Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00051/2015

THE IMMIGRATION ACTS

Heard at Stoke	**Decision & Reasons Promulgated**
On 4 May 2016	**On 12 May 2016**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DANIEL NUNO CLARO MONTEIRO
(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr McVeety Senior Home Office Presenting Officer
For the Respondent: No attendance.

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of a panel of the First-tier Tribunal who allowed Mr Monteiro's appeal against the order for his deportation from the United Kingdom.
2. Mr Monteiro is a national of Portugal born on the 26 November 1994. He entered the United Kingdom on 19 July 1999 with his parents and siblings.

3. Mr Monteiro has a record of criminal activities the most recent incidence of which resulted in his conviction at Nottingham Crown Court on the 20 March 2014 for the offence of wounding/inflicting grievous bodily harm. On 11 April 2014 Mr Monteiro was sentenced to two years detention in a young offenders institute and ordered to pay £100 victim surcharge. On 8 November 2014 Mr Monteiro was served with a notice of liability to deportation.

Discussion

4. In the decision to make a deportation order dated 1 April 2015 it was accepted that Mr Monteiro has been in the United kingdom for ten years in accordance with the 2006 Regulations and that he was entitled to the higher level of protection, that of imperative grounds of public security.
5. The panel noted in paragraph 34 of the determination that the circumstances of the index offence were violent in nature involving the use of a knife and bottle and that Mr Monteiro had been previously cautioned for sexual offences and that his behaviour appeared to be escalating. The OASys report assessed him as a medium risk to the public and to known adults. The key paragraphs of the findings are as follows:

> "36. In our view the appellant would satisfy the serious grounds for public policy test if he had only been here for more than five years but this is not the test in this case. We have to be satisfied that there are imperative grounds for public security as he has been here for more than 10 years. In MG the imperative grounds are required to justify the decision and second grounds must relate to public security. In MG and VC the SSHD accepted that it was limited to terrorist activity although in a reported decision it was said that the concession was not made.
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> ...
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> 38. Whilst the lower threshold test has been met we do not believe for the reasons explained the imperative test has been met. We have an appellant who has been convicted of a single offence and received a caution for two further offences and sentenced to 18 months imprisonment. As the sentencing judge remarks of Judge Hamilton notes that he was charged with a section 18 offence but convicted of a lesser offence "If I thought that this was a more serious matter indeed had the jury convicted you of section 18 you will be going to prison for a great deal longer. The reality is that it is a category one offence and the starting point should be three years but I take the view that I start at the lower point because you have never been in trouble before and certainly nothing like this and you have been making efforts. I am told to do charity work and because of your young age". The case is similar to the facts of LG a person who served nine years for attempted murder. There is a lower risk of re-offending and a medium risk of serious harm to others."

6. Permission to appeal to the Upper Tribunal was granted as it was said to be arguable that the panel had failed to deal adequately with the cases of Tsakouridis and MG [2014].

7. By virtue of Regulation 21(4) Immigration (European Economic area) Regulations 2006 (as amended) a decision to remove may not be taken except on imperative grounds of public security in respect of an EEA national who (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or (b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.
8. The general approach is in two stages (i) does the relevant conduct satisfy the applicable "public policy" criterion (whether the general one or the more or most stringent one); and (ii) if it does, is the decision to remove a "proportionate" one in all the circumstances. In this appeal the panel were not satisfied that the Secretary of State had shown that the first element of the test was met.
9. In relation to the cases specifically mentioned in paragraph 3 of the grant of permission, in Land Baden-Württemberg v Tsakouridis (Case C-145/09) CJEU (Grand Chamber), 23 November 2010 the test to be applied was essentially stated as follows:

> "48. It should be added that Article 27(2) of Directive 2004/38 emphasises that the conduct of the person concerned must represent a genuine and present threat to a fundamental interest of society or of the Member State concerned, that previous criminal convictions cannot in themselves constitute grounds for taking public policy or public security measures, and that justifications that are isolated from the particulars of the case or that rely on considerations of general prevention cannot be accepted.
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> 49. Consequently, an expulsion measure must be based on an individual examination of the specific case (see, inter alia, Metock and Others, paragraph 74), and can be justified on imperative grounds of public security within the meaning of Article 28(3) of Directive 2004/38 only 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 that objective cannot be attained by less strict means, having regard to the length of residence of the Union citizen in the host Member State and in particular to the serious negative consequences such a measure may have for Union citizens who have become genuinely integrated into the host Member State.
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> 50. In the application of Directive 2004/38, a balance must be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision is to be made (see, inter alia, Joined Cases C-482/01 and C-493/01 Orfanopoulos and Oliveri [2004] ECR I-5257, paragraphs 77 to 79), by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity, and, if appropriate, the risk of reoffending (see, to that effect, inter alia, Case 30/77 Bouchereau [1977] ECR 1999, paragraph 29), on the one hand, and, on the other hand, the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which, as the Advocate General

observes in point 95 of his Opinion, is not only in his interest but also in that of the European Union in general."

10. The key phrase in the judgment that "expulsion can be justified on imperative grounds of public security within the meaning of Article 28(3) of Directive 2004/38 only 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 that objective cannot be attained by less strict means, having regard to the length of residence of the Union citizen in the host Member State and in particular to the serious negative consequences such a measure may have for Union citizens who have become genuinely integrated into the host Member State" is the test applied by the panel who found it not proved that the threat was an exceptionally serious threat for which an expulsion measure is necessary for the protection of the interests it aims to secure.

11. In relation to MG and VC (Ireland) [2006] UKAIT 00053 the Tribunal considered that this last test "... is at the very highest level of the calculus introduced by the 2006 Regulations and Directive 2004/38/EC". First, imperative grounds are require to justify the decision and second those grounds must relate to public security. In MG and VC the SSHD accepted that it was limited to terrorist activity (although in the unreported decision of Chindamo no such concession was made.) In MG and VC the Tribunal said "we do not think that it is a phrase which is appropriate to cover the ordinary risk to society arising from the commission of further offences by a convicted criminal. That is the risk which has in the past been met by the removal decisions based on grounds of public policy". In LG (Italy) v SSHD [2008] EWCA Civ 190 the Court of Appeal confirmed that an EEA national who had been here for 10 years can only be deported on imperative grounds of public security, which bear a qualitative difference to the less stringent grounds applicable to deportation of those with shorter residence. Imperative connoted a very high threshold and the ground requires an actual and compelling risk to public security, though public security need not be equated to national security. The Court of Appeal said that "risk to the safety of the public or a section of the public" seemed reasonably consistent with the ordinary meaning of the test. The Court seemed to be of the opinion that the severity of the offence committed was not necessarily one to make removal "imperative". In VP (Italy) v SSHD [2010] EWCA Civ 806 the Court of Appeal endorsed LG (Italy) v SSHD and said that imperative grounds of public security required not simply a serious matter of public policy but an actual risk to public security so compelling that it justified an exceptional course of removing someone who had become integrated by many years residence in the host state. The severity of the offence could be a starting point for consideration but there had to be something more to justify a conclusion that that removal was imperative to the interests of public security. So the appellant, an Italian who had been here since 1986 and had served 9 years for attempting to murder his ex wife, including twice trying to cut her throat and inflicting 32 knife wounds, could not be removed when there was a low risk of reoffending albeit a medium risk of serious harm to others.

12. Mr Monteiro entered the United Kingdom in 1999 and had been in this country for fifteen years before he was imprisoned in 2014. Notwithstanding this the Secretary of States position set out in paragraph 24 of the refusal letter dated 16 February 2014 was:

> "27. As you have not acquired a permanent right of residence under the 2006 Regulations consideration has been given to whether your deportation is justified in grounds of public policy or public security."

13. The revised decision, dated 1 April 2015, is more detailed where it is stated:

> "27. In light of the documentary evidence submitted, it is accepted that you have been continuously resident in the United Kingdom for 10 years in accordance with the 2006 Regulations. Consequently consideration has been given to whether your deportation is justified on imperative grounds of public security."

14. In paragraph 28 and 29 of the that decision it is stated:

> "28. It is accepted that you have acquired a permanent right to reside by virtue of a five year continuous residence in accordance with the EEA Regulations between 1999 and 2014. Although it is also accepted that you have resided in the United Kingdom for at least 10 years, the Home Office considers that you do not automatically qualify for the protection of imperative grounds of public security. The Home Office has applied the "integration test" set out at recitals 23 and 24 of the Free Movement Directive and the CJEU case of Tsakouridis to establish whether the highest level of protection is available to you. The following have been considered:
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> a) the cumulative duration and frequency of any absences from the United Kingdom during the qualifying period (and reason for the absences)
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> b) time spent in prison
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> c) the overall length of your residence in the United Kingdom
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> d) your family connections to the United Kingdom
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> e) your links with your country of origin, and
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> f) your age on arrival in the United Kingdom
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> 29. Having assessed all these factors, the Home Office considers that you meet the integration criteria, as set out in Tsakouridis. Consequently, consideration has been given to whether your deportation is justified on imperative grounds of public security."

15. No arguable legal error is made out in the panels approach to Mr Monteiro's status which is in accordance with the decision letter which was written after the publication of the decision of the Upper Tribunal in August 2014 of MG (prison-Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392 in which it was held that (i) Article 28(3)(a) of Directive 2004/38/EC contained the requirement that for those who had resided in the host member state for the previous 10 years, an expulsion decision made against them must be based upon imperative grounds of public security; (ii) there was a tension in the

judgment of the Court of Justice of the European Communities in Case C-400/12 Secretary of State v MG in respect of the meaning of the "enhanced protection" provision; and (iii) the judgment should be understood as meaning that a period of imprisonment during those 10 years did not necessarily prevent a person from qualifying for enhanced protection if that person was sufficiently integrated. However, according to the same judgment, a period of imprisonment must have a negative impact in so far as establishing integration was concerned.

16. The panel arguably erred in their statement in paragraph 27 that the Secretary of State's attempts to exclude Mr Monteiro from the enhanced protection of Regulation 21(4) by introducing an integration test is flawed, but that has not been shown to be material. The case law supports the need to consider the degree of integration in relation to assessing entitlement to the higher level of protection although in this case the higher level of protection had been obtained prior to the period of imprisonment. Mr Monteiro had lived in the United Kingdom for a period of fifteen years since entry to his loss of liberty and it had not been made out on the evidence that his conduct was such to show he was not integrated at the date of the 1 April 2015 decision.
17. It is also accepted that in assessing whether the required threshold has been met all the relevant factors must be considered but it had not been shown that the decision was not propionate on the basis of the materiel provided to the panel.
18. The panel cannot be criticised for making reference to VP (Italy) a decision of the Court of Appeal that provided guidance in relation to the test to be applied in such cases. The panel cannot be criticised for finding the correct test was that of imperative grounds as this is conceded by the Secretary of State as being the correct starting point in this matter. The panel note at paragraph 14 of the determination that the view of the Secretary of State is that notwithstanding the imperative ground test the threat of serious harm posed by Mr Monteiro to the public was such that it was considered that the circumstances do not preclude his deportation. The panel did not agree and found that although the test of serious grounds had been met the higher level if imperative grounds had not. The panel clearly considered the competing arguments and warn Mr Monteiro in relation to his future conduct in paragraph 39 of the decision.
19. Mr McVeety has not been able to establish today that on the facts available to the panel their conclusion was not one properly open to them. It has not been shown to be a decision based upon a material misdirection of the law or to be irrational or outside the range of permissible decisions.

Decision

20. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

21. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 8 May 2016