Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07848/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 December 2019	**On 31 December 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KEMEN URANGA ARTOLA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: No Representative/no appearance

DECISION AND REASONS

1. Mr Artola challenged a decision of the Secretary of State on 16 November 2018 to refuse him entry to the United Kingdom under the Immigration (European Economic Area) Regulations 2016, specifically Regulation 23(1), and 24. His appeal against that decision was allowed by the First-tier Tribunal in a decision promulgated on 11 June 2019. The Secretary of State was granted permission to appeal to the Upper Tribunal against that decision; and, for the reasons set out in my decision of 9 October 2019, I set aside the decision of the First-tier Tribunal and ordered that the appeal be remade at a later date. A copy of my decision is set out in the annex to this decision.

© CROWN COPYRIGHT 2019

2. The appellant was not present at the hearing. I am satisfied that he had due notice of the hearing, and that he had not instructed a representative to attend. He did, however, make written submissions which I have taken into account, and in the circumstances, I am satisfied that it was in the interest of justice to proceed to determine the appeal.

3. There is little dispute as to the core facts of this case. It is accepted that the appellant is a citizen of Spain. It is accepted by him also that he was convicted of an offence which was cooperation with a terrorist group as stipulated in Article 576 of the Spanish Criminal Code, that being an offence for which he was eventually extradited, an application for extradition having been made on 13 December 2012. The description of the offence is set out in Artola v 6th Section of the National High Court of Madrid, Spain [2013] EWHC 524 (Admin), in the judgment of Toulson LJ. In summary, the charge was that the appellant had rented a flat as a safe house for members of ETA. In October 2000 that flat was searched and they found explosives, detonators, timing devices and other material for the use in offences of terrorism. The appellant says that he was convicted and served a term of imprisonment ending in 2017 and he has lived blamelessly since then.

The Law

4. The 2016 Regulations provide, so far as is relevant, as follows:

> **23.— Exclusion and removal from the United Kingdom**
>
> (1) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if a refusal to admit that person is justified on grounds of public policy, public security or public health in accordance with regulation 27. …
>
> **27.— Decisions taken on grounds of public policy, public security and public health**
>
> (1) In this regulation, a *"relevant decision"* means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.
>
> (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.
>
> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—
>
> (a) has a right of permanent residence under regulation 15 and who][1]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 in the best interests of the person concerned, 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.
>
> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds

of public policy or public security it must also be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

….

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

5. As can be seen from the regulations set out above, Regulation 23(1) states that a person is not entitled to be admitted to the United Kingdom by virtue of Regulation 11 if a refusal to admit that person is justified on grounds of public policy, public security or public health in accordance with Regulation 27.

6. Regulation 27 sets out three different levels of protection which depend, broadly, on the length of time the individual has resided in the United Kingdom. The highest level of protection (reg. 27 (4)) applies to those who have resided in the United Kingdom for a continuous period of at least ten years prior to the decision (and have acquired the permanent right of residence). They cannot be removed or refused entry except on imperative grounds of public security. The second level of protection (reg 27 (3)) applies to those who have not resided here for 10 years continuously but have acquired the right of permanent residence under Regulation 15 cannot be removed or refused entry except on serious grounds of public policy and public security. The lowest level of protection is that removal or refusal of entry can be justified only if it is for grounds of public security or public policy. In all cases the individual must be a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society

7. The first issue is therefore to determine the level of protection to which the appellant is entitled.

8. The relevant decision was the decision to refuse entry on 16 November 2018. The appellant was extradited from the United Kingdom in 2013 and so cannot have spent a continuous period of 10 years in this country prior to the decision. Further, even if the appellant had acquired permanent residence, he has lost it as, under reg. 15 (3) the right of permanent residence is lost through absence from the United Kingdom for a period exceeding two years. The appellant has clearly spent longer than two years outside the United Kingdom. It therefore follows that the appellant is not entitled to anything other than the basic level of protection against a decision to refuse entry.

9. I note that the respondent now states in the skeleton argument of 18 October 2019 that the reference in the refusal of entry decision to "serious grounds of public security" was incorrect and asserts that at no point was it accepted that the appellant met the middle level of protection. I am satisfied that it is open to the Secretary of State to clarify her case, even if it is the withdrawal of a concession. That is because, as a matter of law, the appellant was not entitled to the level of protection indicated by the use of the phrase "serious grounds" and there can be no concession on matters of law.

10. In reaching my decision, I bear in mind also that I must have regard to Schedule 1 of the 2016 Regulations. Of particular relevance in this case is that the appellant has previously been convicted of an offence involving terrorism in connection with ETA, a proscribed organisation, in the United Kingdom and in Spain, and the fundamental interests of society, as set out in Schedule 1(7)(l) include countering terrorism and extremism and protecting shared values.

11. I now turn to the facts of this case. There is little evidence before me other than short statements from the appellant and what he is recorded as having said in an interview on arrival. It does appear that whilst he was living here he did use a another name. He says that it was limited only to getting access to the NHS due to serious health issues (that he had two major cancer operations in the late '90s and he did annual checks to see if the blood marker levels were satisfactory). It appears that he was in a relationship here and that is not in dispute nor is the fact that he has a stepson here who was attending university. He says that he has no other family here.

12. Some detail of the criminal offence in question is set out in Artola v 6th Section of the National High Court of Madrid, Spain [2013] EWHC 524 (Admin), in the judgment of Toulson LJ. In summary, the charge was that the appellant had rented a flat as a safe house for members of ETA. In October 2000 that flat was searched and they found explosives, detonators, timing devices and other material for the use in offences of terrorism. The appellant says that he was convicted and served a term of imprisonment ending in 2017 and he has lived blamelessly since then.

13. I do not have a copy of any certificated conviction or any further details of his case. Nonetheless, it does appear that he was sentenced to five years' imprisonment. It also appears from the decision of the Divisional Court that the original arrest warrant was issued in 2001. I consider that it is a fair inference to draw in this case that the appellant had come to the United Kingdom to avoid the consequences of his actions in Spain. It is also clear that he sought to resist arrest and extradition.

14. Dealing first with Regulation 27(5)(c), the issue here is whether he represents a genuine, present and sufficiently serious threat to one of the interests of society. I have no reason to doubt that in this case the interests of society, in this case involvement with terrorism, are clearly met.

15. The position of the appellant is similar to that of the applicant in K [2018] EUECJ C-331/16 at paragraphs 56 to 58 and 60:

> "56. Moreover, while, in general, the finding of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, within the meaning of the second subparagraph of Article 27(2) of Directive 2004/38, implies the existence in the individual concerned of a propensity to repeat the conduct constituting such a threat in the future, it is also possible that past conduct alone may constitute such a threat to the requirements of public policy (judgment of 27 October 1977, *Bouchereau*, 30/77, EU:C:1977:172, paragraph 29).
>
> 57. In this case, the referring court in Case C-331/16 is uncertain as to the effect of the considerable period of time that has elapsed since the assumed commission of the acts that justified K.'s exclusion from refugee status under Article 1F of the Geneva Convention.
>
> 58. In that regard, the time that has elapsed since the assumed commission of those acts is, indeed, a relevant factor for the purposes of assessing whether there exists a threat such as that referred to in the second subparagraph of Article 27(2) of Directive 2004/38 (see, to that effect, judgment of 11 June 2015, *Zh. and O.*, C-554/13, EU:C:2015:377, paragraphs 60 to 62). However, the possible exceptional gravity of the acts in question may be such as to require, even after a relatively long period of time, that the genuine, present and sufficiently serious threat affecting one of the fundamental interests of society be classified as persistent.
>
> …
>
> 60. In that regard, it must be observed that, however improbable it may appear that such crimes or acts may recur outside their specific historical and social context, conduct of the individual concerned that shows the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, such as human dignity and human rights, as revealed by those crimes or those acts, is, for its part, capable of constituting a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, within the meaning of the first sentence of the second subparagraph of Article 27(2) of Directive 2004/38."

16. Although the issue in K was exclusion from the Refugee Convention, the nature of the offence as disclosed, involvement with a terrorist organisation, and a sentence of five years operates together, in my view, to bring this to the same level.

17. I am satisfied that, were I dealing with somebody who was seeking protection under the Refugee Convention who had been convicted of the same crime as the appellant, he or she would have been excluded from protection in light of the conviction.

18. The Secretary of State contends that the nature of the conduct is such to constitute the kind of exceptional gravity of act which on its own is capable of satisfying the test of genuine, present and sufficiently serious threat, relying primarily on the decision in Bouchereau.

19. I am not satisfied that submission is made out in this case, given the extremity of the conduct necessary to reach the extremity required – see SSHD v Robinson [2018] EWCA CIv 85 at [84] to [86]. There is nothing in the material provided to suggest that the acts with which the appellant was involved resulted in acts which attracted public revulsion.

20. This is a case in which the appellant was sentenced to five years' imprisonment despite having evaded justice for a number of years. I accept the Secretary of State's argument that relevant to the assessment of conduct is the use of the false identity to work in the United Kingdom and I find that he left Spain in order to avoid arrest, which he maintained, avoiding justice for well over a decade.

21. Whilst no single factor of those set out above is determinative, I consider that in this case the Secretary of State has satisfied me that the appellant is a genuine, present and sufficiently serious threat, given not least the evasion of justice, conduct indicative of him presenting a threat. I have only the appellant's word that he is now employed.

22. The Secretary of State also submits that there had been an assumed identity and it amounted to abuse of rights. Whilst the written submissions from the Secretary of State dwell on that at length, I am not satisfied that this would in itself, on the limited evidence before me, amounts to an abuse of rights, and in any event, there is simply insufficient evidence to show that the appellant had acquired a permanent right of residence, an issue which is in any event immaterial given the length of time he has now spent outside the United Kingdom.

23. I therefore turn to the issue of proportionality. I am satisfied that the interference in this case with the appellant's right of free movement are proportionate. On his own evidence, he was only seeking to come here to visit his stepson for a short period. It is, in his own words, the case that the stepson has visited him in Spain and there appears to be no other reason why that could not happen again. The past conduct as representing a present threat is serious and taking all of these factors into account, I conclude that it was, on the facts of this case, proportionate.

24. Accordingly, for these reasons, I uphold the Secretary of State's decision and dismiss the appeal.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the decision by dismissing the appeal under the Immigration (European Economic Area) Regulations 2016.

No anonymity direction is made.

Signed Date 18 December 2019

Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW DECISION

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07848/2018

THE IMMIGRATION ACTS

Heard at Field House
On 27 September 2019

Decision & Reasons Promulgated

……

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KEMEN URANGA ARTOLA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: No Representative

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of the First-tier Tribunal allowing the appeal of Mr Kemen Uranga Artola (to whom I refer as the appellant as he was before the First-tier) against a decision of the Secretary of State to refuse entry pursuant to Regulations 23 and 24 of the Immigration (European Economic Area) Regulations 2016.

© CROWN COPYRIGHT 2019

2. The appellant was not present at the hearing. I am satisfied that he had due notice of the hearing, and that he had not instructed a representative to attend. In the circumstances, I am satisfied that it was in the interest of justice to proceed to determine the appeal.

3. There is little dispute as to the core facts of this case. It is accepted that the appellant is a citizen of Spain. It is accepted by him also that he was convicted of an offence which was cooperation with a terrorist group as stipulated in Article 576 of the Spanish Criminal Code, that being an offence for which he was eventually extradited, an application for extradition having been made on 13 December 2012. The description of the offence is set out in Artola v 6th Section of the National High Court of Madrid, Spain [2013] EWHC 524 (Admin), in the judgment of Toulson LJ. In summary, the charge was that the appellant had rented a flat as a safe house for members of ETA. In October 2000 that flat was searched and they found explosives, detonators, timing devices and other material for the use in offences of terrorism. The appellant says that he was convicted and served a term of imprisonment ending in 2017 and he has lived blamelessly since then.

4. The judge did not hear evidence. It appears that there was no representative either for the appellant or for the Secretary of State and the judge, having directed himself in line with Regulations 23 and 24, took note of what the appellant had said at paragraph 7 and concluded first that he was bound by Arranz (EEA Regulations - deportation - test) [2017] UKUT 00294, in particular that the exception in Bouchereau no longer applied; and, that the evidence that the Secretary of State relied upon consisted of the High Court judgment and the fact of conviction and imprisonment, he found that there was no suggestion the appellant had been involved in further offences or had offended at any time in the United Kingdom, that the appellant had said that the violence had ended in the Basque country and he supports democratic processes and that it was he who had brought his travel plans to the United Kingdom to the attention of the Secretary of State. The judge concluded that the Secretary of State had not discharged the burden of proof to show that the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The judge then also made an anonymity direction.

5. The Secretary of State sought to appeal on the grounds that the judge had erred, first in concluding wrongly that that the Bouchereau test was no longer of relevance, this being contrary to the case law in B and also K and HF, [2018] EUECJ C331/16. It was submitted also that the judge had not made it clear whether he was assuming that the applicant was entitled to any enhanced degree of protection as a result of having had prior permanent residence in the United Kingdom, third, that there was a failure properly to deal with the issue of public security and any threat that the applicant may make, the judge failing properly to have regard to Schedule of the 2016 Regulations.

6. With regard to the first point, I consider that the judge was wrong to state that the Bouchereau exception was no longer good law. That is contrary to the decisions of the Court of Justice in K and HF, albeit that it would be an unusual case in which that would apply. Second, I accept that the judge did not set out whether he considered

the appellant was covered by the lowest threshold, level of protection. That is arguably an error, it being clear that he could only be covered by the lower exception, given that although he may have acquired permanent residence in the United Kingdom in the past his absence for a period of greater than two years meant that that lapsed. I accept also that the judge did not properly deal with the factors he should have taken into account set out in Schedule 1 of the 2016 Regulations and had he done and it is arguable that had he done so, he may have concluded that the Secretary of State's decision was correct.

7. In terms of whether the judge erred in not resolving a conflict of evidence, the difficulty is this. What the Secretary of State relied upon were the elements of a crime set out in an extradition warrant. It does not necessarily follow that all of those accusations were found to be true and thus, strictly speaking, there is no conflict of evidence. The evidence of the appellant is that he simply had let a friend stay in a flat. It is difficult, if not impossible, to extrapolate from the sentence imposed to know whether that is correct or not.

8. Nevertheless, for the reasons I have already given, I am satisfied that the decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

9. I also set aside the anonymity order. The fact that an individual has been convicted of a criminal offence is not a reason why he should be granted anonymity. On the contrary, such conclusion is perverse and accordingly, I set it aside, there being no good reason why in the interests of justice anonymity should be maintained in this case, and that concludes my decision.

Notice of Decision

10. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

11. The appeal will be remade in the Upper Tribunal on the basis of submissions to be made in writing by the parties.

12. The parties must make submissions to the Upper Tribunal **within 28 days** of the date of the issue of this decision. They should be sent by email to fieldhousecorrespondence@justice.gov.uk

13. Any documents not in English must be accompanied by a certified translation.

Signed Date 2 October 2019

Upper Tribunal Judge Rintoul