Neutral Citation Number: [2019] EWCA Civ 592

Case No: C5/2017/2775

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Upper Tribunal (Immigration and Asylum Chamber)
Judge Eyre QC
HU009722015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2019

Before:

LORD JUSTICE DAVIS
THE SENIOR PRESIDENT OF TRIBUNALS
and
LORD JUSTICE HADDON-CAVE

- -

Between:

EYF (Turkey)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Mr. David Chirico & Ms. Catherine Robinson (instructed by **Islington Law Centre**) for the **Appellant**
Mr. Andrew Byass (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date: 2 April 2019

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Approved Judgment

The Senior President:

Introduction:

1. This is an appeal against the decision of Judge Eyre QC sitting in the Upper Tribunal (Immigration and Asylum Chamber) ["UT"] made on 29 June 2017 which upheld the decision of Judge Macdonald sitting in the First-tier Tribunal ["FtT"] on 4 July 2016, to dismiss the appellant's appeal against the Secretary of State's refusal to revoke the deportation order made against him. Permission to appeal to this court was granted by Hickinbottom LJ on 14 August 2018. The appellant has been granted anonymity.

Factual and Procedural Background:

2. The facts are not in dispute and are set out at paragraphs 4 to 15 of the FtT's judgment. They can be summarised for the purpose of this appeal in the following way.

3. The appellant is a citizen of Turkey. On 22 November 2000 the appellant entered the United Kingdom and claimed asylum with his family. On 15 January 2001 his asylum claim was refused. He appealed that decision and his appeal was dismissed on 22 August 2001.

4. On 11 February 2003 the appellant went to Manchester Airport with his wife and seven-year old daughter. Outside the entrance to the airport's terminal building he set various immigration papers alight. When police officers arrived he poured petrol over himself, his wife and his daughter and he threatened to set himself and his family on fire. He splashed the officers with petrol. On 12 February the appellant was convicted of the offence of affray. On 6 March 2003 he was sentenced to two years imprisonment.

5. On 6 February 2004 the appellant was served with notice of the decision to make a deportation order against him. The appellant appealed that decision. His appeal was dismissed on 4 November 2004 and leave to appeal was refused on 17 January 2005. Accordingly, on 3 February 2005, the appellant's appeal rights were exhausted and on 14 September 2005 he was deported to Turkey.

6. On 28 January 2008 the appellant applied for entry clearance to enter the UK from Turkey. The application was refused because of the appellant's outstanding deportation order. The appellant appealed the decision. On 5 February 2009 the FtT allowed his appeal. However, on appeal to the UT, the Secretary of State's decision to refuse the appellant entry clearance was upheld. The appellant sought leave to appeal to the Court of Appeal. Permission was refused on 9 October 2009.

7. On 17 November 2009 the appellant applied for the deportation order to be revoked. Revocation was refused on 16 September 2010. The appellant appealed the decision. On 18 February 2011 the FtT dismissed the appeal. The appellant appealed to the UT. On 2 July 2012 his appeal was dismissed. Permission to apply to the Court of Appeal was refused.

8. On 23 May 2013 a further application was made for revocation of the deportation order. A decision by the Secretary of State refusing to revoke the deportation order

was made on 5 June 2015. It is this decision which is the subject of this appeal. On the direction of the Tribunal, the Secretary of State made a supplementary decision on 29 March 2016, upholding the decision to revoke the deportation order. That decision was also taken into account by the FtT. On 4 July 2016 the FtT dismissed the appeal and on 29 June 2017 the UT dismissed the appeal.

9. Part 13 of the Immigration Rules sets out the Secretary of State's policy in relation to deportation where the procedure for deportation set out in section 5 of the Immigration Act 1971 applies. Paragraphs 390 to 392 of the Rules address the revocation of a deportation order. The relevant paragraph of the Rules for this appeal is paragraph 391:

> "391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:
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> (a) in the case of a conviction for an offence for which the person
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> was sentenced to a period of imprisonment of less than 4 years,
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> unless 10 years have elapsed since the making of the deportation
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> order when, if an application for revocation is received,
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> consideration will be given on a case-by-case basis to whether the
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> deportation order should be maintained, or
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> (b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,
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> Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors."

It is the wording of paragraph 391(a) which is central for present purposes.

10. In the UT Judge Eyre QC noted that the appellant had two grounds of appeal against the decision to maintain his deportation order:

i) That the FtT's judgment demonstrated that the judge had made up his mind based on the nature of the offending before looking at the particular circumstances of the appellant and therefore the judge did not carry out the appropriate case specific assessment; and

ii) That the FtT judge improperly took account of the 'public revulsion' about the offence the appellant had committed.

11. The UT rejected the first ground on the basis that the decision when read as a whole demonstrated that the judge did not err in law. The FtT judge considered the public interest and the proportionality arising from it in the light of the particular

circumstances of this appellant and considered those circumstances with care. That included, at paragraph [119], an express comparison between the effect on the family life of the appellant and the public interest deriving from the offence, i.e. a proportionality balance. Judge Eyre characterised the appellant's interpretation of the FtT's decision as artificial.

12. The UT rejected the second ground on the basis that paragraph [101] of the FtT judgment, which referred to public revulsion, when read in context, showed that revulsion was not a factor that was being taken into account separately. The judge was taking into account the gravity of the offence and that was appropriate having regard to what was described as 'factor (c)' in *OH (Serbia) v Secretary of State for the Home Department* [2008] EWCA Civ 694, which relates to public confidence in the treatment of foreign citizens who have committed serious crimes.

13. The UT accordingly concluded that neither of the appellant's grounds could be sustained and the appeal was dismissed.

14. Before this court, the appellant applied for permission to appeal on two grounds. Hickinbottom LJ granted permission only in relation to the construction by the FtT and UT of paragraph 391(a) of the Immigration Rules. Although Mr Chirico, who appears on behalf of the appellant with Ms Robinson, made brief submissions about the description of the offence relied upon by the judges below, he cannot out of that construct a ground of appeal and, in fairness to him, no application for renewed permission has been made.

15. Mr. Chirico puts the appellant's case three ways. First, he submits that paragraph 391(a) of the Immigration Rules should be construed as meaning that once an applicant has complied with the prescribed period (in this case 10 years) a new 'presumption' arises to the effect that the fact of the making of a deportation order in consequence upon the criminal offending cannot of itself justify the continuation of the order beyond the prescribed period. Alternatively, Mr Chirico submits that at the very least this should be the starting point of the court's analysis in a case of this kind.

16. In the further alternative, Mr. Chirico submits that paragraph 391(a) should be construed to mean that an applicant's compliance with a deportation order for the prescribed period must carry 'very significant weight' in favour of a decision to revoke it to the extent that it counterbalances the public interest in the maintenance of the deportation order.

17. Mr Byass appears on behalf of the Secretary of State. In a concise and clear oral argument, he submitted that after the prescribed period has elapsed, there is no presumption either way. Each applicant must be taken on his or her merits.

18. I shall summarise the various arguments for and against the interpretations advanced. The appellant submits that:

    i) The scheme set out in the Rules necessarily involves respect being given to the Secretary of State's policy which is crystallised for the purpose of this appeal by the existence of the ten year period prescribed in the Rules. Given the way the scheme operates pre-deportation, during the existence of the prescribed period and after the period has expired (to which the court was taken in some

detail), it must be the case that something other than the public interest derived out of the offending is necessary to justify the continuation of the order after ten years;

ii) The Secretary of State's policy as expressed in paragraph 391(a) of the Rules is that the public interest does not require the continuation of the order after a period of ten years has elapsed or to put it a different way, the prescribed period would be 'meaningless' if the same public interest consideration that led to the making of the order was sufficient to continue the order after the period had elapsed;

iii) There is a separate, strong public interest in recognising and encouraging compliance with a deportation order;

iv) Absent any other factor that can be independently relied upon on a case- by-case basis, the public interest in the making of the order has no continuing weight in the proportionality balance after the prescribed period has elapsed because it is counterbalanced by the public interest in compliance with the order that has occurred for the prescribed period;

v) The ongoing public interest in the consistent maintenance of immigration control is met by the separate and detailed provisions relating to entry clearance, i.e. the question of revocation of the deportation order should not be elided with the separate question of entry clearance;

vi) Accordingly, the starting point for a decision about revocation is that it should be granted after the prescribed period has elapsed or at the very least the appellant's compliance with the order should at that point be given equal weight to that of the public interest in the making of the order.

19. It follows that the appellant submits that a presumption or starting point in favour of revocation has to be read into the wording of the Rule on the basis that it is a necessary inference or implication given the overall context of the scheme that is being operated.

20. The Secretary of State submits that:

i) The plain meaning of the Rule is that after ten years a case-by-case assessment is required: that imports no presumption one way or the other;

ii) Whether the maintenance of a deportation order is in the public interest is no longer prescribed by the presumption which is the policy shortcut that the Rules provide before ten years have elapsed but that does not exclude any relevant factor or public interest, it simply provides a 'clean sheet' on which the factors are to be balanced;

iii) The prescribed period is not 'meaningless': it provides a presumption that recognises the public interest in deportation which relates to the criminal offending and the public interest in compliance i.e. the starting point is that deportation will be maintained for ten years. At the end of that period, deportation *may* be maintained but that is not the starting point any more than

revocation might be: it will all depend on the balance of factors on a case-by-case basis.

Discussion:

21. Although the court has had the advantage of an extensive *tour d'horizon* of the scheme from Mr. Chirico, the only issue before this court on the appeal concerns the proper construction of paragraph 391(a) of the Immigration Rules. It is apparent from the parties' submissions that there has been some inconsistency in that construction. I bear in mind that Immigration Rules are not to be construed strictly as if they are statutes.

22. In *Smith (paragraph 391(a) – revocation of deportation order* [2017] UKUT 166 (IAC), the UT (Judge Canavan) held at [23]:

> "The fact that a period of ten years has elapsed since the making of the order *creates a presumption* that the order will be discharged unless, having considered the individual facts of the case, the Secretary of State considers that it continues to be in the public interest to maintain the order." (*emphasis added*)

and at [26]:

> (ii) "[…] paragraph 391(a) allows the Secretary of State to consider on a case by case basis whether a deportation order should be maintained. The mere fact of past convictions is unlikely to be sufficient to maintain an order if the 'prescribed period' has elapsed. Strong public policy reasons would be needed to justify continuing an order in such circumstances."

23. In *SU (Pakistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1069 the appellant, a national of Pakistan, illegally re-entered the UK in breach of his deportation order. The case was decided under paragraph 399(D) of the Rules, which relates to breaches of deportation orders, rather than paragraph 391(a). However, David Richards LJ at paragraph [64] of the judgment stated *obiter* that the proper construction of 391(a) was without presumption once the prescribed period had elapsed as follows:

> "…. While under paragraph 391 there is a presumption that continuation of the deportation order "will be the proper course" if less than 10 years have elapsed, *there is no presumption either way after the 10 years have elapsed*. Paragraph 391 simply requires each case to be considered on its merits, taking account of applicable paragraphs of the Rules, including most
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> ` obviously paragraph 390, and the applicable statutory provisions. The

effect of the expiry of 10 years is only that the previous presumption in

favour of maintaining the order falls away…" (*emphasis added*)

24. In *Smith*, the UT considered that its reasoning was supported by this court in *ZP (India) v Secretary of State for the Home Department* [2015] EWCA Civ 1197. One of the issues in *ZP* (*India*) was the impact on the proportionality balance of the prescribed period in the circumstance that early revocation within the prescribed period was being considered. In that context, it is hardly surprising that at paragraph [25] of the judgment Underhill LJ said that the "default position must be that deportees should 'serve' the entirety of the prescribed period in the absence of specific compelling reasons to the contrary."

25. I can detect no support for the propositions advanced by the appellant in this appeal from that conclusion and I do not agree that *ZP* (*India*) supports the reasoning of the UT in *Smith*. Underhill LJ at [25] of *ZP (India)* was clear that the proposition that the public interest in maintaining the deportation order would generally diminish over time was only accepted up to a point. That point was the duration of the prescribed period. That says nothing about the asserted existence of a new presumption at the end of the prescribed period. Indeed, it rightly in my judgment leaves the question at large. Furthermore, it is of note that the wording of the Rule changed after the decision in *ZP (India)* to add-in by amendment the words that are critical to the interpretation relied upon by the Secretary of State.

26. The Strasbourg case law relied upon by the appellant does not take the question any further. In *Maslov v Austria* (168/04: 23/06/2008) at paragraph [98] the Grand Chamber says "The Chamber referring to the Court's case-law, has rightly pointed out that the duration of an exclusion measure is to be considered as one factor among others". Nowhere does the ECHR say that the duration of an exclusion measure must be given presumptive weight (one way or the other) in the balancing exercise.

27. The plain language of the Rule supports the Secretary of State's position and I would, with respect, agree with the *obiter* comments of David Richards LJ. There is an obvious advantage in taking the plain meaning of words as he has done: the clarity of understanding and consistency of application that are necessary in a tribunal is made all the more likely. Rule 391(a) works perfectly well without implying any further words.

28. Within the ten year period, it will be very difficult for other factors to counterbalance the presumptive effect of the Secretary of State's policy. That is consistent with the decision of this court in *ZP (India)*. Once the ten year period has elapsed it becomes easier to argue that the balance has shifted in favour of revocation on the facts of a particular case because the presumption has fallen away; but that does not mean that revocation thereafter is automatic or presumed. The question of revocation of a deportation order will depend on the circumstances of the individual case.

29. That is consistent with the scheme described by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799 per Lord Reed JSC at [46]:

> "[…] the decision under review has involved the application of rules which have been made by the Secretary of State in the exercise of a responsibility entrusted to her by Parliament, and which Parliament has approved. It is the duty of appellate tribunals, as independent judicial bodies, to make their own assessment of the proportionality of deportation in any particular case on the basis of their own findings as to the facts and their understanding of the relevant law. But, where the Secretary of State has adopted a policy based on a general assessment of proportionality, as in the present case, they should attach considerable weight to that assessment"

30. For these reasons, I would dismiss the appeal.

Lord Justice Haddon-Cave:

31. I agree.

Lord Justice Davis:

32. I also agree.