Neutral Citation Number: [2024] EWCA Civ 1192

Case No: CA-2023-001619

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
UTJ Bruce
DA/00743/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 October 2024

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE ASPLIN
and
LADY JUSTICE ELISABETH LAING

- -

Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
WILLIAM GEORGE	**Respondent**

- -
- -

Ben Keith (instructed by **The Treasury Solicitor**) for the **Appellant**
Sonali Naik KC and Rory O'Ryan (instructed by **Turpin Miller Solicitors**) for the **Respondent**

Hearing date: 30 July 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 14 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. The respondent, Mr George, is a Belgian citizen. He was born on 27 March 1996. He arrived in the United Kingdom with his family in 2004, when he was eight. The Secretary of State accepted that he had lived in the United Kingdom since 2004. In 2017, when he was 21, he was convicted of manslaughter for his part in a horrifying gang murder. I say more about that offence below (paragraphs 4-7). He was sentenced to 12 years' imprisonment. On 8 November 2018, the Secretary of State decided to deport Mr George on 'imperative grounds of public security' ('the decision').

2. Mr George appealed to the First-tier Tribunal (Immigration and Asylum Chamber) ('the F-tT'). The F-tT allowed Mr George's appeal in determination 1. The Secretary of State appealed to the Upper Tribunal (Immigration and Asylum Chamber) ('the UT'), with the permission of the F-tT. The UT held, in determination 2, that the F-tT had erred in law. It decided to re-make the F-tT's decision. It had a hearing and dismissed the Secretary of State's appeal in determination 3.

3. The Secretary of State now appeals against determination 3 with the permission of Singh LJ. It is not in dispute that the UT applied the right legal test to the facts. This appeal concerns an issue on which the Secretary of State did not rely in the decision. The Secretary of State was nevertheless given permission to appeal to the UT on that issue. At the UT hearing, the Secretary of State's representative, a Senior Home Office Presenting Officer, chose not to argue it, and, in fact, abandoned it. The short issue is whether, as the Secretary of State now submits, the UT erred in law by not considering that issue. The Secretary of State relies on *R v Secretary of State for the Home Department ex p Robinson* [1997] EWCA Civ 3090; [1998] QB 929. For the reasons given in this judgment, I would dismiss this appeal.

The facts

4. It is not necessary to say much about the facts. I have taken this summary from determination 3. Mr George was nearly 27 at the date of the UT hearing. The UT said that he had only one conviction, but that it was 'extremely serious…It was for his part in the death of an 18 year old man, Mr Abdul Hafidah' ('AH'). On 12 May 2016, AH turned up in Moss Side, Manchester with 'what was perceived to be "hostile intent"'. He was armed with a knife. He had taken part in an earlier assault on a local man. The victim's arm had been broken. AH was spotted by a group of men and boys who were in a local sports ground. AH belonged to a Libyan/Somali gang, the 'Rusholme Crips'. The people in the crowd belonged to, or were associated with, the rival 'AO' gang. There was a long history of animosity between the two gangs. The UT gave various examples of their 'tit for tat violence' (paragraph 9). When the group in the sports ground saw AH, they chased him, caught up with him, and killed him.

5. The prosecution account was pieced together from CCTV footage and the evidence of 20 witnesses. The UT relied on the judge's sentencing remarks for a description of Mr George's role in that killing. AH was killed in 'broad daylight' on a Thursday afternoon. AH arrived in Westwood Street, Moss Side. When he saw the group, he changed direction. He hid in some bushes. Four of the group got into two cars to drive down Westwood Street. As the cars passed, he ran off. The cars turned round and

drove fast back up the street. Two passengers jumped out and ran after AH. Others joined the chase. They could not find AH at first, and they re-grouped.

6. AH was then seen running along Moss Lane East towards a busy junction. One of those chasing him had a hammer, another, a knife. AH asked a passer-by to call the police. All the members of the group who chased AH were convicted of murder. They must all have known that some of their number were armed with deadly weapons which were to be used on AH. They ran through the rush-hour traffic, 'causing chaos and alarm'.

7. AH tried to open the door of a passing car and to get in, but the car drove off. As they entered the other side of Moss Lane East, Mr George, who was on his bike, overtook those chasing AH. He then got off his bike and confronted AH. The sentencing judge was sure that Mr George acted as a scout, 'and in doing so he was performing a valuable service'. Mr George did not have a knife, and AH did, so Mr George held his bike in front of him to protect himself. By confronting AH like that, he enabled to chasers to catch up with AH. He did not take part in the final attack. That, the judge considered, was why he had been acquitted of murder. It was 'a bad case of manslaughter' because of the 'vital part' he played in finding AH and helping 'bring him to bay'. The attackers beat AH, threw a hammer at him, and deliberately hit him with a car. He had many defence wounds from trying to protect himself from a knife. The fatal wound was in his neck.

8. There was limited evidence at trial that Mr George was affiliated with a gang (paragraphs 14-16). The sentencing judge recorded that he had written a letter 'expressing evidently sincere regret; he even conceded that he was guilty of the offence for which he was convicted, which is the start of rehabilitation' (paragraph 16).

The decision

9. The decision is 105 paragraphs long. It referred to Mr George's representations in response to the Secretary of State's notice of her intention to make a deportation order. The Secretary of State accepted (under the heading 'Residence'), after some explanations, that Mr George had been continuously resident in the United Kingdom for ten years, that he met the 'integration criteria as set out in *Tsakouridis*', and that his deportation could only be 'justified on imperative grounds of public security' (paragraphs 13-27). The reference to *'Tsakouridis*' is to *Land Baden-Wűrttemburg v Tsakouridis* (C-145/09) [2011] 2 CMLR 261. I will also refer to that decision as '*Tsakouridis*'.

10. The next heading in the decision is 'Assessment of Threat'. The 'principles' in regulation 27(5) of the Immigration (European Economic Area) Regulations 2016 ('the Regulations') and in Schedule 1 to the Regulations were referred to. Mr George's behaviour was considered to be a threat to three identified 'fundamental interests of society': 'maintaining public order', 'excluding or removing' a person with 'a conviction (including where the conduct of that person is likely to cause or has in fact caused, public offence and maintaining public confidence in the ability of the relevant authorities to take such action' and 'protecting the public' (Schedule 1 to the Regulations, paragraph 7(b), (f) and (i)).

11. The decision described the offence, Mr George's denial of involvement, his lack of remorse, and that he had been assessed as posing a high risk of harm to the public, although the risk of re-offending was low. The asserted denial of involvement and lack of remorse are inconsistent with the sentencing remarks of the judge (see paragraph 8, above), but consistent with the findings of the F-tT in paragraph 58 of determination 1. The decision analysed an OASys report, noting, among other things, the comment that the offence was particularly serious as it had been committed at a busy time of day when there were many witnesses. 'This would have been a particularly horrific incident for members of the public to have witnessed including young children'.

12. The decision referred several times to the risk which, it was considered, Mr George posed to the public, and explained why that view was taken. Incidents of this kind 'can have a wider impact upon society as they create a climate of fear and insecurity in our communities'. The offence was a serious one, which was reflected in the sentence. The fact that Mr George's risk of re-offending was low was not decisive, as the Home Office 'takes the view that serious harm would be caused as a result of any similar instances of offending is such that it is not considered reasonable to leave the public vulnerable to the potential for you to re-offend.' It was reasonable to conclude, on the evidence, that there was such a risk. There was no evidence that Mr George's personal circumstances had improved or that he had successfully addressed the issues which caused him to offend. It was reasonable 'to conclude that there remains a risk of you re-offending and continuing to pose a risk of harm to the public' (paragraph 59).

13. The next heading in the decision is 'Risk of harm/re-offending conclusion'. Paragraph 60 referred to *Tsakouridis*. The test was not limited to terrorism. The state could include such serious criminality as drug dealing. Mr George posed a high risk of serious harm, albeit a low risk of conviction. The public would be at a serious risk of harm if he were released from custody. If he were to associate with 'negative peers' there would be 'high chance of you seeking to re-offend'. It was 'imperative that you be deported from the United Kingdom in order to preserve the safety and security of those resident here'.

14. The decision considered proportionality in paragraphs 63-73 and rehabilitation in paragraphs 74-79. The Secretary of State concluded that Mr George's deportation would be proportionate and that it would not prejudice his rehabilitation. Under the heading 'EEA Regulations – Conclusion' the decision maker referred to Mr George's serious offence, and to the 'real risk' that he might re-offend in the future. The 'genuine, present and sufficiently serious threat' he posed to 'the fundamental interests of United Kingdom society' meant that his deportation was justified 'on the grounds of public policy, public security or public health in accordance with regulation 23(6)(c)'. The decision maker added that, given the threat which Mr George posed, the decision to deport him was proportionate and in accordance with the principles in regulations 27(5) and 27(6). The Secretary of State considered, and rejected, Mr George's article 8 claim in paragraphs 81-97. The Secretary of State did not certify the decision under regulation 33 of the Regulations (paragraphs 95-100). Paragraphs 101-104 notified Mr George of his right of appeal under regulation 36 of the Regulations.

The legal framework

R v Secretary of State for the Home Department ex p Robinson

15. As I have indicated, the Secretary of State relies on *R v Secretary of State for the Home Department ex p Robinson* [1997] EWCA Civ 3090; [1998] QB 929. It is convenient to summarise that decision before I summarise the legislative scheme and the relevant cases. The procedural context for the decision in that case was an application for permission to appeal to the tribunal which was the predecessor of the UT from the predecessor of the F-tT (the special adjudicator). The issue was whether the tribunal was obliged to give permission to appeal on the basis of a point not made to the special adjudicator. A linked issue was whether a High Court Judge was obliged to give permission to apply for judicial review of a refusal by the tribunal of permission to appeal in relation to a point not taken in the notice of appeal to the tribunal (p 945G-H). I will refer to this decision as '*Robinson No 1*'.

16. This court held, at p 945E-F, that it is the duty of appellate authorities 'to apply their knowledge of Convention jurisprudence to the facts established by them when they determine whether it would be a breach of the Convention to refuse an asylum seeker leave to enter as a refugee, and that they are not limited in their consideration of the facts by the arguments actually advanced by the asylum seeker or his representatives'. This court then considered the circumstances in which it might be appropriate for the tribunal to give permission to appeal on the basis of an argument not run in before the special adjudicator, or for a High Court Judge to give permission to apply for judicial review in relation to a point not taken in the notice of appeal to the tribunal.

17. The appellate authorities are not obliged to search for new points, this court said. 'If there was a readily discernible and obvious point of Convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submission on points which they have not taken but which could properly be categorised as "merely arguable" as opposed to "obvious". Similarly, if when the tribunal reads the special adjudicator's decision there is an obvious point of Convention law favourable to the asylum-seeker which does not appear in the decision, it should grant leave to appeal. If it does not do so there is a danger that this country will be in breach of its obligations under the Convention. When we refer to an obvious point, we mean a point which has strong prospects of success if it is argued. Nothing less will do.' (p 946B-D).

The legislative scheme

18. The legislative regime which applies in Mr George's case is the Regulations. Neither party suggests that there is a relevant discrepancy between the Regulations and the law of the European Union, so it is unnecessary to refer directly to the underlying Directive, Directive 2004/38 ('Directive 2').

19. Nor is it necessary for me to refer to the Regulations in any detail. Regulation 23 is headed 'Exclusion and Removal from the United Kingdom'. Regulation 23(6)(b) enables the Secretary of State to remove an EEA national, subject to regulation 23(7) and (8), if the Secretary of State decides that that person's removal is 'justified on

ground of public policy, public security or public health in accordance with regulation 27'.

20. Regulation 27 is headed 'Decisions taken on grounds of public policy, public security and public health'. 'A relevant decision' is a decision taken on those grounds (regulation 27(1)). Regulation 27(3) applies to a person who has a right of permanent residence under regulation 15. It provides that a relevant decision may not be made in the case of such a person except on 'serious grounds of public policy and public security'. Regulation 27(4) applies to a person who has a who has lived in the United Kingdom for a continuous period of at least ten years before the date of the relevant decision. It is common ground that regulation 27(4) applies to Mr George. It provides that 'A relevant decision may not be taken except on imperative grounds of public security' in respect of an EEA national in that position.

21. Regulation 27(5) provides that 'the public policy and public security requirements of the United Kingdom include restricting the rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where the decision is taken on grounds of public policy or public security, it must also be taken in accordance with' the principles listed in regulation 27(5). Those include 'the principle of proportionality', that the decision must be based only on a person's conduct, that the conduct 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', that the person's previous criminal convictions do not in themselves justify the decision, and that 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'.

22. The drafting of regulation 27(8) echoes the drafting of section 117A(2) of the Nationality, Immigration and Asylum Act 2002. It requires a court or tribunal which is considering whether the requirements of regulation 27 are met '(in particular) to have regard to the considerations…in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.')'. Mr Keith relied on paragraph 7(f) of Schedule 1. This provides that the fundamental interests of society include 'excluding or removing an EA national…with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action'.

The cases about the removal of EEA nationals

R v Bouchereau

23. When *R v Bouchereau* (Case 30/77) [1978] 1 QB 732 was decided, the relevant legislative instrument was article 3 of Directive No 64/221 ('Directive 1'). It provided:

> '1. Measures taken on grounds of public policy or 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'.

24. The defendant, a French citizen working in the United Kingdom, had been convicted, for the second time in a matter of months, of possessing illegal drugs. The first offence involved 'small quantities of methyl amphetamine and of cannabis'. The defendant received a conditional discharge for that offence. The second offence related to 28 tablets of LSD and three packets of salts of amphetamine. The metropolitan stipendiary magistrate deferred sentencing the defendant for those offences until he had decided whether or not to make a recommendation that that defendant be deported. Before doing that, he referred two questions to the Court of Justice. Only the second of those questions is relevant to this appeal. The second question was whether article 3.2 meant that 'previous criminal convictions are solely relevant in so far as they manifest a present or future propensity to act in a manner contrary to public policy or public security; alternatively, the meaning to be attached to the expression "in themselves" in article 3(2)…'

25. The prosecutor in that case (the Metropolitan Police) argued that nothing in Community legislation supported 'the proposition that previous criminal convictions are only relevant in so far as they manifest a present or future propensity to act in a manner contrary to public policy or public security. The purpose of article 3(2) of Directive No 64/221 is to ensure that the facts or actions giving rise to the conviction are examined and that any subsequent decision which restricts the freedom of movement of the person concerned is only taken on the basis of the personal conduct resulting in the conviction'. The contrary argument 'would result in preventing a member state from deporting a worker…who has been convicted of the most heinous breach of public policy or public security as long as it has not been shown that [he] may commit a future breach of public policy or public security. That argument is a fortiori unacceptable in the light of the fact that a person who has not previously been convicted of a criminal offence but whose personal conduct nevertheless infringes public policy or public security may be deported without, in such a case, any need to consider the future danger which he represents' (p752F-H).

26. The defendant argued that criminal convictions were only relevant 'in so far as they manifest a present or future propensity to act in a manner contrary to public policy or public security'. If it were otherwise, that would be 'to use public policy for the punishment of criminals rather than the protection of the state' (p755G-H).

27. The Court of Justice quoted the second question referred by the national court in paragraph 25. Its aim was to discover whether the defendant's argument was correct, or whether, while a court could not make a recommendation for deportation based on the fact alone of the conviction, it was entitled to take the conduct which resulted in the conviction into account (paragraph 26).

28. The Court of Justice held, in paragraph 27, that article 3.2 required the national authorities to 'carry out a specific appraisal from the point of view of the interests inherent in protecting the requirements of public policy which does not necessarily coincide with the appraisals which formed the basis of the criminal conviction'. The criminal conviction could only be taken into account 'in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy' (paragraph 28). In paragraph 29,

the Court said that 'Although, in general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy'.

29. It was for 'the national authorities and, where appropriate, the national courts, to consider that question in each individual case in the light of the particular legal position of the persons subject to Community law and of the fundamental nature of principle of the free movement of persons' (paragraph 30).

30. In paragraph 35, the Court said: 'In so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by national authority to the concept of public policy presupposes, in any event, 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'.

LG (Italy) v Secretary of State for the Home Department

31. In *LG (Italy) v Secretary of State for the Home Department* [2008] EWCA Civ 190 the Secretary of State made a decision under regulation 23 of the Immigration (European Economic Area) Regulations 2000 ('the 2000 Regulations') to deport LG, on the grounds that his presence in the United Kingdom posed a threat to the requirements of public policy and his deportation would be conducive to the public good. The 2000 Regulations were made to give effect to Directive 1. The 2000 Regulations were replaced by the Immigration (European Economic Area) Regulations 2006 ('the 2006 Regulations'), which were made to give effect to Directive 2. It was common ground that, by virtue of the relevant transitional provisions, the appeal was to be considered under the 2006 Regulations (see paragraph 2 of the judgment of Carnwath LJ, with which Mummery LJ agreed). Regulations 21(3) and (4) of the 2006 Regulations were the same as regulations 27(3) and 27(4) of the Regulations.

32. LG was an Italian citizen who had lived in the United Kingdom for about 20 years. LG had been convicted five times between 1996 and 2001. The most recent of those convictions was for robbery and causing grievous bodily harm with intent. The sentencing judge described the offence as 'a brutal, senseless, cowardly attack upon an elderly gentleman'. The judge thought that LG was 'a thoroughly dangerous man'. He added, 'I don't think for offence of robbery of this type it gets much worse'. LG received two concurrent sentences of 12 years' imprisonment, which were reduced on appeal to sentences of nine years 'for technical reasons'.

33. He appealed to the Asylum and Immigration Tribunal ('the AIT'). The AIT dismissed his appeal. The AIT held that LG satisfied the ten-year criterion but agreed with the Secretary of State that the test for removal was met. The issues on the appeal to his court were whether LG satisfied the ten-year residence criterion, given that he had spent the past seven years in prison, and, if he did, whether the AIT had erred in law in holding that there were 'imperative grounds of public security' for removing him.

34. In paragraph 14, Carnwath LJ noted that, in regulation 21, the 2006 Regulations had introduced a 'new hierarchy of protection'. The Regulations gave no guidance about the meaning of the relevant words. He added, in paragraph 15, that the wording of regulation 21 '(following the Directive) reflected the language of the ECJ in an early case, *R v Bouchereau* …' He referred to paragraph 35 of *Bouchereau* (see paragraph 30, above). He also referred to three decisions of this court concerning removal on ground of 'public policy'.

35. He then referred to recital 3 to Directive 2. One of the stated purposes of Directive 2 was to codify and review existing Community instruments and to strengthen the right of free movement and residence of all citizens of EU member states. He also referred to recitals 17 and 22-24 which explained the new rights of residence and protections against removal. Article 28 '(Protection against expulsion)' was the basis of the tri-partite hierarchy in regulation 21 of the 2006 Regulations. In paragraphs 20-23, he referred to some provisions of the Secretary of State's relevant policy, the 'Operational Enforcement Manual' ('the OEM').

36. His initial view was that the appeal should fail. Permission to appeal had been given on the basis that this court should give guidance. The need for guidance was underlined by inconsistencies in successive versions of the OEM and in the positions taken by the Secretary of State at various stages in the litigation. There were issues which needed further consideration, and he did not feel that the court was able to give guidance on 'the basis of the relatively limited arguments we have heard'. He was persuaded that it was open to the court to allow the appeal for the reasons given by Arden LJ, '(even if not on grounds which were argued before the AIT)' (paragraph 30).

37. He added, in paragraph 31, that he did not want to give guidance, in particular, before 'the Secretary of State has reached a more settled view both of the legal interpretation of the provisions and the policy considerations governing their application in practice. In the latter respect, European law recognises "an area of discretion" for Member States… and the Directive specifically allows for the "imperative grounds" test to be subject to specific definition by Member States'. He repeated and expanded on this point in paragraph 40, in which he said that 'the Secretary of State has primary responsibility under the Directive for determining issues of public policy and public security' and that guidance could not be given until she had reached 'a coherent and settled view'. Arden LJ appears to have read Carnwath LJ's judgment as requiring any such view to be expressed in legislation (paragraph 46). I can find no support for that interpretation of his judgment.

38. He made three further points about the interpretation of the 2006 Regulations in paragraph 32. He criticised the aspects of the two versions of the OEM for not reflecting these points.

    1. 'Imperative grounds of public security' is a test which is 'both more stringent and narrower in scope than "serious grounds of public policy or public security"'.
    2. 'Public security' is a familiar expression but does not seem to have been defined. There was no reason to equate it with national security. It is a broader concept.
    3. 'Imperative' is a high threshold.

Land Baden-Wűrttemburg v Tsakouridis

39. *Tsakouridis* concerned a citizen of Greece who was living in Germany. He was convicted of eight counts of drug trafficking as part of an organised group and sentenced to six and a half years' imprisonment. The German authorities decided that he had lost his right of residence in Germany on the basis of domestic legislation which provided as much if a person was sentenced to more than five years' imprisonment. In the first question it referred to Court of Justice, the national court asked the Court of Justice whether the term 'imperative grounds of public security' in article 28(3) of Directive 2 was 'to be interpreted as meaning that only irrefutable threats to the external or internal security of' the member state 'can justify expulsion, that is, only to the existence of the State and its essential institutions, their ability to function, the survival of the population, external relations and the peaceful co-existence of nations?'

40. In paragraph 40, Court of Justice said, from the words and scheme of article 28, that the test in article 28(3) was 'considerably stricter' than the test of 'serious grounds' in article 28(2). The EU legislature wanted to limit measures based on article 28(3) to 'exceptional circumstances' as set out in recital 24. The relevant threat had to be of a 'high degree of seriousness' (paragraph 41). The Court referred to its relevant decisions and said that the concept included a member state's internal and external security, and the other considerations referred to in the first question (paragraphs 43 and 44). 'It does not follow' however 'that objectives such as the fight against crime in connection with dealing in narcotics as part of an organised group are necessarily excluded from that concept' (paragraph 45). It explained why in paragraphs 46 and 47. '…trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical safety of the population as a whole or a large part of it'.

41. Having referred to article 27(2) of Directive 2, the Court said that any expulsion measure must be based on 'an individual examination of the specific case'. It could only be justified under this criterion if 'having regard to the exceptional seriousness of the threat, such a measure is necessary for the protection of the interests it aims to secure' provided that the measure was proportionate (paragraph 49). The assessment should be made by reference to the matters specified in paragraph 50, and, 'if appropriate, the risk of re-offending' (the Court here referred to paragraph 29 of *Bouchereau*) and to the risk of compromising rehabilitation (paragraph 50). The sentence passed was a relevant factor (paragraph 51). It was for the referring court to decide whether the test was met in the case of Mr Tsakouridis (paragraph 55).

I v Oberbűrgermeisterin der Stadt Remscheid

42. The offender in *I v Oberbűrgermeisterin der Stadt Remscheid* (C-348/09) [2012] QB 799 was an Italian citizen who had lived in Germany for over ten years. He was sentenced to seven and a half years' imprisonment for sexual offences against a minor (sexual assault, sexual coercion and rape). The victim was his partner's daughter whom he had subjected to repeated rapes and assaults for several years. She was eight when the offences began. He had used force and threatened to kill her mother and brother. He had been 'relentless in his criminal conduct' and caused his victim 'endless suffering'. In the light of the length of time over which he had committed the

offences, and of his lack of remorse, the possibility that he might commit further offences in similar circumstances could not 'be ruled out'.

43. The national court referred a question to the Court of Justice which was similar to the question referred by the national court in *Tsakouridis* (see paragraph 39, above). The national court did not consider that the judgment in *Tsakouridis* answered that question for the purposes of I's case (paragraph 16). It wanted to know whether the test applied to offenders who did not belong to a criminal organisation but who had committed 'extremely serious criminal offences which affect individual interests benefitting from legal protection, such as sexual autonomy, life, freedom, and physical integrity, where there is a high level of risk that they will re-offend, committing other similar offences' (paragraph 17).

44. The Court referred to the 'particularly high degree of seriousness' of the relevant threat, by reference to paragraph 41 of *Tsakouridis* (paragraph 20). The law of the European Union did not impose on member states a 'uniform scale of values' in making the relevant assessment (paragraph 21). Article 28(3) of Directive 2 provided that imperative grounds of public security are to be 'defined by member states', subject to the supervision of European institutions (paragraph 23). The Court then listed the factors which must be taken into account by member states in paragraphs 25-27. One of those is that the sexual exploitation of children is one of the offences referred to in article 83(1) of the Treaty on the Functioning of the European Union ('the TFEU') as 'one of the areas of particularly serious crime with a cross-border element in which the European legislature may intervene' (paragraph 25). It followed from the listed factors that member states might regard such offences as 'constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population' and thus meet the criterion of 'imperative grounds of public security'. Even if the referring court were to find, by reference to 'particular values of the legal order' of the member state, that, the offences met that test, that would not necessarily be enough (paragraph 29). In general, a propensity to act in the same way in the future would be necessary (paragraph 30).

Robinson (Jamaica) v Secretary of State for the Home Department

45. The issue in *Robinson (Jamaica) v Secretary of State for the Home Department* [2018] EWCA Civ 85; [2018] 4 WLR 81 was whether the UT had erred in law in allowing the respondent's appeal from a decision of the F-tT dismissing her appeal from a decision of the Secretary of State to refuse to revoke a deportation order. The respondent was Jamaican citizen. She was a '*Zambrano*' carer who had been convicted of supplying a Class A drug. Her sentence was two and a half years' imprisonment. I will refer to this case as '*Robinson No 2*'. Singh LJ, giving a judgment with which Lindblom LJ and Underhill LJ agreed, accepted a submission (paragraph 66) that the Secretary of State was not required to show that there were 'imperative reasons relating to public security' for removing a *Zambrano* carer who had committed a crime. '*Zambrano*' is a reference to *Ruiz Zambrano v Office national de l'Emploi* (Case C-34/09) [2012] QB 265.

46. The Secretary of State's primary argument was that the UT had erred in law in by supposing that the protection given to a carer by the decision in *Zambrano* (as further

elaborated by the Court of Justice in later decisions) was absolute, and left no room for the tribunal to balance the public interest in removal against the rights of the *Zambrano* carer. Singh LJ accepted that argument. He held that the UT had erred in law by not considering the proportionality of the respondent's removal and that the appeal should be remitted to the UT for the UT to consider that issue (paragraph 53). He then considered three further issues in order to give the UT guidance about how to approach the appeal on that remittal.

47. One of those issues (paragraphs 68-86) was he extent to which *Bouchereau* is still good law. The question was said to be 'the extent to which past conduct alone, and "public revulsion", in particular, may be sufficient to justify the deportation of an offender in this sort of case'. Singh LJ quoted paragraphs 27-30 of the decision of Court of Justice in *Bouchereau*. He noted that the Court referred, not to a threat to the public, but to a threat to public policy, which is 'a broader concept'. The reference in the opinion of Advocate General to 'deep public revulsion' was a helpful guide. 'That is the kind of case in which past conduct alone may suffice as constituting a present threat to the requirements of public policy' (paragraph 71).

48. In paragraph 73, Singh LJ referred to paragraphs 19 and 20 of the judgment of Moore-Bick LJ in *Straszewski v Secretary of State for the Home Department* [2015] EWCA Civ 1245; [2016] 1 WLR 1173. Singh LJ said that that judgment showed that, while such cases would be exceptional, Moore-Bick LJ 'acknowledged that there can in principle be cases in which 'the *Bouchereau* reference to past conduct, and, in particular, public revulsion, may still be relevant'. Singh LJ's conclusion was that *Bouchereau* was still binding. A present threat to the requirements of public policy 'in an extreme case…might be evidenced by past conduct which has caused deep public revulsion' (paragraph 84). The facts of any such case, however, would have to be 'very extreme'. He did not 'attempt an exhaustive definition'. An example he gave was where a person had 'committed grave offences of sexual abuse or violence against young children' (paragraph 85).

49. *Robinson No 2* was not such a case (paragraph 86). In *Straszewski* Moore-Bick LJ had referred to 'the most heinous of crimes'. Singh LJ distinguished *R v Secretary of State for the Home Department ex p Marchon* [1993] 2 CMLR 132. In that case, this court applied *Bouchereau* to the case of a doctor who had been convicted of conspiracy to import 4.5kg of heroin, and sentenced to 14 years' imprisonment (reduced to 11 on appeal). This court had described his offence as 'particularly horrifying' and 'repugnant to the public', because it had been committed by a doctor. By contrast the sentence imposed on the respondent in *Robinson No 2* was 'at the lower end of the scale' for such offences (paragraph 86).

Secretary of State for the Home Department v Okafor

50. This court considered *Bouchereau* more recently in *Secretary of State for the Home Department v Okafor* [2024] EWCA Civ 23. In that case the Secretary of State appealed against a decision of the UT allowing the respondent's appeal under the Regulations. *Okafor* takes this appeal no further. The relevant test in that case was not 'imperative grounds of public security'. The reasoning in that case turned on whether or not the UT had erred in law in applying the relevant test (that is, 'serious grounds of public policy and public security').

The Secretary of State's relevant policy

51. In paragraph 7 of determination 3 the UT referred to and quoted the Secretary of State's policy about the expulsion of EEA nationals 'Public policy, public security or public health decisions' ('the policy'). The policy says that the phrase 'imperative grounds of public security' is not defined in the Regulations. It may be interpreted more widely than threats to the state and to its institutions.

52. It can include 'serious criminality such as drug dealing as part of an organised group, (*Tsakouridis* is referred to). The policy also describes *I v Oberbűrgermeisterin der Stadt Remscheid* as authorising member states to consider the crimes referred to in article 83(1) of the TFEU as meeting that test. The crimes include terrorism, trafficking in people, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting means of payment, computer crime and organised crime. The list is not exhaustive. Other crimes with a 'cross-border element' may count, depending on their severity, and on whether they pose 'a threat of a particularly high degree of seriousness'.

53. The policy was not in the bundle of authorities for this appeal.

Determination 1

54. It is unnecessary to say much about determination 1. Mr George was represented by Mr O'Ryan. The Secretary of State was also represented. The parties agreed that the issue was 'imperative grounds for deportation' (paragraph 5). The F-tT summarised the facts in paragraphs 11-21, and analysed the 'OASys and Other Assessments' in paragraphs 23-34. It summarised the law in paragraphs 35-38. It concluded that the relevant test was not met in paragraphs 58-63, having summarised and commented on the parties' submissions in paragraphs 39-57.

The grounds of appeal to the UT

55. The grounds of appeal disputed the F-tT's assessment of the risk of future offending, which was based on the OASys report. Paragraph 12 added that 'It is also possible that past conduct alone may constitute such a threat to the requirements of public policy', referring to paragraph 29 of *Bouchereau*. The importance of that principle had been 'recently reiterated' in *Robinson No 2*. The sentencing remarks showed that Mr George's offence caused 'deep public revulsion'.

Mr George's rule 24 response

56. Mr O'Ryan drafted a rule 24 response to the Secretary of State's grounds of appeal. He argued that the Secretary of State should not be heard on the *Bouchereau* point, which was not relied on in the decision. Moreover, the requirements of 'public policy', as per the Secretary of State's grounds of appeal, were not relevant in this case, because the test was different ('imperative grounds of public security'). The response explained, by reference to *Bouchereau*, that that decision was about the requirements of public policy. Directive 2 distinguishes between public policy and public security. The distinction was also clear in *Robinson No2*, which was also quoted.

The F-tT's grant of permission to appeal

57. On 22 March 2019 the F-tT gave the Secretary of State permission to appeal to the UT, because the grounds of appeal disclosed 'an arguable error of law'. The F-tT added 'The grant of permission is not limited'.

Determination 2

58. The UT held a hearing in order to decide whether or not the F-tT had, in determination 1, erred in law. Mr George was again represented by Mr O'Ryan, and Secretary of State by a Senior Home Office Presenting Officer. The UT summarised the facts. In paragraph 14, the UT summarised the grounds of appeal and referred to *Bouchereau*. In paragraph 16 it referred to the Secretary of State's submissions about future risk, and to Mr O'Ryan's submissions in paragraph 17-20. In paragraph 19, it recorded Mr O'Ryan's answer to the *Bouchereau* point. The grounds of appeal did not refer to the relevant threshold and the focus of the decision was actual risk. 'There was no error in not addressing this point and in any event it did not apply in an imperative grounds case'.

59. In paragraph 23 the UT said that paragraph 28 of determination 1 was at 'the heart of the challenge'. That paragraph concerned the weight which the F-tT had given to the OASys report. It was arguable that it had erred in law in seeing itself as bound by the OASys report, and that that error was material. 'Though I agree with Mr O'Ryan that the *Bouchereau* point takes matters little, if any, further, I consider that the judge did materially err in law for the reasons given[. A]s a consequence the matter will need to be reheard'.

Determination 3

60. In its careful reasons, the UT reached several conclusions which the Secretary of State does not challenge in this appeal. The UT concluded that the AO gang existed, and that Mr George was a member of that gang (although the evidence suggested that his membership was peripheral or temporary). There was limited if any evidence that the members of the gang were involved in organised crime for financial gain, such as dealing in drugs or evading excise duty. Mr George had been a promising footballer. He had a semi-professional contract with Morecambe FC and a scholarship to Lancaster College. He had been living away from home for two years. He had GCSEs, no criminal convictions and a part-time job in a restaurant. By the time of the UT hearing, he had been released on licence and was living in a bail hostel some distance from his parents, who had given him a stable and supportive home. He had no job and was not 'in education'.

61. The UT also concluded, by reference to the policy, that it was 'not satisfied that Mr George has, or has ever had, any involvement in organised criminality, beyond his involvement in this offence' (paragraph 42). The UT asked whether there was 'genuine present and sufficiently serious threat'. Its emphatic answer was that Mr George would not be involved in gang violence again: 'absolutely not'. The UT was 'confident that there is a low risk of him being drawn back into any gang violence' (paragraph 44). The UT then asked whether there was a similar threat that he would become involved in any other violence and concluded that he would not be. The UT considered that Mr George was 'deeply remorseful' (paragraph 46).

62. The Secretary of State had failed to discharge the burden of showing that the test in regulation 27(4) of the Regulations was met (paragraph 46).

The UT's reasons for refusing permission to appeal to this court

63. The UT summarised the history of the appeal in paragraph 1. In paragraph 2, it said that the Secretary of State had chosen not to rely on the *Bouchereau* point at the second UT hearing 'despite the door having been left open for her to do so'. The Secretary of State had argued that she could show imperative grounds of public security based on Mr George's continuing involvement in 'gang culture' and the associated risk of violence. The Secretary of State had lost because there was no evidence that Mr George was in a gang, and 'in unchallenged findings, supported by all of the available evidence' the UT had concluded that his risk of reoffending was low. In paragraph 4, the UT added that the Secretary of State was trying to revive a ground of appeal which had 'only ever featured' in the case when the Secretary of State applied for permission to appeal to the UT. It was not argued before the F-tT or the UT. The second appeals test could not be met by pointing the seriousness of the offence. The grounds did not identify any arguable error of law.

The ground of appeal to this court

64. This case is said to fall 'firmly within the ECJ judgment in *Bouchereau…*'. The ground quotes paragraph 29 of *Bouchereau* (see paragraph 28, above). The conduct in this case, 'a brutal killing as part of gang violence is precisely the type of conduct that alone threatens public policy'. Such cases 'in and of themselves are so serious as to require the removal from the UK of the perpetrator. This matter has not been considered by the Court of Appeal in relation to unlawful killing'.

The respondent's notice

65. There is a Respondent's Notice, but it is not necessary for me to refer to it.

The submissions

66. In his extremely brief skeleton argument, Mr Keith set out ground 1, and referred to paragraph 85 of the judgment of Singh LJ in *Robinson No 2* (see paragraph 48, above). He submitted that 'the luring of a man to his death met that test'. He accepted, however, in answer to a question from the court, that the word 'lure' was not accurate. He referred to the decision of the UT refusing permission to appeal. He submitted that the second appeals test was met because the arguments were 'an important point of principle or practice'. It was a high profile case and 'the first to deal with the issue of murder/manslaughter in this context'. The answer to the UT's procedural point (see paragraph 63, above) was said to be the decision in *Robinson No 1* (see paragraphs 15-17, above). *Robinson No1* is said to show that 'there remains a power to consider any other point arising from the decision if the interests of justice require'. The skeleton argument continued: 'This is such a case'.

67. In answer to questions from the court, Mr Keith accepted that the decision does not refer to, or rely on, *Bouchereau*, and that this point was not argued in the F-tT. He also accepted, by reference to a transcript of the UT hearing, and to Mr O'Ryan's recollection of that hearing, that the Senior Home Office Presenting Officer had abandoned the *Bouchereau* point in an exchange during the UT hearing. In that

exchange, part of which was recorded by the transcriber as 'inaudible', Upper Tribunal Judge Bruce asked Senior Home Office Presenting Officer whether he was relying on the point, and he had said, 'No'. Mr Keith was therefore content with the word 'abandon'.

68. He accepted that *Robinson No 1* is a different case from this one, but maintained that it stood for a broad principle. This case was slightly different from the facts considered in the other authorities, in that the *Bouchereau* point was in the grounds of appeal to the UT, which meant that the UT had jurisdiction to consider it. The *Bouchereau* point was either '*Robinson* obvious', or, if not, this court had a discretion to consider a new point of law on this appeal. He accepted, when asked, that it was not a pure point of law; if there was not only one answer, the case would have to be remitted to the UT for the UT to make the necessary assessment. He tried to persuade us that, even though there was no relevant assessment by the Secretary of State, by the F-tT or by the UT, this court could decide the point. The offence was so serious that there could only be one answer. He maintained that that was so even though the decision did not analyse Mr George's offence in that way.

69. He also accepted that, even though Singh LJ had considered seven pages of procedural objections to the application for permission to appeal, it would be open to this court, in the light of the Secretary of State's several procedural failings, and having heard oral argument from both sides, to decline to hear the appeal. I should explain that those procedural failings included, not only the conduct of the case in the tribunals, but also mistakes in the institution of the appeal to this court.

70. On the substance, he accepted that regulation 27(4) excluded the requirements of public policy as a ground for exclusion. He did not know whether Schedule 1 represented the Secretary of State's view of the relevant considerations. He relied on paragraph 7(f) (see paragraph 22, above). He accepted that, on a literal reading, it would include any offender, no matter how trivial his offence. He submitted that 'the principles of *Bouchereau*' are 'incorporated in the Regulations'.

Discussion

71. There are two issues.

1. Should this court allow the Secretary of State to argue this point?
2. Does this court accept that the UT erred in law?

1. Should this court allow this point to be argued?

72. Mr Keith realistically accepted that the grant of permission to appeal by Singh LJ, after full argument on the papers about what Singh LJ described as the 'unimpressive' procedural history, did not prevent this court, after oral submissions, from refusing to allow the Secretary of State to argue this point. In their skeleton argument for this hearing, Ms Naik and Mr O'Ryan urged us not to allow the point to be argued, relying, among other things, on that history, and on *Mullarkey v Broad* [2009] EWCA Civ 2.

73. Singh LJ is a very experienced judge of this court, and has particular expertise in this field (as in many others). I would defer to his assessment that this is a point of public

importance, which, in any event, coincides with my own view. On that ground alone, I consider that this court should decide this appeal on its legal merits, notwithstanding that procedural history. The description 'unimpressive' is an understatement, perhaps a deliberate understatement. That does not make that history irrelevant. It is relevant, for the reasons I give below (see paragraphs 74, and 80). The Secretary of State should not interpret this exceptional indulgence as a green light for future procedural failings of the kind we have seen in this case. As Singh LJ noted in paragraph 72 of *R (SWP) v Secretary of State for the Home Department* [2023] EWCA Civ 439; [2023] 4 WLR 37, it is as important for the Secretary of State to observe procedural rules as it is for claimants.

74. I have two reservations about deciding this appeal on its merits, nevertheless. First, it is clear from Directive 2 and from the relevant decisions of the Court of Justice that the national authorities have a significant role in cases such as these. In the first instance, it is for the Secretary of State to define the relevant interests. It is true that that Schedule 1 to the Regulations represents, at a high level, the Secretary of State's assessment of the relevant interests, and that the UT quoted the policy in determination 3. This court does not have, however, any assessment by the Secretary of State of the facts of this case against the criteria in Schedule 1 and in the policy, as there is no reasoning or assessment in the decision which is relevant to the Secretary of State's current ground of appeal; and no such assessment was made by the F-tT or by the UT. Essential building blocks for this appeal were missing. This is a paradigm case (had the point of law been right) in which an assessment by the Secretary of State of the facts against the relevant public interests would have been essential, together with the assessments of the F-tT and of the UT. Had this court reached a different view about the merits of this appeal, it would simply not have been in a position to make the relevant assessment itself. It would have had to remit the case to the UT. This consideration weighs against the exercise by this court of its discretion to permit the Secretary of State to argue this point now.

75. Second, the principle in *Robinson No 1* is limited to points of refugee law which favour a person who claims to be a refugee, and which are 'obvious' and arguable with 'strong prospects of success' (see paragraph 17 above). The reason for that principle is that it is necessary to enable the United Kingdom to comply with its obligations under the Refugee Convention. This is not a case to which that principle applies. I am only aware of one case in which this principle has been extended in favour of the Secretary of State, also in a refugee case, where it was obvious that the appellant was excluded from the protection of the Refugee Convention, as a self-confessed torturer, by article 1F (*A (Iraq) v Secretary of State for the Home Department* [2005] EWCA Civ 1438). Counsel did not refer us to any other relevant cases. There are obvious policy reasons why this principle should not be extended any further in favour of the Secretary of State.

76. The only basis, therefore, on which this this court could consider this appeal is its discretion to entertain points of law which were not argued below. I consider, on balance, that it is appropriate to invoke that discretion, in order to decide the underlying point of law, which, as I have said, is an important one.

2. Did the UT err in law in this case?

77. The starting point is that there is no express misdirection of law in determination 3. Secretary of State accepted in the decision that Mr George had the highest level of protection against removal conferred by the Regulations. He could only be removed on 'imperative grounds of public security'. That is precisely the test which the UT applied. No aspect of the UT's express reasoning is challenged on this appeal. On the face of determination 3, the UT did not err in law.

78. The next question is whether there is, nevertheless, a latent error of law in determination 3. I consider that there are two main reasons why not.

79. First, and most significantly, when *Bouchereau* was decided, there was no test of imperative grounds of public security in Directive 1, which was the only material legislative instrument. The test in article 3(1) of Directive 1 (see paragraph 23, above) was different from the test in article 28(3) of Directive 2 (which, in turn, is reflected in regulation 28(4) of the Regulations). Article 3(1) of Directive 1 referred only to 'public policy or public security', and not to 'imperative grounds of public security'. The short and decisive point for this appeal is that considerations of public policy do not feature in that new test, which only applies to EEA nationals with the strongest protection against removal. That new test sets a very high threshold, by reference only to 'imperative grounds of public security'. The reasoning in *Bouchereau*, on which the Secretary of State now relies, is irrelevant to the new test. *Robinson No 2* does not help the Secretary of State. It decides that *Bouchereau* is still good law when the appellant has a lower level of protection from removal (see the facts described in paragraphs 7-14 of the judgment of Singh LJ, and paragraph 66). The reasoning in *Robinson No 2* does not apply if appellant has the highest level of protection conferred by the Regulations. This appeal is based on a misconception about the law which applies in a case like this. That misconception was identified by Mr O'Ryan in his rule 24 response, clearly articulated by him at the error of law hearing, and maintained since then (see, for example, paragraphs 56 and 58, above).

80. Second, I do not consider that the UT can be said to have erred in law by failing to consider a point which the Secretary of State had permission to argue in the UT, but which she expressly abandoned in the UT. The UT is not required to consider a point which the Secretary of State has expressly abandoned. The position might be different if the Secretary of State had not expressly abandoned the point (cf *Shyti v Secretary of State for the Home Department* [2023] EWCA Civ 770, which concerns points taken in a decision letter and not expressly abandoned before the F-tT). I do not express any view about that. The point of law on which the Secretary of State now relies was not a latent point of law, precisely because it was identified by the Secretary of State and expressly abandoned.

Conclusion

81. For those reasons I would dismiss this appeal.

Lady Justice Asplin:

82. I have had the opportunity to read the judgments of Elisabeth Laing and Underhill LJJ in draft and I agree that the appeal should be dismissed for the reasons they give. I should add that I have the same reservations as Underhill LJ in relation to the

additional reason referred to by Elisabeth Laing LJ at para 80 of her judgment. As he points out, however, it makes no difference to the outcome of this appeal.

Lord Justice Underhill:

83. I agree that this appeal should be dismissed. I will give my reasons briefly in my own words, though on the central issue I do not think they differ from Elisabeth Laing LJ's.

84. At paras. 60-62 above Elisabeth Laing LJ has summarised the reasoning which led the Upper Tribunal Judge to her conclusion that Mr George's deportation could not be justified "on imperative grounds of public security" – which is, in accordance with regulation 27 (4) of the 2016 Regulations, the applicable criterion. I would only add that the Judge's reasons involve a conspicuously careful consideration of the evidence and that they follow a thorough review both of the guidance given in *LG (Italy) v Secretary of State for the Home Department* [2008] EWCA Civ 190 and *Land Baden-Wűrttemburg v Tsakouridis* (C-145/09) [2011] 2 CMLR 261 (summarised at paras. 39-44 above) and of the terms of the Secretary of State's policy (paras. 51-52). As appears from Elisabeth Laing LJ's summary, the essential basis of the Judge's conclusion was that there was no "genuine, present and sufficiently serious threat" of Mr George becoming involved in gang violence, or any other kind of violence, in the future. That phrase applies the requirement of regulation 27 (5) (c) (see para. 21 above). It is important to appreciate that the Secretary of State does not challenge that finding.

85. The Secretary of State's ground of appeal reads:

> "5. This case falls firmly within the ECJ judgment of *Bouchereau* (case 30-77) (1977) 66 Cr.App.R. 202 jurisprudence. This case states at §29:
>
> > '29. Although, in general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy.'
>
> 6. The conduct in this case of a brutal killing as a part of gang violence is precisely the type of conduct that alone threatens public policy. The SSHD submits that such cases in and of themselves are so serious as to require the removal from the UK of the perpetrator. This is a matter that has not been considered by the Court of Appeal in relation to unlawful killing."

86. That is not very tightly pleaded; but the effect of the two paragraphs read together is to contend that, because AH's killing was in the context of gang violence, Mr George's involvement in it necessarily justified his deportation as a matter of public policy, irrespective of whether there was any risk of his committing violent offences in the future. That, as appears from the passage quoted from *Bouchereau*, is the effect of the word "alone" in para. 6: what is being said is that in such a case past conduct

alone is enough to require removal as a matter of "public policy". In his skeleton argument, and in his oral submissions before us, Mr Keith makes clear that the basis of that submission was the consideration identified in paragraph 7 (f) of Schedule 1 to the Regulations, to which the Court is obliged by regulation 27 (8) to have regard, namely that the fundamental interests of society in the United Kingdom include

> "… excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action".

He relied in particular on the second limb of the sub-paragraph, namely the need to maintain public confidence in the ability of the authorities to remove (as a shorthand) EEA criminals.

87. Mr George contends that the Secretary of State should not be permitted to advance that ground, since it was expressly abandoned in the Upper Tribunal. I have much sympathy with that submission, but in the end I agree with Elisabeth Laing LJ that we should not go behind Singh LJ's assessment that, notwithstanding the Secretary of State's extremely unimpressive handling of this case to date, the public interest would be served by allowing the point to be taken. I find that decision easier since in my view, as appears below, the pleaded ground has no merit.

88. The necessary starting point is to appreciate that the 2016 Regulations, reflecting the requirements of EU Directive 2004/38, provide for differing levels of protection from deportation for EEA nationals with a right of permanent residence depending on whether they have been continuously resident in the UK for more than ten years. If they have not, they can be removed "on serious grounds of public policy and public security" (regulation 27 (3)). If they have, they can only be removed "on imperative grounds of public security" (regulation 27 (4)). Mr George, as an EEA national who enjoyed a permanent right of residence and had been continuously resident for more than ten years, enjoyed the greater degree of protection afforded by regulation 27 (4).

89. The distinction between the two levels of protection is fundamental to the issue in this appeal. Two key points emerge from para. 32 of the judgment of Carnwath LJ in *LG (Italy)*, which was concerned with the provisions in regulation 21 of the 2006 Regulations (which are, save in one respect noted at the end of para. 91 below, substantially identical to the provisions of the 2016 Regulations with which we are concerned):

(1) The words "imperative grounds of public security" impose a criterion which is "both more stringent and narrower in scope than the criterion of "serious grounds of public policy and public security" (see para. 32 (1)). To spell it out, the criterion is more stringent because the grounds must be "imperative", which "connotes a very high threshold" (see para. 32 (3)); and it is narrower because the grounds must relate only to "public security", whereas under regulation 27 (3) they may relate also to "public policy".

(2) The difference between the two levels of protection is not merely one of degree but qualitative: "in other words, [regulation 27 (4)] requires, not simply a

> serious matter of public policy, but *an actual risk to public security* [my italics], so compelling that it justifies the exceptional course of removing someone who ... has become integrated by many years residence in the host state" (para. 32 (5)).

I respectfully agree with those points, and in my view they afford a complete answer to the ground of appeal advanced by the Secretary of State. In the present case she was obliged to show that Mr George's continuing presence in the UK posed, in Carnwath LJ's words, an "actual risk to public security" – and, what is more, a risk so compelling as to justify the exceptional course of deporting him from a country into which he was now integrated by so many years' residence. The Judge's unchallenged findings establish that he posed no such risk.

90. That conclusion is not affected by the observation in para. 29 of the ECJ's decision in *R v Bouchereau* (30/77) [1978] QB 732 that "the requirements of public policy" might, albeit exceptionally, require the removal of an EEC national who had committed a serious criminal offence, even where there was no "propensity to act in the same way in the future", i.e. where there was no threat of future misconduct. The circumstances in which that might be the case are explained by Singh LJ at paras. 68-80 of his judgment in *Robinson (Jamaica) v Secretary of State for the Home Department* [2018] EWCA Civ 85, [2018] 4 WLR 81, (referred to by Elisabeth Laing LJ as "*Robinson 2*"): in short, public policy might justify deportation in such a case where the offending conduct was such as to give rise to "deep public revulsion". However, *Bouchereau* was concerned with an earlier Directive which had a completely different structure from Directive 2004/38 and, specifically, did not provide for the higher level of protection afforded to EEA nationals with more than ten years' residence by article 28.3 (from which regulation 27 (4) of the 2006 Regulations derives); and its reasoning was concerned only with the criterion of "public policy". None of the authorities in which *Bouchereau* has been considered or applied have been concerned with the criterion of "imperative grounds of public security". It is one thing to accept that public policy might justify the deportation of an EEA criminal whose offending behaviour had caused "deep public revulsion", even though there was no threat of repetition; but that has nothing to do with "public security", which is, as Carnwath LJ says, a different and narrower concept than "public policy".

91. It follows that it is strictly unnecessary to address Mr Keith's reliance on paragraph 7 (f) of Schedule 1 to the Regulations: no doubt there is a societal interest in maintaining public confidence in the ability of the authorities to remove EEA criminals, but that does not in itself amount to an imperative ground of public security. The function of Schedule 1 is to identify "considerations", formulated at a high level of generality, to which a court or tribunal must have regard in deciding whether the criteria prescribed by paragraphs (3) and (4) of regulation 27 (or paragraph (5), which is ancillary to both) are met: in the case of paragraph 7, the purpose is to identify various aspects of the "fundamental interests of society" that may weigh in favour of removal. It cannot, and does not purport to, supplant or qualify the criteria themselves. The limited function of Schedule 1, and of paragraph 7 in particular, is well illustrated by sub-paragraph (f) itself. In a different context, and read literally, the statement that it is "in the fundamental interests of society" that EEA criminals be removed, and that confidence be maintained in the Secretary of

State's ability to do so, might appear to create a weighty presumption in favour of their removal, even (apparently) where the offence is trivial and however long the offender has lived in the UK. But that is evidently not its effect in the present context: on the contrary, the whole purpose of regulation 27 is to restrict the right to deport, and the issue in any particular case will depend on the application of the criteria in paragraphs (3) or (4), as the case may be, read with paragraph (5). (I should say that I am aware that the 2006 Regulations with which the Court was concerned in *LG (Italy)* did not include a provision corresponding to regulation 27 (8) of the 2016 Regulations (or therefore to Schedule 1), but the introduction of that provision cannot alter the meaning of the substantive criteria in paragraphs (3)-(5).)

92. At para. 80 of her judgment Elisabeth Laing LJ gives an additional reason why the appeal should be dismissed. I am not myself persuaded that if the ground of appeal which the Secretary of State abandoned below, but which we have allowed to be revived in this Court, had been well-founded we could nevertheless have dismissed the appeal on the basis that it could not be an error of law for the Upper Tribunal not to consider a point which had been abandoned: that would be giving with one hand and taking away with the other. But since I agree with her that the point is in fact bad I need not pursue the point further.

93. I wish to say in conclusion that nothing in our decision means that we take anything but the most serious view of Mr George's conduct. But he has been punished for that conduct by the sentence of twelve years' imprisonment which he received. The question in this case is whether, in addition to that punishment, he should be deported to Belgium (where he has not lived since he was eight). The rule under the Regulations is that that depends not, as such, on the seriousness of the offence but on whether he poses a sufficiently serious risk to public security in the future. The Judge, after carefully weighing all the evidence, found that he does not. I must say that I find her reasoning convincing; but in any event it contains no error of law.