Upper Tribunal
(Immigration and Asylum Chamber)

Arranz (EEA Regulations – deportation – test) [2017] UKUT 00294 (IAC)

THE IMMIGRATION ACTS

PART 1

Heard at Field House, London
On 16 and 30 January and 02 February 2017 **Date of promulgation: 22 February 2017**

Before

The Hon. Mr Justice McCloskey, President
The Hon. Mr Justice Supperstone, sitting as a Judge of the Upper Tribunal

PART 2

Heard at Field House, London
On 09 May 2017 **Date of promulgation: 22 August 2017**

Before

The Hon. Mr Justice McCloskey, President
Upper Tribunal Judge Blum

Between

Antonio Troitino Arranz

Appellant

and

Secretary Of State for the Home Department

Respondent

Representation

For the Appellant: Ms L Dubinsky, of counsel, instructed by Birnberg Pierce Solicitors
For the Respondent: Ms J Anderson, of counsel, instructed by the Government Legal Department

(i) *The burden of proving that a person represents a genuine, present and sufficiently threat affecting one of the fundamental interests of society under Regulation 21(5)(c) of the EEA Regulations rests on the Secretary of State.*

(ii) *The standard of proof is the balance of probabilities.*

(iii) *Membership of an organisation proscribed under the laws of a foreign country does not without more satisfy the aforementioned test.*

(iv) *The "Bouchereau" exception is no longer good law: CS (Morroco) applied*

Preface

This, the composite judgment of the Upper Tribunal, is in two parts. Part 1 contains the error of law decision promulgated on 22 February 2017. Part 2 is the remade determination of this appeal.

DECISION

PART 1

Introduction

1. This is the judgment of the panel to which both members have contributed. At this stage of these appeal proceedings, the sole question for the Upper Tribunal is whether the First-tier Tribunal (the "*FtT*") committed a material error of law within the compass of the permitted grounds of appeal.

2. The Appellant, Antonio Troitino Arranz, is a Spanish national, aged 59 years. The Respondent, the Secretary of State for the Home Department (the "*Secretary of State*") is the author of the decision underlying this appeal. The impugned decision, which is dated 18 August 2015, notified the Appellant that he would be deported from the United Kingdom under regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 (the "*EEA Regulations*") on the ground of public policy. The reason proffered was that the Appellant was considered to represent "*a genuine, present and sufficiently serious threat to the public ….*".

The Statutory Framework

3. The underlying legislative instrument is a measure of EU law, namely Directive 2004/38/EC (the "Citizen's Directive"). This, as its long title states, regulates "the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States". The topic of expulsion from a Member State is addressed in Article 27, which provides:

"1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3 In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

4 The Member State which issued the passport or identity card shall allow the holder of the document who has been expelled on grounds of public policy, public security, or public health from another Member State to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute."

4. The United Kingdom transposing instrument is the EEA Regulations 2006. Regulation 19 is the sister provision of Article 27 of the Directive. It provides, under the rubric of "Exclusion and Removal from the United Kingdom", in material part:

"(3) Subject to paragraphs (4) and (5), an EEA National who has entered the United Kingdom or the family member of such a National who has entered the United Kingdom may be removed if –

…

(b) The Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21 …."

[Paragraphs (4) and (5) have no application in the present context.]

Regulation 21 is concerned with decisions taken on public policy, public security and public health grounds. It provides:

> *"(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 permanent right of residence under regulation 15 except on serious grounds of public policy or 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 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.*
>
> *(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;*
>
> *(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.*
>
> *(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."*

5. In the context of this appeal, the key provision of Regulation 21 is paragraph (5)(c). The mirror provision in the Directive is Article 27 (2).

The Secretary of State's Decision

6. It is necessary to analyse the Secretary of State's decision in a little detail. The decision refers to the Order of a Spanish Court dated 07 November 1989 whereby the Appellant was convicted of the murder of 12 civil guards and injury to 43 civil guards and 17 civilians, all perpetrated on 14 July 1986. These offences were committed in the name of the terrorist organisation ETA. The decision letter states:

> "*In appraising the interests of public policy and security, it is determined that your involvement in these serious offences, as evidenced by the imposition of a custodial sentence of 30 years in Spain, are evidence of your personal conduct constituting a present threat to the requirement of that policy. Therefore your past terrorist conduct itself justifies your deportation.*"

7. The second reason given for the deportation decision is expressed in the following passage:

> "*Furthermore, there is no evidence that you have severed your links to Basque terrorists ….*
>
> *The Metropolitan Police have provided copies of forged identity cards (which contained your photograph) found at* [address] *where you were living with a man named ….* [who] *was wanted in Spain for his involvement in ETA Basque separatist related offences. He was accused of being a member of an armed group and possession of explosives ….* [and] *on 16 August 2013* [he] *was extradited from the United Kingdom to Spain in order to be tried for this matter.*"

The decision continues:

> "*Falsified documents can be used to enable identity, theft, age deception, illegal immigration, terrorism and organised crime. There can be no legitimate reason to hold such documents. Bearing in mind your previous conviction, your possession of these documents and your association with a man implicated in ETA terrorist offences strongly suggests that you present a significant risk of harm to the public.*"

Thus the deportation decision was, in substance, based on two grounds.

8. The decision maker then purported to give effect to regulation 21(5)(a) of the EEA Regulations, which stipulates that any deportation decision must comply with the principle of proportionality and details an inexhaustive list of factors to be taken into account: age, state of health, family and economic situation, length of residence in the United Kingdom, social and cultural integration and links with country or origin. This discrete assessment yielded the following conclusion:

> "… *Given the threat of serious harm you pose to the public, it is considered that your personal circumstances do not preclude your deportation being pursued. It is considered that the decision to deport you is proportionate ….*"

It was further noted that there was no evidence that the Appellant was engaged in any form of rehabilitation in the United Kingdom.

9. Next, the Secretary of State's decision maker considered Article 8 ECHR, in the following terms:

> "*You have not provided any evidence of Article 8 family life existing in the United Kingdom …*
>
> *It is accepted that you may have developed a degree of private life ….*
>
> *Your deportation is conducive to the public good and in the public interest because you have been convicted of an offence for which you have been sentenced to a period of imprisonment of at least four years.*"

The decision maker noted that the deportation provisions of the Immigration Rules – paragraphs A362 and A398 – 399D – and Part 5A of the Nationality, Immigration and Asylum Act 2002 did not apply to the Appellant's case. However, these had been "*used as a guide for considering your Article 8 claim*". This exercise entailed posing the question of whether there were very compelling circumstances sufficient to outweigh the public interest underpinning the Appellant's deportation. The conclusion made was that there were no such circumstances.

The European Arrest Warrant

10. By reason of certain aspects of the permitted grounds of appeal, it is necessary to outline some features of the evidential framework. Two of the key components of this framework are the European Arrest Warrant (the "EAW") and the Appellant's two witness statements. The background to this evidence is that on 13 April 2011, having served 24 years' imprisonment with six years' remission for good behaviour, the Appellant was released from prison. The only evidence of what occurred during the immediately ensuing phase is what is contained in the Appellant's witness statements.

11. There is no dispute that the Appellant travelled through Spain and entered France. There he remained for an unspecified period. He admits to having procured false identity documents at this stage. Next, equipped with these documents, he travelled to England. Following arrival he resided in London, sharing accommodation with a fellow countryman, whom we shall describe as "LS", until his arrest on 29 June 2012.

12. The ensuing extradition proceedings in this jurisdiction have become complex and protracted, involving the transmission by the Spanish authorities of a series of EAWs, each replacing its immediate predecessor and three decisions of the Divisional Court: see [2016] EWHC 3029 (Admin) at [3] – [7]. We shall refer only to the current EAW.

13. Sandwiched between the first two Divisional Court decisions was a significant decision of the Grand Chamber of the ECtHR, in Del Rio Prada v Spain [2014] 58 EHRR 37. This was followed by a successful appeal against the second EAW, the issue of a third EAW, an unsuccessful first instance appeal and a successful appeal to the Divisional Court: see Spanish Judicial Authority v Arranz (No 3) [2015] EWHC 2305. This was the impetus for the issue of the fourth – current - EAW by the Spanish Judicial authority

14. The most recent judicial decision is that of the Divisional Court noted in [12] above which upheld the decision of Senior District Judge Riddle, dated 14 June 2016, ordering the Appellant's extradition to Spain. We were informed that there is at present an undetermined application for permission to appeal to the Supreme Court.

15. The current, operative EAW, is dated 23 October 2015. It contains several references to "ETA", a proscribed Basque terrorist organisation. It identifies, in section 2, the offences of (a) actively participating in a terrorist organisation or group or being part thereof and (b) falsifying a public, official or commercial document, contrary to specified provisions of the Spanish Codigo Penal. Both offences are punishable by imprisonment. In a later section of the EAW one finds the following detail:

> "[The Appellant] *was set free in accordance with a ruling issued on April 2011 ….*
>
> *Subsequently, the same Division upheld an appeal lodged by the State Prosecutor and ordered the search and arrest of* [the Appellant] *who went underground and hid, initially, in an unidentified place in Spain. From there, he contacted the terrorist organisation ETA again so they would help him flee from Spain, thus making the search and arrest warrant against him ineffective. By doing so he accepted submission to the terrorist organisation's instructions regarding what is known as the Group of Refugees* [El Colectivo de Refugiados]*, a branch that groups ETA militants together in countries other than Spain and France, placing himself at the disposal of ETA …*
>
> *Thus, around 19 April 2011, to evade the search warrant issued against him* [the Appellant] *sent a photograph of himself to the terrorist organisation ETA's branch for forging documents* [FAL] *which belongs to ETA's logistics department ….* [which] *forged six Spanish identification documents with his photograph and the following identities ….* [names] *….*
>
> *Said documents, analysed by the Forensic Services, were of the same origin as other documents seized from several members of the terrorist organisation …*
>
> *The same documents were found on 29 June 2012 in the possession of* [the Appellant] *in the house he occupied with another member of the organisation* [LS] *at* [London address] *where they were arrested by the British police.*"

The text continues:

> "*In addition, two forged driving permits in the names of* [names] *both of which had a photograph of* [the Appellant] *where seized from the latter. Moreover, two European health cards in the name of* [names] *were also found in his possession*."

Referring to the person with whom the Appellant was living in London, the EAW continues:

> "*Previously,* [LS] *had lodged* [the Appellant]. *Both men followed the guidelines received beforehand from the terrorist organisation ETA, in accordance with the groups internal rules and* [its] *so-called Protocol for Refugees*".
>
> ["Lodged" in this context denotes providing accommodation.]

16. The EAW then addresses the issue of alleged membership of ETA:

> "*The presence of* [the Appellant] *in said place with the aforementioned individual is not a casual circumstance. Rather, it shows that* [the Appellant] *belongs to the terrorist organisation. The entire process by which an ETA militant goes underground is not due to an independent, individual decision. It obeys the organisation's internal rules and the so-called Protocol for Refugees* ….
>
> *In the case of* [the Appellant]*, it meant a reintegration into the terrorist organisation when he was released from prison*".

The EAW then provides an outline of the evidence supporting the allegation that the Appellant is a member of ETA: police reports, the entry and search at the London address, items and documents seized, experts' reports and police analyses and certain documents recovered from LS when searched in France following his arrest in 2008.

17. The identity of the requesting Spanish judicial authority is of some significance. It is the Juzgado Central de Instruccion (the Central Examining Magistrates' Court). This indicates that the proceedings in Spain relating to the two offences of which the Appellant is suspected have not proceeded beyond the investigative phase and, in particular, have not reached the stage of indictment or prosecution, for the reason that the Appellant's presence in the Court is a necessary prerequisite.

The Appellant's Witness Statements

18. In juxtaposing the EAW with the Appellant's two witness statements, which are dated 01 May 2014 and 12 July 2016 respectively, each of which formed part of the evidence before the FtT, we are conscious that the Appellant did not give evidence at first instance and, hence, neither of these statements has been tested. On the other hand, the FtT stated, in substance, that its determination of the appeal did not turn on these statements: see [5] of its decision.

19. In his first statement the Appellant asserts that upon his release from prison on 13 April 2011 he travelled directly to his daughter's home in Hendaye, South Western France. He did so in order to avoid the effect of the so-called "Parot" doctrine, which exposed him to the risk of reimprisonment for a considerable period. His flight through Spain to France appears to have been accomplished within a period of some 24 hours. He claims that he entered France without having to display any identification document. His Spanish national identity card, though returned to him by the prison authorities, was out of date. He asserts that he obtained multiple false identity documents from an unidentified person in France at a cost of €600, claiming that he is unaware of any ETA involvement in this exercise. He felt unsafe in France on account of the French/Spanish Governments' collaboration and, following a clandestine existence there, he entered the United Kingdom on an unspecified date. He was able to make contact with LS in London by virtue of information given to him by a fellow prisoner. He claims that LS was previously unknown to him.

20. In his statements the Appellant asserts that he is no longer a member of ETA. He claims to support the permanent ETA ceasefire and expresses regret for his terrorist activities.

The Operative Extradition Decision

21. The second intervention by the Divisional Court noted above was the impetus for the issue of the fourth EAW by the Spanish Judicial Authority, on 23 October 2015. The Appellant appealed. By his decision dated 14 June 2016 the Senior District Judge found that there was no bar to extradition and made the Order culminating in the third of the Divisional Court's decisions, which is dated 25 November 2016. It is pertinent to note that by this stage the extradition order was confined to the first of the two offences specified in the fourth EAW namely membership of a proscribed terrorist organisation (ETA), the Senior District Judge having discharged the Appellant in respect of the document falsification offence. It is also appropriate to note that in the extradition proceedings, the Appellant's case relied heavily on the evidence of two experts, Mr Woodworth and Mr Casanova. All of this evidence, with the exception of some modest updating, was laid before the FtT.

First Instance Decision

22. The Secretary of State's decision to deport the Appellant from the United Kingdom was challenged by appeal to the FtT which, in its decision, made three principal

conclusions. First, the Appellant will not be "*at risk for a Convention reason*" in the event of his deportation to Spain (the "*Convention*" being the Refugee Convention). Second, the Appellant's deportation will not involve any breach of Articles 5 or 6 ECHR (contrary to section 6 of the Human Rights Act 1998). Third, the Appellant's deportation "*… is justified and in accordance with Regulation 19(3)(b) and Regulation 21 of the 2006 Regulations*". Giving effect to these conclusions, the FtT dismissed the appeal on asylum grounds, under Articles 5 and 6 ECHR and under the EEA Regulations.

23. It is appropriate to highlight certain aspects of the FtT's decision. This can be conveniently undertaken in list form. The FtT:

(a) noted that the Appellant was entitled to the first tier of protection from deportation only, in light of his status under the EEA Regulations;

(b) accepted that the Appellant's witness, Mr Woodworth, is an expert in the realm of Basque and Spanish affairs;

(c) stated that the burden of proof rested on the Appellant in certain specified respects and that the standard of proof was the balance of probabilities;

(d) acknowledged that the Secretary of State's decision maker erred in stating that the Appellant's personal conduct itself warranted his deportation, but considered this immaterial having regard to the decision as a whole;

(e) accepted Mr Woodworth's evidence that ETA is a defunct organisation whose members have engaged in no acts of terrorism since the declaration of its permanent ceasefire in 2011 and that ETA has never posed any threat to the security of the United Kingdom;

(f) found that when the Appellant was encountered in London, certain "*false identity documents*" were discovered; that he admitted to using forged documents to evade the UK and Spanish authorities; and that he was living with "*a terrorist who was subsequently convicted of terrorism related offences*";

(g) found that the Appellant had not "*addressed*" or regretted his offending and, linked to this, found that ETA continues to function "*insofar as it provides logistical support and a welfare role*" of which the Appellant had been the beneficiary in his successful transition from Spain to the United Kingdom;

(h) further found, on this basis, that the Appellant has continuing links to ETA "*in its non-violent supportive role*"; and

(i) made no finding of whether the Appellant is still a member of ETA.

24. The main conclusion of the FtT entailed a finding that the Appellant's "*personal conduct*" represented a genuine, present and sufficiently serious threat affecting one

of the fundamental interests of United Kingdom society under regulation 21(5)(c) of the EEA Regulations. The dismissal of the appeal entailed a rejection of all of the Appellant's grounds which were, in brief compass, that the Secretary of State's decision was unlawfully based on the Appellant's previous convictions alone; amounted to "disguised extradition"; was contrary to the Refugee Convention; infringed the Appellant's rights under Articles 5 and 6 ECHR; and infringed his rights under Article 47 of the EU Charter.

25. Permission to appeal was sought, and granted, on several grounds (Grounds 1, 2 (in the alternative to 1), and 4-8). These, in essence, resolve to arguable errors of law consisting of a failure to make necessary findings, misdirection in law, failing to apply the correct legal test and inadequate reasoning. We shall concentrate mainly on what we consider to be the two principal grounds of appeal.

The Principal Grounds of Appeal

26. In this section of our judgment we consider the following grounds of appeal: no finding of identification of genuine, present threat (Ground 1), together with misdirection as to the evidence and facts (Ground 4). In addition we shall consider the burden of proof issue forming part of Ground 1.

27. The main ground of appeal is that the FtT made no sustainable finding that, in the language of regulation 21(5) of the EEA Regulations, the Secretary of State's decision was -

> "… *based exclusively on the personal conduct of the* [Appellant] ….
>
> [representing] …. *a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.*"

This omnibus formulation (ours) encompasses the several inter-related strands and alternatives of which this ground consists, both as pleaded and as developed in argument.

28. The evidence of one of the two Appellant's experts, Mr Woodworth, is of particular relevance to this ground. Mr Woodworth's report formed part of the documentary evidence assembled and was supplemented by his oral testimony. Mr Woodworth's evidence on what we term the "ETA issue" is ascertainable from the following passages in his most recent report:

> "*I am as certain as it is possible to be about such things that ETA's terrorism has now ended permanently ….*
>
> *There is no active ETA left to join ….*"

At [17] of its decision the FtT comments:

> "*It was the evidence of Mr Woodworth, in particular at [114] – [115], [177] and [184] of his report, that ETA is a defunct terrorist organisation. None of the high profile ETA prisoners have* [sic] *returned to violence. Further, there is no evidence that any ETA terrorist has returned to violence since ETA declared its permanent ceasefire, nor is there any active violent organisation for them to join if they wished to do so. No serious observer of the Spanish security scene believes that ETA will ever launch a new campaign of terrorism. Mr Woodworth is as certain as it is possible to be about such things that ETA's terrorism has ended permanently ….*
>
> *ETA has never operated in the United Kingdom or Northern Ireland in any way that involves risk to UK citizens or our security forces. Mr Woodworth is of the opinion that ETA activity here is limited to some of its members taking refuge in or moving through the UK utilising false documents possibly provided by ETA in order to avoid detection and extradition to Spain.*"

29. Following this passage the FtT reminded itself that the deportation of the Appellant "*… must be justified on grounds of public policy, public security or public health in accordance with Regulation 21(5)*". In the next five paragraphs the judge rehearses some of the arguments developed by the parties' respective counsel. This is followed by the key paragraph in his decision, [24]:

> "*I accept that there is no presumption of reoffending. Nevertheless, there was no evidence that the Appellant has addressed the issues which caused him to engage in acts of terrorism. The Appellant did not adopt his statement, nor did he give oral evidence, for example, to acknowledge regret for his terrorist activities. The only evidence to suggest a lack of potential to further offend is not by way of rehabilitation … but the view of Mr Woodworth that ETA is a defunct organisation and its terrorism has come to an end on a permanent basis. While ETA might be defunct in terms of carrying out acts of terrorism, it appears to be functioning at least insofar as it provides logistical support and a welfare role. There was no suggestion that the Appellant was assisted in leaving Spain with multiple false identities and directed to a house in London where an ETA terrorist was residing by any organisation other than ETA, albeit in a welfare role; there was no other credible explanation. In that sense, then, I find the Appellant at least has links to ETA in its non-violent supportive role (albeit still proscribed), even if he cannot be said to be still a member of the organisation, although I make no finding in that regard. Whatever justification the Appellant might have considered entitled him to flee Spain in possession of forged false identities to reside with an ETA terrorist wanted by the Spanish authorities in London, I do not accept that either Article 31 of the Refugee Convention or section 31 of the Immigration and Asylum Act 1999 are authority to legitimise the Appellant's continued association with ETA and the means by which he facilitated his exit from Spain, entry to the United Kingdom and residence here with an ETA terrorist.*"

30. In the next comparable passage of substance, at [27], the judge, in giving consideration to the argument that the Secretary of State's decision was flawed as it was based exclusively on the Appellant's previous convictions, states:

> "*… but she went on to comment as part of her overall assessment that there was no evidence the Appellant had severed his links to ETA (a proscribed organisation in Spain and in the UK notwithstanding the ceasefire), that the Metropolitan Police had provided copies of the forged identity cards found here in the possession of the Appellant and that he was living in London with an ETA member wanted for terrorist offences in Spain. In such circumstances, I find that leaving aside the Appellant's claimed motives …. the fact that in all likelihood he left Spain with ETA's facilitation and supply of numerous false identities and was directed to an address in London where he might live with* [LS] *is sufficient evidence to satisfy Regulation 21(5)(c).*"

The judge then summarises his conclusions on this ground of appeal. These include this omnibus conclusion:

> "*I find that the Appellant's personal conduct does represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society in terms of regulation 21(5)(c).*"

31. There are certain objectively demonstrable errors in the two lengthy passages reproduced above. First, the comment that the Appellant did not give oral evidence to acknowledge regret for his terrorist activities is strictly correct. However, there is no recognition of the expressions of regret contained in the Appellant's witness statements. Second, there was no evidence that the Appellant had departed Spain and entered France "*with multiple false identities*". This error was repeated. Once again, the judge gave no express consideration to the Appellant's witness statements. Third, the judge thrice describes LS as an "*ETA terrorist*" and once as a "*ETA member*". This too is erroneous, as the evidence establishes only that LS is a suspect with alleged ETA links in whom the Spanish authorities are interested. Furthermore, the judge erroneously states that the Appellant's extradition to Spain relates to the two offences specified in the fourth EAW, overlooking that the Appellant had been judicially discharged in respect of one of these. Finally, no consideration is given to the evidence relating to the *Colectivo de Refugiados* organisation.

32. Properly analysed and considered in their full context these are not egregious errors. However, they provide some illumination in our task of determining the first ground of appeal. In the course of argument we suggested to counsel that in determining an issue of this kind viz whether the requirements of regulation 21(5)(c) are satisfied it is incumbent on every first instance court or tribunal to discharge the three inter-related duties of engaging with the most important evidence bearing on the issue, making clear findings and expressing sufficient and intelligible reasons for the findings made. As regards both the "ETA issue" and the Appellant's possession of false identity documents when arrested, we consider that the first of these duties was acquitted. However, for the reasons we shall give, we find ourselves unable to make

the same conclusion regarding the second and third, having regard to the key passages in [24], [27] and [28] of the FtT's decision.

33. The absence of clearly expressed findings coupled with adequate supporting reasons is not fatal *per se*. That is so because we must nevertheless ask ourselves whether adequate findings and sufficient supporting reasons can be deduced from what the FtT has written. This exercise places the spotlight firmly on the three paragraphs noted immediately above. In the first of these paragraphs there are eight references to ETA. In the second, there are three. Read as a whole and considered in their full context these passages impel to the inescapable conclusion that the judge's finding that the Appellant poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of United Kingdom society was based on two aspects of his personal conduct, namely (a) his continuing association with ETA and (b) his possession of false identity documents when arrested. Significantly, the judge did not make a finding that the Appellant's past offending posed a sufficiently serious threat to one of the fundamental interests of society; rather, he focussed upon the "potential to further offend" (para 24). That being so it is not necessary for us to consider the competing submissions we heard as to whether the decision in *Marchon v Immigration Appeal Tribunal* [1993] IMAR 384 remains good law.

34. The factual dimension of (a) cannot be criticised, given the evidence of the Appellant's conduct since his release from prison. There was undoubtedly sufficient evidence to underpin it. However, the overall assessment is unsustainable as it is confounded by expert evidence which the judge clearly accepted: see [23] (e) and [27] above. It follows that this discrete conclusion was irrational. It suffers from the further flaw of being unreasoned.

35. Similarly there is no factual flaw in the second of the judge's discrete conclusions: leaving aside technical questions relating to the offence of "possession" of something, the evidence that false identity documents were recovered from the property in which the Appellant was residing – or from the Appellant's person, this detail being unclear - at the time of his arrest was not disputed. However, this represents the beginning and end of the judge's assessment. There is no examination of any possible risks or consequences associable with this fact, with particular reference to the regulation 21(5) (c) test. Furthermore, the discrete conclusion is entirely unreasoned. It is unsustainable in law in consequence.

36. For the reasons given, the first ground of appeal succeeds.

The Burden of Proof Issue

37. Though embedded in Ground 1, this emerged in argument as a discrete ground of appeal. The gist of this ground is that the FtT erred in law by imposing a burden on the Appellant to demonstrate that his personal conduct does not pose a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. While this was formulated as one of the strands, or alternatives, of the main ground of appeal, we consider that it has a free standing status.

38. In the introductory paragraphs of its decision, the FtT, under the rubric "*Burden and Standard of Proof*" states, at [8]:

> "*The Appellant claims he is at risk of persecution on return to Spain. Alternatively or in addition, that there will be a breach of Articles 5 and 6. The burden is on the Appellant to show as of today's date that there are substantial grounds for believing that he meets the requirements of the Qualification Regulations.* ***Insofar as the appeal relies upon the 2006 Regulations, the burden is also on the Appellant, the standard being the balance of probabilities***."
>
> [Emphasis added.]

At the beginning of [24] the judge states:

> "*I accept that there is no presumption of reoffending*."

This is followed by the passage which we have reproduced in full in [28] above. Next, at [27], the judge makes reference to how the Secretary of State has "*attempted to justify the Appellant's deportation …*". This is followed by the passage which we have reproduced at [29] above.

39. The last passage of significance in the context of this ground is at [28] (a):

> "*Considering the provisions of Regulation 21(5), I find for the reasons I have set out at [21] – [24] above, the Secretary of State has not justified her decision to deport based only upon the Appellant's previous criminal convictions.*"

Followed by [28] (d):

> "*I find that the Appellant's personal conduct does represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society in terms of regulation 21(5)(c).*"

In a later passage in this paragraph, the FtT adverts to "*… the Appellant's continued association with ETA and the means by which he facilitated his exit from Spain, entry to the United Kingdom and residence here with an ETA terrorist*".

40. We link the above passages to [27], where the FtT refers to those parts of the Secretary of State's decision which highlighted that there was no evidence of severance by the Appellant of his links to ETA, together with the forged identity

cards discovered "*in the possession of the Appellant*" and his residing in London "*with an ETA member wanted for terrorist offences in Spain*".

This is followed by the conclusion:

> "… *the fact that in all likelihood he left Spain with ETA's facilitation and supply of numerous false identities and was directed to an address in London where he might live with* [name] *is evidence sufficient to satisfy Regulation 21(5)(c).*"

41. The argument of Ms Dubinsky on behalf of the Appellant invoked the decision of the Court of Appeal in Rosa v Secretary of State for the Home Department [2016] EWCA Civ 14, [2016] 1 WLR 1206 which held, in an EEA Regulations context, that the legal burden of proof rested on the Secretary of State to prove that a marriage was one of convenience, to the standard of the balance of probabilities. Richards LJ, delivering the unanimous judgment of the Court, expressed this conclusion in [24] and elaborated in [25] as follows:

> *"I do not accept Mr Kellar's submission that the burden of proof is a matter for national law alone. The EEA Regulations have to be interpreted and applied in line with the Directive which they implement. Although the Directive is silent as to burden of proof, the Commission's guidance (paragraph 20 above) provides the key to the correct approach under it. Article 35 of the Directive provides that the rights otherwise conferred by the Directive may be refused, terminated or withdrawn in the case of abuse of rights or fraud, such as marriages of convenience. As a matter of general principle, one would expect that the burden of proving that an exception applies should lie on the authorities of the Member State seeking to restrict rights conferred by the Directive – in this case, that it should lie on the Secretary of State when seeking to rely on the existence of a marriage of convenience as a reason for refusing a residence card to which the applicant is otherwise entitled. That is the approach set out clearly in the Commission's guidance, and there is no reason to doubt the correctness of the guidance on the point."*

He said further regarding the Commission's guidance, at [26]:

> *"The guidance also shows the subsidiary role that national procedural rules have in this context. As a matter of EU law, the burden of proof lies on the authorities of the Member State seeking to restrict rights under the Directive, but it is for the national court to verify the existence of the abuse relied on, evidence of which must be adduced in accordance with the rules of national law."*

The judgment quotes from the Commission's guidance, at [20] and we were shown a copy of the entire instrument. It is not confined to marriages of convenience. Rather, it extends to several of the discrete subject areas covered by the Citizen's Directive.

42. Ms Anderson accepted that the legal burden of proof rested on the Secretary of State. She suggested, faintly, that [24] of the FtT's decision is to be rationalised on the basis that the judge, in effect, was stating that an evidential burden had transferred to the Appellant. She further submitted that in substance and read as a whole, there had been no misdirection by the FtT on this issue.

43. We consider that, logically, the reasoning of the Court of Appeal in Rosa, which was concerned with a decision which would require the removal of the Appellant from the United Kingdom, extends to exclusion and removal decisions made under Regulation 19. We can identify nothing in the Directive, the Regulations or in principle impelling to a different assessment. It follows that the legal burden rested on the Secretary of State of establishing, on the balance of probabilities, that the removal of the Appellant from the United Kingdom was justified on public policy grounds.

44. Two inter-related questions arise. Did the FtT appreciate where the legal burden of proof lay and did it give effect to same in its decision? We have reproduced in [37] – [39] above, the passages in the FtT's decision bearing most prominently on this issue. The thrust of Ms Dubinsky's argument is that the error is patent in [8], quoted above, and we should deduce it from the other passages.

45. It is indisputable that the FtT's first reference to burden of proof – in [8] of its decision - in relation to regulation 21(5) is incorrect. The misstatement here that the Appellant bore the burden of proof, the standard being the balance of probabilities is unambiguous and unqualified. It is not remedied in any other part of the decision. We acknowledge that in [28] (a) the FtT uses language of the Secretary of State not justifying something. The difficulty with this discrete sentence is that, considered in its full context, it is far from clear that this can properly be construed as a recognition of the Secretary of State's burden of proof sufficient to correct the stark misstatement of the burden of proof in [8] of the decision (see [37] supra).

46. We elaborate thus. The judge had just devoted a lengthy paragraph to considering Ms Dubinsky's submission that the Secretary of State "*… has attempted to justify the Appellant's deportation in reliance on ex post facto arguments …*". We consider that there is some confusion in what follows. It seems to us that this submission was based on arguments advanced by Ms Anderson at the hearing: we refer particularly to [15] – [17] of the FtT's decision in this context. It might be said that quite substantial swathes of the submissions therein recorded do not readily bear comparison with the text of the Secretary of State's decision. Be that as it may, the judge, having rehearsed the Appellant's "ex post facto" argument, turned to the Secretary of State's decision letter and embarked upon an assessment of this. He rejected the submission that the Secretary of State had, impermissibly, based her decision on the Appellant's previous convictions. Rather, the judge found, there were clear references to the Appellant's continuing links with ETA and the recovery of falsified identity documents from his place of residence in London. This was the stimulus for the judge's conclusion that these two factors were "*sufficient to satisfy regulation 21(5)(c)*".

47. One of the consequences of this is that the Appellant's "*ex post facto justification*" challenge was neither considered nor resolved. As we have observed above, the extensive arguments addressed to the FtT by counsel for the Secretary of State, summarised in [15] – [17] of the decision, did indeed purport to add – significantly and substantially so – to the text of the Secretary of State's decision. It seems to us that the FtT failed to grasp the thrust of the "*ex post facto justification*" argument. In our judgment, it would not have been open to the FtT to allow many of the arguments outlined in [15] – [17] of the decision to influence the conclusion that the regulation 21(5)(c) test was satisfied. However, reading the decision as a whole, it appears to us that this is what occurred.

48. It is also necessary to reflect on the underpinning of the FtT's conclusion at [28] (a) of its decision. It is underpinned by "*the reasons I have set out at [21] – [24] above*". This invites the following analysis:

    (i) Paragraph [21] of the decision is a mixture of a rehearsal of certain submissions advanced in the Secretary of State's Skeleton Argument, some commentary by the judge on the Secretary of State's decision letter and, finally, the Appellant's "*response*" in argument. This paragraph is essentially discursive in nature. It contains no findings or conclusions.

    (ii) Paragraph [22] consists exclusively of a reference to the decision of the Court of Appeal in R v Benabbas [2005] EWCA Crim 2113 and a lengthy quotation from the report.

    (iii) Paragraph [23] continues the exercise begun in [22] without making any clear conclusion regarding the governing principle or principles to be applied.

    (iv) Paragraph [24] has been extensively analysed by us above.

49. We continue our analysis as follows. In the key passages, the FtT began by stating that there was no evidence that the Appellant had addressed the issues which caused him to engage in acts of terrorism. In context and in reality, only the Appellant could have been the source of evidence of this kind. Next, the judge highlighted that the Appellant had not given any oral evidence: in particular, he had not, by oral testimony, acknowledged regret for his crimes. The only evidence suggestive of a lack of potential to reoffend was, the judge said, that of the Appellant's expert, Mr Woodworth. He highlighted that, furthermore, the Appellant had not testified ETA had not assisted him in leaving Spain and entering the United Kingdom and securing accommodation there.

50. We have acknowledged that it is necessary to consider the decision of the FtT as a whole, rather than in isolated fragments. The key passages in its decision bearing on this ground of appeal are assembled in [24] – [27]. That these passages must be considered in unison is confirmed by the conclusion expressed at the end of [27]. The FtT nowhere refers to the Secretary of State bearing a burden of proof. Reading the decision as a whole, we are satisfied that the essential thrust of the critical

passages is that the Appellant had not persuaded the Tribunal that his removal was not satisfied on grounds of public policy.

51. This analysis, in our judgment, follows from the series of failures on the part of the Appellant identified by the FtT: the Appellant failed to formally adopt his witness statements, failed to give oral evidence, failed to testify that he regretted his heinous crimes, failed to testify that he was not assisted by ETA in his flight to the United Kingdom and in securing accommodation there and failed to explain the documents recovered by the police upon his arrest. In our judgment, the FtT applied the wrong legal prism to all of these issues and, ultimately, to the overarching statutory precondition enshrined in regulation 19(3)(b). This constitutes an error of law. The materiality of this error is clear beyond peradventure, as the conclusion expressed at the end of [27] demonstrates. Finally, Ms Anderson's somewhat tepid submission about a shifting burden of proof was made without reference to supporting authority and we consider that [24] of the FtT's decision does not bear this analysis in any event.

52. We return to the use of the verb 'justify 'in two places, in [27] – [28]. This might, in theory, lend some force to the view that the manifest misdirection in [8] was on the road to redemption. However, we decline to adopt this assessment in light of our concerns about [28] (a), elaborated above, which cannot, in our judgment, provide a reliable basis for correcting the clear error of law in [8], coupled with the other aspects of our analysis and construction of the FtT's decision above.

Other Grounds of Appeal

53. We have addressed above what we consider to be the principal grounds of appeal. While remaining grounds appear to us supplementary in nature we shall consider them in the interests of finality and certainty.

54. Grounds 5, 6 and 7 of the grounds of appeal challenge the judge's findings in relation to the issue of "judicial engineering" and the risk of the Appellant not receiving a fair trial in Spain. We shall consider the points that arise under these grounds under the four sub-headings set out below.

(i) Misunderstanding The Evidence

55. This element of the challenge to the decision of the FtT is encapsulated in the grounds of appeal in these terms:

> "*The Designated Immigration judge materially misdirected himself as to the evidence and facts. He held that the Appellant is currently sought by the Spanish authorities in relation to the forgery of official documents. He clearly considered that it was uncontroversial that the Appellant had obtained false documents in Spain. He also held that there was 'no suggestion' that any group other than ETA had furnished the Appellant with the forged identity documents with which the Appellant was arrested in*

London or directed him to another former ETA militant on the run in London. All this was either incorrect or in dispute."

In argument emphasis was placed on the evidence relating to the Colectivo de Refugiados organisation, its undisputed peaceful aims and methods, its non-proscribed status in France and what is said about it in the EAW.

56. The riposte of Ms Anderson on behalf of the Secretary of State is, in summary, that the decision in E v Secretary of State for the Home Department; R v Secretary of State for the Home Department [2004] EWCA Civ 49; [2004] QB 1044 is not satisfied; there is a distinction to be made between the evidence of Mr Woodworth recited in [42] of the FtT's decision and the content of the EAW; the FtT's findings about the Appellant's flight from Spain through France to the United Kingdom and his subsequent settlement in this jurisdiction accord with the Appellant's own statements; and that no material error of fact which could constitute a material error of law is demonstrated. The E & R test is formulated at [63] of the report in these terms:

"In our view, the CICB case points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between "ignorance of fact" and "unfairness" as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that "objectively" there was unfairness. On analysis, the "unfairness" arose from the combination of five factors:

i) An erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case);

ii) The fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence;

iii) The claimant could not fairly be held responsible for the error;

iv) Although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result;

v) The mistaken impression played a material part in the reasoning."

And at [66]:

"Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively

verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

57. The overlapping nature of this ground of appeal is confirmed by reference to [31] above. This does not, however, deprive this ground of its free standing character. The evidence bearing thereon includes the Appellant's two statements (outlined in [10] – [15] above). The FtT highlighted, twice, that the Appellant had not given evidence in that forum. First, at [5]:

> "*The Appellant declined to give oral evidence, nor did he adopt his statements, which inevitably affects the weight I can place upon that evidence, although for reasons I will explain, in my view, nothing material turns upon it. See [24] below.*"

Next, at [24]:

> "*… There was no evidence that the Appellant has addressed the issues which caused him to engage in acts of terrorism. The Appellant did not adopt his statement, nor did he give oral evidence, for example, to acknowledge regret for his terrorist activities.*"

The description of the Appellant's written evidence in the singular ("*statement*") is, of course, erroneous.

58. We consider that there was a duty on the FtT to engage with the Appellant's two written statements. In [5] the judge, correctly, recognised the existence of this duty and the related duty to assess the weight to be attributed to this evidence. However, this represents the beginning and end of this discrete exercise. In what follows in the decision, there is no engagement with the statements, no assessment of their weight and no associated findings with supporting reasons. Our assessment is that this failure is to be evaluated in conjunction with the factual errors identified above. Individually, the factual errors are not egregious in nature. However, collectively they assume a more substantial hue. We add to this the further failure on the part of the FtT which we have just identified. This assessment impels to the conclusion that this ground of appeal is also established.

(ii) Misunderstanding the Second Divisional Court's Decision

59. This ground of appeal draws attention to certain passages in the decision of the Divisional Court in Spanish Judicial Authority v Arranz (No 3) [2015] EWHC 2305 (Admin). The context is ascertainable from [20] – [26] of the judgment of the Court, delivered by the Lord Chief Justice. In these passages, consideration is given to the ground of appeal which is termed, in shorthand, "*judicial engineering*". The substance of this ground, in very brief compass, was that the EAW should be set

aside on the ground that it was the product of submission, or surrender, by the Spanish Judicial Authority to pressure from and the expectations of the Spanish public and State. In common law terms, the asserted vitiating factor was improper motive. In human rights terms, the vitiating factor advanced was an apprehended breach of Articles 5 and 6 ECHR, in contravention of section 6 of the Human Rights Act 1998. The Lord Chief Justice outlined the supporting evidence, the sources whereof were Mr Woodworth and the Spanish lawyer, Mr Casanova.

60. Having set the context, we now identify those passages upon which this ground of appeal is promoted:

Paragraph 27

> *"We ourselves have very carefully considered the evidence that was before the Senior District Judge. In addition we have also taken into account the failure of the Spanish Judicial Authority to terminate the underlying Spanish proceedings relating to EAW1, in breach of their express undertaking to this court. However, as we explain at paragraph 39 below, the Spanish Judicial Authority has remedied that matter. As is apparent from the Senior District Judge's careful and considered judgment, he was also very concerned at the evidence put before him and the weight it carried."*

Paragraph 28

> "*Nonetheless, despite the careful and meticulous argument of Mr Summers QC, we cannot conclude that the Senior District Judge was wrong in the conclusion he reached on the evidence. He had the benefit of hearing the witnesses and of carefully weighing that testimony. We cannot in those circumstances see, on well established principles, that he came to a decision that was not open to him on the evidence. It would not therefore be the proper function of an appellate court to set his findings aside. In the result therefore this particular submission fails …".*

We interpose here paragraph 39 of the judgment:

> *"Our view was communicated to the Spanish Judicial Authority who immediately took action to bring the proceedings in Spain in respect of the original sentence to an end. The documentation has been provided to the court and to the appellant. It is accepted that the proceedings in respect of the conviction are at an end. The issue on specialty therefore no longer forms a bar to extradition."*

61. The final passage invoked by the Appellant in support of this ground relates to the issue of whether there was a bar to extradition under section 12A of the 2003 Act on the basis that a decision to prosecute the Appellant had not been made in Spain. The Spanish Judicial Authority had formally certified that no prosecution decision had been possible on the ground that by reason of the Appellant's absence from Spain, the preliminary investigation ("*Instruccion*") phase could not be concluded. The Divisional Court stated, at [56]:

"It is clear in our view that, where evidence is adduced which shows that a means of examination of a defendant is possible either through the use of the Mutual Legal Assistance Convention or otherwise before the decision to prosecute is made, then it is for the requesting European judicial authority to prove by adducing evidence to the requisite standard of proof that the test in s.12A(1)(b)(ii) has been met. In the present case the Spanish Judicial Authority has given no reasons. On the face of it, on the evidence before the court, it therefore has not shown that the sole reason for the decision to prosecute not having been made is the appellant's absence from Spain."

This was a prelude to the particular passage on which the Appellant places much reliance.

Paragraph 60

"It seems to us, following the decision in Kandola, that the Senior District Judge was wrong on the facts of this case to act on the unreasoned statement of the Spanish judge.

(1) Proper evidence had been adduced before the court that there was a means of examining the appellant in the United Kingdom; therefore the sole reason for the decision to prosecute not having been made was not his absence from Spain.

(2) There are real concerns about the delay in this case. The matter with which the appellant is charged relates to events in April 2011 and further delay would not be acceptable.

(3) It would not have been difficult for the Spanish Judicial Authority to have responded on this point. It could easily set out its reasons, taking into account that the purpose of s.12A was to ensure that there would be no delays.

(4) It is inexplicable in these circumstances why the Spanish Judicial Authority did not seek to take advantage of the invitation which we extended to put in evidence during the course of the appeal. We are very concerned that our invitation was expressly declined on the instructions of the CPS, in contradistinction to acceptance by the Spanish Judicial Authority of the need to terminate the proceedings underlying EAW1.

(5) In the light of these matters and of evidence which we have considered under the first issue, "judicial engineering", and the concerns we have expressed, the failure to answer the simple points raised by Mr Casanova cannot be accepted in this particular case.

(6) Even if Kandola was wrongly decided (which we think it was not) and the usual position is that it is permissible to accept the unreasoned statement of a judicial authority, it would not in the circumstances of this case be appropriate to accept the unreasoned statement of the Spanish Judicial Authority."

Followed by, at [61]:

> *"It follows that we consider the judge was wrong. We must therefore allow the appeal and discharge the Appellant."*

62. The Appellant's argument also invokes the decision of the Divisional Court in Puceviciene v Lithuanian Judicial Authority [2016] EWHC 1862 (Admin) and, in particular, [72]:

> *"There may be, in what we would anticipate would be very rare cases, circumstances in which mutual trust and confidence has broken down, or where there is cogent evidence of bad faith or of abuse. In those circumstances, it may well be appropriate to go behind the answers and seek more information. Spanish Judicial Authority v Arranz [2015] EWHC 2305 (Admin) provides a rare example of the problems, there described as "judicial engineering", which justify that different approach, and what it says should be read in the context of the very special circumstances of that unusual case."*

[Per Thomas LCJ]

The correctness of this principle was not disputed in the arguments advanced to us.

63. In evaluating this ground of appeal, we consider it appropriate to identify the duty resting on the FtT. In our judgment, the FtT was under a duty to, firstly, consider and, secondly, understand correctly the judgment of the Divisional Court considered extensively in [60] – [61] above. Was this twofold duty discharged? The answer turns mainly on what the FtT stated in [35] of its decision. Having acknowledged the discrete argument of Ms Dubinsky on this issue, the FtT stated:

> "*I do not accept … nor was it demonstrated to me that the Lord Chief Justice expressed such concern in the manner Ms Dubinski claims. See [72] of Vanda Puceviciene.*"

The FtT is to be commended for its alertness to the necessity of confronting this submission and resolving it. However, we consider that its conclusion suffers from three material flaws. The first is that it is expressed in bald and unreasoned terms. The second is that it fails to engage with the passages in the Divisional Court Judgment highlighted above. The third is that it is irreconcilable with [72] of Vanda Puceviciene, to which the FtT made express reference.

64. The materiality of these flaws cannot be gainsaid having regard to the formulation of the Appellant's grounds of appeal to the FtT. We conclude that this ground is also made out.

(iii) The FtT's Treatment of the "Judicial Engineering" Evidence

65. While this discrete ground of appeal overlaps somewhat with that addressed in [59]–[64] above, we consider that its contours and content suffice to endow it with a free standing existence.

66. Evidentially, the colourful and evocative term "judicial engineering" can be traced to Jacobo Tteijelo Casanova, a Spanish lawyer whose evidence to the Senior District Judge in the extradition proceedings was both written and oral and whose written statement formed part of the evidence considered by the FtT. In his written statement, Senor Casanovo gave consideration to, *inter alia*, the phenomenon of "*ingeneria judicial*". As his evidence makes clear, this phrase was first coined, in public, by the Spanish Home Secretary (El Ministerio del Interior). This issue was also addressed in the written and oral evidence of the Appellant's expert, Mr Woodworth. The gist of this ground of appeal is that the FtT failed to engage adequately with this evidence and failed to give adequate reasons for rejecting it.

67. We have, in [63] – [64] above, diagnosed a material error of law in the FtT's treatment of this discrete issue. The thrust of this ground of appeal may properly be viewed through the prism which we have formulated in [32] above. In short, it is based upon the inter-related first instance Tribunal's duties of engagement with material evidence, making appropriate findings and providing sufficient and intelligible reasons.

68. The key passages in the decision of the FtT bearing on this ground of appeal are found at [38] – [46]. It is not insignificant that this section of the judgment has the title "Articles 5, 6 and Refugee Convention". It begins at [30]. We have considered this section in its entirety and in conjunction with all that precedes it.

69. In [38] of its decision, upon which much of the spotlight is thrust, the FtT records:

> "*The Appellant has made grave allegations against the Spanish judiciary and authorities supported by the expert evidence of Mr Woodworth who gives specific examples of 'judicial engineering' or bad faith with regard to ETA cases: …*"

This is followed by ten subparagraphs, each containing instances of the phenomenon espoused in the evidence of the experts. This is followed by, in [39] – [41], a further recitation of parts of Mr Woodworth's evidence. In [43] the FtT repeats its earlier acknowledgement of Mr Woodworth's expertise, while observing that he is not a lawyer. Considered in its full context, the significance of this observation is at best opaque. In [44] the FtT focuses exclusively on the topic of persecution. In [44] and [47] the FtT articulates the conclusion that the deportation of the Appellant will not give rise to any breach of his rights under Articles 5 and 6 ECHR.

70. The FtT purported to base its decision on this discrete challenge on "*the reasons … set out …*". There is no identifiable reasoning in [43] – [45] of its decision. In [46], the

FtT refers to "*complex historic, cultural and political issues which require equally complex academic study inappropriate to my analysis on the discrete issues before me*". This is followed by a reiteration of the Tribunal's recognition of Mr Woodworth's expertise and some undeveloped references to the scope for discussion relating to the IRA and the interface between academic historians and Tribunals. In our judgment none of this amounts to a proper engagement with the "judicial engineering" evidence. Nor are there any identifiable findings. Absent the latter, the lack of supporting reasons follows virtually as a matter of course. In the passages in question, one finds nothing more than bare and unreasoned conclusions.

(iv) The Article 6 ECHR Issue

71. The essence of this ground of appeal is that the FtT failed to consider the question of whether the Appellant would be tried by (in the language of Article 6 ECHR) an "*independent and impartial tribunal established by law*" in both the subjective and objective senses of this criterion.

72. We are of the opinion that, properly analysed, this ground is subsumed within the ground which we have considered in [65] – [71] above. Accordingly, it adds nothing of substance to the Appellant's appeal.

73. Ground 8 of the Grounds of Appeal concerns the "systemic failure" issue. It is based on what the FtT stated in [45] of its decision:

> "*In summary, the evidence I have been asked to consider does not disclose a systematic failure on the part of the Spanish judiciary to discharge their duties in a fair and impartial manner.*"

This statement formed part of the FtT's rejection of the Appellant's contention that his removal to Spain would give rise to a breach of his fair trial rights under Article 6 ECHR.

74. Insofar as the FtT was purporting to formulate the test to be applied to this aspect of the Appellant's challenge, we consider that it was in error. "Systematic failure" was not the test to be applied (see R (EM Eritrea) v SSHD [2014] AC 1321 per Lord Kerr at [68]). Elaboration is unnecessary. To the extent that this ground adds anything of substance to that considered in [65] – [70] above, we conclude that it succeeds.

75. We would add that we accept Ms Dubinsky's submission that flagrant breach is not the touchstone to be applied in cases where apprehended breaches of Articles 5 and 6 ECHR are raised in resistance to expulsion decisions involving transfer between the High Contracting Parties who have subscribed to the ECHR. We contrast the test applicable in cases involving expulsion to third country states: see R (Ullah) v SSHD [2004] 2 AC 329 at [24], [29] and [69]. Furthermore, no flagrancy threshold is specified in Article 47 of the EU Charter. The uncluttered and straightforward question for the FtT in this appeal was whether there were substantial grounds for

believing that there was a real risk of a breach of the Appellant's rights under Articles 5 and 6 ECHR, Article 47 of the EU Charter and the Refugee Convention in the event of expulsion to Spain. The FtT failed to formulate and apply this test.

Conclusion

76. Based on the foregoing, we conclude that the decision of the FtT is vitiated by the material errors of law identified above.

Decision and Directions

77. We decide as follows:

    (a) The decision of the FtT is set aside.

    (b) Taking into account the nature of the errors of law diagnosed and having regard to the Practice Statements of the Upper Tribunal, the remaking of said decision will be undertaken in this forum.

    (c) The remaking will be carried out by any judge or panel of judges of the Upper Tribunal, with the President presiding if available.

    (d) The Appellant's solicitors will review, revise and update the appeal and authorities bundles as appropriate.

    (e) The relisting of this appeal for the purpose of remaking the decision will be not later than the week commencing 10 April 2017.

PART 2

78. This, the second part of our decision, follows the further hearing conducted on 09 May 2017 in the wake of which the parties' representatives have provided further written submissions as directed. We preface what follows with the detail that the Appellant's long battle against extradition has ultimately failed. He was extradited to Spain on 05 May 2017.

79. The underlying decision of the Secretary of State was to deport the Appellant from the United Kingdom under Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 (the "*EEA Regulations")* on the ground of public policy based on an assessment that the Appellant represented *"a genuine, present and sufficiently serious threat to the public"*. The Appellant will potentially gain both practical and reputational benefit if his appeal against the Secretary of State's decision is successful. Accordingly this is not an academic appeal and the contrary was not argued.

80. The legal criteria to be applied are enshrined in Regulation 21 of the EEA Regulations, the domestic law counterpart of Article 27 of the Citizens Directive. Regulation 21 provides in material part:

> *"(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 permanent right of residence under regulation 15 except on serious grounds of public policy or public security.*
>
> *(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;*
>
> *(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.*
>
> *(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."*

81. We remind ourselves that Secretary of State bears the onus of proof and the standard of proof is the balance of probabilities: see [43] above. Furthermore, it is not in dispute that the country in which the requisite genuine present and sufficiently serious threat of offending must arise is the United Kingdom. We further remind ourselves that the sole basis of the Appellant's extradition to Spain has been his alleged continuing association with ETA. We also take into account that the extradition proceedings against the Appellant were, ultimately successful. See, generally, [10] – [17] above.

The Evidence of Professor Silke

82. Professor Silke spoke to his central thesis in both examination in-chief and cross-examination. An exhaustive rehearsal of his testimony is not necessary. Professor Silke elaborated on the empirical data touched on in his report and also highlighted the low rates of psychiatric illness among politically motivated offenders. He further developed the discrete thesis of subjective altruism which features commonly in the psyche of such offenders. In addition, he elaborated on the distinction between "core" and "fringe" former members of a terrorist cell and the factor of an offender's age – which, in this Appellant's case – would fortify the low risk of reoffending thesis.

83. In cross-examination Professor Silke contended that his thesis is in no way undermined by either the standard "OASYS" model or the "Extremism Risk Guidance" ("ERG") model. He testified that, in real terms, the reoffending rate for most convicted terrorists is in single figure percentages. He illustrated this by reference to empirical studies in different areas of the globe, in particular Northern Ireland and Sri Lanka. He further opined that, in an evolving national context, access to political power for former terrorists is not a key factor. Finally, he acknowledged that "one size does not fit all".

84. The key elements of Professor Silke's thesis were not challenged or contradicted by any competing expert evidence. They were probed appropriately in both cross-examination and questions from the bench. Professor Silke emerged as an impressive witness. His evidence was demonstrably balanced and well researched. Furthermore, his contention that he was advancing an orthodox thesis was not controversial. He engaged well with questions and there was no element of impermissible advocacy in his evidence. Overall, we accept the main tenets of his evidence.

The Battle Lines Drawn

85. The submissions of Ms Anderson on behalf of the Secretary of State placed considerable emphasis on the Appellant's protracted membership of the proscribed terrorist organisation ETA and the atrocious loss of life perpetrated by him: see [6] *supra*. We recall that the murders and other terrorist offences perpetuated by the Appellant or in which he participated spanned the period 1983 – 1987, culminating in his conviction of multiple offences on 07 November 1989. Ms Anderson also drew attention to the various strands of evidence underpinning the EAW giving rise to the Appellant's extradition. She further highlighted the Appellant's use of forged identity documents in order to enter the United Kingdom and his continued possession of such materials, exposed at the time of his arrest, together with the allegation that the Appellant was harbouring a fugitive from justice, LS – (*supra*).

86. At the core of Ms Andersons' submissions lay the contention that the Appellant has demonstrated by his personal conduct that he is willing and able to breach United Kingdom laws by his possession and use of forged documents with the intention of deceiving the authorities and aiding an ETA fugitive to evade justice. Building on this foundation, Ms Anderson submitted that there are reasonable grounds to expect

that if the Appellant considered it in his interests to breach United Kingdom laws again, he would do so. The Appellant is, she submitted, a person who considers himself not bound by the rule of law. Ms Anderson contrasted the Appellant with other ETA prisoners who, rather than fleeing, remained in Spain and attempted to resolve their "Parot doctrine" issues there. The gravamen of Ms Andersons' argument appears in the following extract from her helpful written submissions:

> "*There is a clear risk of further resort to false documents if the Appellant wished to evade the UK authorities on any return in the future and the harm from possession and use of forged identity documents is unarguably significant and sufficient to meet the limited requirement in the EEA context where only the basic rights apply.*"

In this context Ms Anderson also canvasses the possibility that the Appellant would continue to provide assistance to ETA fugitives to evade the United Kingdom authorities.

87. Ms Anderson further submitted that belonging to or assisting a proscribed organisation <u>in itself</u> poses a threat to the fundamental interests of society. There is a risk that the Appellant could use his "*knowledge and potential access to weapons*" in furtherance of his personal interests or those of ETA. Ms Anderson condemned as misconceived any suggestion that the only threat that can be posed by the Appellant is engaging in a terrorist campaign in or affecting the United Kingdom on behalf of ETA. She emphasised that the Appellant qualifies for the minimum level of protection available under the EEA Regulations. Highlighting the Appellant's failure to give evidence to the Tribunal, Ms Anderson invoked section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, submitting that a refusal to be interviewed and/or to give evidence belonged to the "*highest possible end*" of conduct warranting the drawing of adverse inferences. Finally, Ms Anderson submitted that the lawfulness of the Secretary of State's deportation decision is not dependent upon the "*Marchon/Bouchereau*" principle.

88. On behalf of the Appellant Ms Dubinsky advanced four main submissions. First, there is no evidence that ETA or Basque militants have ever posed a threat to the community of the United Kingdom or have any motive for doing so in the future. Second, there is no evidence that ETA or Basque militants pose any risk of resuming armed conflict. Third, there is no evidence that former ETA prisoners pose any risk of reoffending in any form. Fourth, the Appellant's past offending cannot, without more, as a matter of law be indicative of a propensity to reoffend, per Regulation 21(5)(e).

89. Ms Dubinsky further submitted that there is no adequate evidential basis for the threat attributed to the Appellant in the context of the Regulation 21(5)(c) test. She developed this submission in the following way:

(i) In a context where the Appellant has been extradited to Spain, there is no logical basis for believing that he will have resort to the use of false documents in the future.

(ii) The Appellant's past use and possession of forged documents are insufficient to satisfy the statutory test.

(iii) The burden of proof is important because the key question of whether the Appellant will re-offend in the United Kingdom is disputed.

Conclusions

General

90. The critical provision of the EEA Regulations is Regulation 21(5)(c). The impugned decision of the Secretary of State is sustainable in law only if the personal conduct of the Appellant constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the United Kingdom. Neither the prism of a public inquiry nor that of supervisory judicial review applies to this Tribunal's determination of this central issue. Rather, this issue falls to be decided by reference to the burden and standard of proof noted in [81] above. We note Ms Andersons' submission based on JS (Sudan) v SSHD [2013] EWCA Civ 1378 that the burden of proof is not important in our resolution of this appeal. We do not agree, for the basic reason that the primary facts are very much in issue. The central factual issue is that of the Appellant's threatened reoffending at a prescribed level in the United Kingdom. This is keenly contested.

91. On the other hand, we derive some assistance from JS (Sudan) on the issue of evaluative judgment. By virtue of the terms of regulation 21(5)(c) of the EEA Regulations, the task of the Tribunal is to make a predictive evaluative assessment of future events based on the relevant factual matrix. This matrix must be constituted by the Appellant's personal conduct. Drawing the strands together, the elements of the Appellant's personal conduct under scrutiny are his previous activities as an active ETA member; his convictions in Spain in respect of appalling terrorist offences; his post-release interaction with the Colectivo; his use of forged identity documents to facilitate his entry into the United Kingdom; his occupation of a Colectivo house with another ETA member in this jurisdiction; and his continuing possession of forged identity documents at the time of his arrest. These, properly analysed, are the building blocks of the Secretary of State's case against the Appellant. It is trite that they must be considered in unison.

92. Next, we pose the question of whether the Regulation 21 (5) (c) test is satisfied by any of the other elements identified in [90] above, singly or in combination. While we shall consider each, by virtue of Ms Anderson's submissions the main focus is on the Appellant's use of forged identity documents for the purpose of travelling to and entering the United Kingdom and his continuing possession of documents of this nature when apprehended by the police some considerable time later. In agreement with Ms Andersons' submission, we take as our starting point the truism that immigration document fraud is an offence of some gravity, being in conflict with the maintenance of firm immigration control and the economic interests of society and,

in some instances, having the potential to threaten public order and national security. The question is whether the Appellant's demonstrated past use and continuing possession of forged identity documents, considered in isolation or in tandem with the other ingredients identified above, satisfies the statutory test.

93. We shall now address *seriatim* what we consider to be the central issues.

The 'Colectivo' Issue

94. Having considered the evidence in its totality, we highlight certain of its features only. We draw attention particularly to the evidence pertaining to the "*Colectivo de Refugiados*" (the "Colectivo"). There is clear evidence that the Appellant interacted with this organisation following his release from prison and, in this way, secured forged travel documents to facilitate his entry to the United Kingdom and benefited from accommodation here, shared with another ETA beneficiary of the Colectivo's services, LS: see [10] – [19] *supra*. There is expert evidence that the Colectivo is a peaceful organisation which operates openly in France where it is not proscribed. It exists to provide solidarity and support to released ETA prisoners.

95. In this context, it is convenient to address the topic of the Appellant's association with LS and the London accommodation. The evidence indicates that LS was already accommodated in the relevant premises upon the Appellant's arrival. It cannot be gainsaid that the two men associated with each other thereafter, until the Appellant's arrest. However, there is no primary evidence that the Appellant was harbouring LS or obstructed justice on this front. Nor can this be properly inferred from any primary evidence. This analysis is fortified by the contents of the EAW: see [15] – [16] above. While there is mention of LS in the text, there is no allegation that the Appellant was instrumental in harbouring him. Indeed, *au contraire,* it is asserted that LS "*lodged*" the Appellant in London.

Risk of Reoffending

96. The battleground upon which the hearing of this appeal ultimately unfolded was shaped mainly by the evidence of Professor Andrew Silke *(supra).* The expert credentials of this witness were not in dispute. In his evidence, both written and oral, he developed an abstract theory in circumstances in which he had neither interviewed nor attempted to assess the Appellant. The central pillar of this theory, insofar as it can be reduced to a single sentence, is that in a post-conflict situation a politically motivated offender who has previously committed heinous crimes is unlikely to reoffend in a comparable way or at all. Professor Silke's opinion is encapsulated in the following extracts from his report:

> "*Overall, the available elements suggests strongly that reoffending rates for released terrorist prisoners is* [sic] *low. The terrorist reoffending rates are certainly much lower than the levels typically seen with ordinary, non-terrorist prisoners. This trend applies both in the context of releases where a related conflict is still ongoing and where the conflict has ended or entered a significant peace process. It is important to acknowledge, however, that some reoffending does occur, although the level of reoffending is typically much lower than we would normally expect with most released prisoners.*"

97. Based on the above analysis we accept Professor Silke's evidence. We juxtapose it with the expert evidence of Mr Woodworth which, in the history of the extradition and immigration appeals forming the backgrounds to this hearing, has previously been rehearsed *in extenso*. We consider it unnecessary to repeat any part of these previous exercises. Rather it suffices to highlight that Mr Woodworth's evidence, all of it in written form and none of it challenged by any competing expert evidence, provides significant complementary ballast to the thesis of Professor Silke, which we have accepted.

The Appellant's Terrorist Criminality and ETA

98. In our judgment, the exercise of considering the evidence as a whole impels to the following conclusions. First, ETA does not pose any present threat, serious or otherwise, current or predictive, to any of the fundamental interests of the United Kingdom. Nor is there any realistic prospect of any such threat materialising in the future – short term, medium term or longer term. These conclusions apply fully to the Appellant *qua* former ETA terrorist. Thus, from this perspective, the past personal conduct of the Appellant in terrorist activities and active membership of a proscribed organisation in Spain does not constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the United Kingdom.

99. We consider that the correct answer to this question is provided by a combination of the context to which the Appellant's previous conduct, in all of its guises, belonged, present realities and future probabilities. All of the elements of the Appellant's conduct underpinning the impugned deportation decision of the Secretary of State belonged to a context which no longer obtains. The proscribed terrorist organisation ETA featured in all aspects of this past context. This organisation, its aims and its ruthless armed struggle all lay at the heart of the Appellant's past conduct. They were its *raison d'etre*.

100. It is, as a minimum, improbable that ETA continues to exist. The evidence establishes that it has not been involved in active terrorism for several years. It has renounced its struggle and has been involved in the decommissioning of weapons. The Appellant's last active terrorist involvement in ETA terrorism occurred some 30 years ago. The circumstances and context in which all elements of the Appellant's relevant past conduct occurred have been extinct for some time. Furthermore, there is no realistic prospect of their resurrection. Thus there is no ascertainable reason why, or expectation that, the Appellant would conduct himself in a similar fashion ever again. Furthermore, there is no evidence that a resuscitated ETA would conduct terrorist operations in, or affecting, the United Kingdom.

The Forged Travel Documents

101. Next, we turn to the subject of forged documents. Based on all the evidence before the Tribunal, we accept Ms Dubinsky's submission that the Appellant's initial use of forged identity documents was motivated by his flight from the real threat of further incarceration by the Spanish authorities which, in light of the ECtHR decision in Del

Rio Prada, would have been unlawful. There was no other conceivable purpose, taking into account the Appellant's history as a whole.

102. We next focus on the evidence bearing on the Appellant's alleged possession of similar documents at the time of his arrest. Ms Anderson's submission was that the Appellant possessed such documents for the purpose of deceiving the United Kingdom authorities. We can identify no evidential foundation for this submission. There is no primary evidence of such (or any) purpose and none from which this can reliably be inferred. Furthermore, and notably, it does not feature in the impugned decision of the Secretary of State: see [6] – [9] above. We accept in principle that immigration document fraud could, in certain circumstances, satisfy, or contribute to satisfying, the test enshrined in Regulation 21(5)(c). Everything would depend upon scale, impact, motive, context and the relevant prevailing public interests, bearing in mind that these are not immutable.

103. We make two conclusions in this respect. First, there is no evidential foundation warranting the assessment that by reason of the Appellant's past conduct involving the use and possession of forged identity documents he poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the United Kingdom. Based on all the evidence, the most likely future scenario is that the Appellant will have no presence in, interest in or connection of any kind with the United Kingdom which is not innocuous. If he were to attempt to enter the United Kingdom or to resume his residence in this jurisdiction, the evidential foundation for concluding that the statutory test is satisfied is, in our view, clearly lacking.

104. The evidence on this issue, neither directly nor inferentially, fails to pass muster and the Secretary of State's case, in certain of its aspects, resorts to bare assertion and mere speculation. This is exemplified by the suggestion that the Appellant might in the future, in the language of counsel's skeleton argument, engage in "… *using his knowledge and potential access to weapons to commit crime to finance further 'legitimate' or illegitimate activities by this proscribed organisation or activities pursuing his own personal interests*". A further illustration of this is the assertion that the Appellant engaged in "… *aiding a fugitive to evade the UK authorities*". A third example is provided by the suggestion that the Appellant predictably would breach United Kingdom laws if he "*… considered it was in his interests to* [do so]". All of these suggestions, in addition to constituting bare assertion, suffer from the further infirmities of neglecting the context in which the Appellant's past conduct occurred, the markedly changed circumstances, the absence of any discernible motive to re-engage in similar conduct and the current realities generally.

The Reluctant Witness

105. The various assessments and conclusions set forth above are made without reference to the Appellant's written evidence. Ms Anderson properly highlighted that this has not been tested by cross examination at any stage. We further take into account that it is more likely to be self-serving than not. The two particular features of the Appellant's conduct, in this discrete context, are his failure to give evidence at any stage of these proceedings and his earlier refusal to engage with the Home Office proposal that he be interviewed. We have considered all of the evidence bearing on

these two issues. Having done so, we do not consider that any inference adverse to the Appellant is appropriate. In particular, in the language of section 8(3)(e) of the 2004 Act, we are not persuaded that this behaviour falls within "… *designed or likely to conceal information or to mislead*". In our judgment, this exacting test is not satisfied. This assessment is based on our evaluation of the evidence as a whole. It is further informed by the factors of strategy (generally), litigation tactics and legal advice. The evidence, expressly or by inference, establishes that all of these factors formed part of this discrete equation.

106. We also take into account Ms Andersons' submission relating to what is not contained in the Appellant's witness statement: no acceptance that he was a terrorist who perpetrated horrendous offences that are inherently unjustifiable; no acceptance of culpability; no expression of apology or genuine remorse; and no acknowledgement of breaching United Kingdom laws in the matter of the forged identity documents. This submission is well made. However, it does not deflect us from our evaluative assessments and conclusions above. Furthermore, protestations of this kind would have been scrupulously analysed by the Tribunal through the "possible self-serving" lens and would have been unlikely to attract any significant weight.

The "Bouchereau" Exception

107. At the error of law stage the Appellant argued that the exception established by the Court of Justice in Case 30/77 Bouchereau [1978] QB 732 at §29, which was applied by the Court of Appeal in Marchon v Immigration Appeal Tribunal [1993] Imm AR 384, does not represent the current state of EU law having been displaced by Case C-340/97 Nazli and the Citizens Directive. The Appellant further argued that if this were not considered *acte clair*, a reference should be made to the Court of Justice. The Respondent disputed that Bouchereau was a live issue or that any reference was necessary and submitted that the Bouchereau exception and Ex parte Marchon remained good law. The Tribunal received detailed submissions on these issues.

108. At the second stage hearing,the parties' submissions on this issue were not repeated in any detail and the Appellant invited the Upper Tribunal to follow its intervening decision in SSHD v CS (DA/00146/2013, currently unreported) at [89] – [108]).We refer particularly to [108] of CS:

> "*Drawing together the various strands we summarise our evaluation of the Bouchereau decision in these terms. First, the conclusion expressed in [29] is prima facie irreconcilable with the clear language of Article 3(2) of the 1964 Directive. Second, the reasoning underpinning the conclusion is sparse and opaque. Third, the conclusion cannot be readily linked to either the argument of the United Kingdom Government or the opinion of the Advocate-General. Fourth, neither the legal regime to which the Bouchereau decision belongs nor its modern incarnation has any application to the expulsion of third country nationals such as the Respondent. Finally, in our judgment, the Bouchereau principle has not survived the advent of Article 20 TFEU and the Citizens' Directive, either singly or in combination*."

We can identify no good reason not to follow CS. Accordingly we resolve this issue in the Appellant's favour.

Omnibus Conclusion

109. On the grounds and for the reasons elaborated above the Secretary of State has failed to discharge the burden of establishing on the balance of probabilities that the Appellant, by reason of the various elements of his past conduct identified in [94] above, considered individually or as a whole, represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of United Kingdom society. We consider that the evidence falls measurably short of satisfying this exacting test. It follows that this appeal must succeed.

110. The decision of the FtT has been set aside previously. We remake such decision allowing the appeal.

Signed: Lord McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 30 May 2017