conclusion

43. For the reasons given above, the judge erred in law in failing to consider whether the Bouchereau exception applied in the instant case. If she had considered it, she would have been bound to conclude that it did apply, on any legitimate view. She would then have been bound to dismiss the claimant's appeal against the Secretary of State's decision of 5 July 2016, without the need to consider whether he posed a risk of re-offending such that he presents a genuine, present and sufficiently serious threat on that account.
44. I therefore set aside the judge's decision. Mr Malik and Mr Kotas agreed that, if I were to decide that the Bouchereau exception applies and if I did not accept Mr Malik's submission that even in cases in which the Bouchereau exception applies it is still necessary to consider the risk of re-offending and factors such as age and health, I could proceed to re-make the decision on the material before me.
45. I therefore proceed to re-make the decision on the claimant's appeal. For the reasons given at paras 33-41 above, I dismissing his appeal against the Secretary of State's decision dated 5 July 2016.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that it fell to be set aside.

I set it aside in its entirety. I re-made the decision by dismissing the claimant's appeal against the Secretary of State's decision to make a deportation order.



Upper Tribunal Judge Gill

Date: 23 May 2018