Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00463/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 December 2017	**On 1 February 2018**

Before

THE HONOURABLE LADY RAE
UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAHEEL KHAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Miss Everett, Senior Home Office Presenting Officer
For the Respondent: Mr Hussain, instructed by Trent Chambers

DECISION AND REASONS

1. The appellant, Raheel Khan, was born on 14 January 1992 and is a male citizen of France. The appellant has a significant history of criminal offending whilst in the United Kingdom. On 3 March 2016, a deportation order was signed in respect of the appellant. The appellant was removed from the United Kingdom to France on 15 April 2016 but returned in breach of the deportation order via Belfast and was detained on 1 December 2016. The appellant was returned to custody to serve the remainder of his custodial sentence and he was released on 23 June 2017. On 8 March 2017, the appellant applied for the deportation order (against which he had

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not appealed) to be revoked. By a decision dated 4 August 2017, the Secretary of State refused to revoke the deportation order. The appellant appealed against that decision to the First-tier Tribunal (Judge Moran) which, in a decision promulgated on 6 October 2017, allowed the appellant's appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. There are two grounds of appeal. First, the Secretary of State argues that the Tribunal had no jurisdiction to entertain the appeal. The appeal was brought under the provisions of the Immigration (European Economic Area) Regulations 2016 Regulation 37 provides:

> (1) Subject to paragraph (2), a person may not appeal under regulation 36 whilst in the United Kingdom against an EEA decision—
>
> (a) to refuse to admit that person to the United Kingdom;
>
> (b) to revoke that person's admission to the United Kingdom;
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> (c) to make an exclusion order against that person;
>
> (d) to refuse to revoke a deportation or exclusion order made against the person;
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> (e) to refuse to issue the person with an EEA family permit;
>
> (f) to revoke, or to refuse to issue or renew any document under these Regulations where that decision is taken at a time when the person is outside the United Kingdom; or
>
> (g) to remove the person from the United Kingdom following entry to the United Kingdom in breach of a deportation or exclusion order, or in circumstances where that person was not entitled to be admitted pursuant to regulation 23(1), (2), (3) or (4).
>
> (2) Sub-paragraphs (a) to (c) of paragraph (1) do not apply where the person is in the United Kingdom and—
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> (a) the person holds a valid EEA family permit, registration certificate, residence card, derivative residence card, document certifying permanent residence, permanent residence card or qualifying EEA State residence card on arrival in the United Kingdom or the person can otherwise prove that the person is resident in the United Kingdom; or
>
> (b) the person is deemed not to have been admitted to the United Kingdom under regulation 29(3) but at the date on which notice of the decision to refuse admission is given the person has been in the United Kingdom for at least 3 months.

3. The grounds [5], state that, "it is respectfully submitted that the respondent did not concede the point and as the judge did not have jurisdiction to hear the matter, the appeal could not be allowed". The grounds [3] refers to the decision letter of the Secretary of State as follows: "The letter states: (90) you have a right of appeal against this decision under Regulation 36 and 37 of the 2016 EEA Regulations."

4. Secondly, and in the alternative, the Secretary of State challenges the judge's decision to conclude that the appellant was entitled to the "imperative" protection afforded by Regulation 27(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 in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(1).

5. The Secretary of State relies on *MG (Portugal)* (C-400/12). The Secretary of State acknowledges that the appellant had been living in the United Kingdom for at least ten years prior to his imprisonment; he came to the United Kingdom when he was 3 years old in 1995. He was convicted of the offence of attempted robbery on 28 February 2014 and sentenced to a total of five years and nine months' imprisonment. He had not been imprisoned for any offence prior to that date. The appellant had, therefore, completed more than ten years of residence prior to his imprisonment. However, the Secretary of State argues that the seriousness of the appellant's offending constituted a significant breach in the integration of the appellant in the United Kingdom. In addition, at [14] the grounds of appeal challenge the judge's finding under Regulation 34:

> 34.—(1) An exclusion order remains in force unless it is revoked by the Secretary of State under this regulation.
>
> (2) A deportation order remains in force—
>
> (a) until the order is revoked under this regulation; or
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> (b) for the period specified in the order.
>
> (3) A person who is subject to a deportation or exclusion order may only apply to the Secretary of State to have it revoked on the basis that there has been a material change in the circumstances that justified the making of the order.
>
> (4) An application under paragraph (3) must set out the material change in circumstances relied upon by the applicant and may only be made whilst the applicant is outside the United Kingdom.
>
> (5) On receipt of an application under paragraph (3), the Secretary of State must revoke the order if the Secretary of State considers that the criteria for making such an order are no longer satisfied.
>
> (6) The Secretary of State must take a decision on an application under paragraph (2) no later than six months after the date on which the application is received.

6. The respondent considers that the death of the appellant's mother did not constitute a "material change in circumstances" of a kind which would entitle the appellant to apply to revoke the deportation order. We note in this regard that the grounds [16] make no reference to the fact that the application to revoke the deportation order was made whilst the appellant was in the United Kingdom (see Regulation 34(4)).

Jurisdiction

7. The majority of the submissions from the representatives of both parties concerned the matter of the Tribunal's jurisdiction. At the hearing, Mr Hussain, who appeared for the appellant, sought to rely on the authority of *Anwar [2010] EWCA Civ 1275.* Since no reference had previously been made in the appeal to this authority, we adjourned the hearing briefly so that Miss Everett, who appeared for the respondent, might have the opportunity to read the case and make submissions on it. Having heard the submissions of both parties, we reserved our decision.

8. As we recorded above, this appellant did not appeal against the decision to make a deportation order against him but did appeal against the refusal of the Secretary of State to revoke the deportation order. This appeal falls within one of the categories provided for in Regulation 37 (see above). In consequence, the appellant may not appeal against the decision whilst in the United Kingdom.

9. We have quoted above from the grounds of appeal which, in turn, purport to quote from the decision notice. That notice (which is dated 4 August 2017) does indeed contain the words which are quoted in the grounds of appeal but the quotation is incomplete. Paragraph [90] of the refusal letter reads, "information on how to appeal and the time limits for appealing are contained in the attached notice". The notice under the heading "RIGHT OF APPEAL" reads:

> You are entitled to appeal this decision while you are in the United Kingdom by virtue of Regulations 36 and 37. A notice of appeal is enclosed which explains what to do and an Asylum and Immigration Tribunal leaflet which explains how to get help. The appeal must be made on at least one of the following grounds …

10. The treatment of the appellant's rights of appeal in the notice of decision is plainly incorrect. Regulation 37 provides that the appeal could only be made from outside the United Kingdom. Moreover, the Tribunal addressed the issue, albeit briefly, at [5]:

> Whilst Regulation 34(4) requires the application for revocation to be made from outside the UK at the hearing the respondent conceded that they had given RK a right of appeal in the UK by the notice of decision dated 4 August 2017.

11. This paragraph comes close to conflating two different issues: the requirement that the appellant must make the application for revocation from outside the United Kingdom and, additionally, can only appeal against a refusal to revoke from outside the United Kingdom. However, we find that the paragraph will only make sense if it is understood to mean that the respondent conceded not only that the appellant had been "given" a right of appeal in the United Kingdom but also that no point was being taken in respect of his failure to make the application (in the first instance)

from abroad. Moreover, there appears to be a dispute of fact as to what occurred at the hearing. The grounds of appeal assert that the respondent had not "conceded the point" regarding jurisdiction. We have had the benefit of considering the judge's Record of Proceedings under the heading "HOPO [Home Office Presenting Officer] submissions" the judge has written:

> *Reg 34(3) – has to show material change in circumstance*
>
> *(4) not taking point in being outside the UK because given right of appeal – RL1.*

12. It is clear to us that, notwithstanding what is asserted in the grounds of appeal, the Presenting Officer before the First-tier Tribunal expressly informed the judge that he intended to refrain from taking any point as regards Regulation 34 or Regulation 37. It seems that the Presenting Officer believed that he was not in a position to resile from the in-country right of appeal which the notice of decision had purported to give the appellant in country.

13. Sedley LJ in *Anwar* considered jurisdiction point at [19–23]:

> 19. Was the AIT right in Ms Pengeyo's and Mr Anwar's cases to hold that the respective immigration judges had acted without jurisdiction? In my judgment they had jurisdiction to embark on the hearing notwithstanding that neither appellant had left the United Kingdom, but once the point was taken by the Home Office (and assuming it to be factually correct, since they might have been absent from the hearing) it operated in bar of the proceedings. Had the point not been taken in either case, the immigration judge would have been bound to proceed with the appeal.
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> 20. The reason for this ostensibly subtle distinction is one which matters. It is the distinction between constitutive and adjudicative jurisdiction which I sought to draw in a dissenting judgment in *Carter v Ahsan* [2005] EWCA Civ 990, ICR 1817, §16-27, which secured approval on appeal [2007] UKHL 51, 1 AC 696. The constitutive jurisdiction of a tribunal is the power to embark upon trying specified kinds of issue. Whether a foreign national has obtained leave to enter or remain by deception is, by common consent, such an issue. Its adjudicative jurisdiction may then depend on a number of factors, such as whether the appeal has been brought within time or – as here - whether the appellant has left the United Kingdom.
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> 21. This in turn may depend on several other things. First it must depend on whether the out-of-country rule applies at all, which is likely to be a mixed question of fact and law. IJ Callender-Smith concluded in Mr Anwar's case that it did not apply. Secondly it may depend on whether the appellant has in fact left the country: he or she may be absent from the hearing but not, or allegedly not, from the United Kingdom. This will then be a triable issue. Until such issues have been decided it is impossible to say that the tribunal cannot hear the appeal.
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> 22. One must not, of course, lose sight of the words of s.92(1) of the 2002 Act: "A person may not appeal … while he is in the United Kingdom unless his appeal is of a kind to which this section applies" – and the section does not apply to an appeal against a deception decision under s.10(b): see s. 82(2)(g). But it is not every such formula which bars the door to justice. To take only the best-known example, the Limitation Act 1980, s. 2, provides: "An action founded in tort shall not be brought after the expiration of six years from the date on which the cause of action accrued." It is trite law that unless the point is taken, this provision

constitutes no bar. In consequence it can be waived by agreement or by unilateral decision. Another example can be found in requirements for leave to bring proceedings: see *Adorian v Metropolitan Police Commissioner* [2009] EWCA Civ 18.

23. Any apparently absolute bar to justice has to be scrutinised very carefully. The one contained in the 2002 Act is not of the kind which operates independently of the will of either party so as to bind the tribunal regardless. It offers a point which can be but need not be taken. In the present two cases, it was taken.

14. Sedley LJ states unequivocally [23] that the bar to justice contained in the 2002 Act "is not of a kind which operates independently of the will of either party so as to bind the Tribunal regardless". We find that, for the purposes of deciding the instant appeal, we can substitute the words "2016 EEA Regulations" for "2002 Act" in that sentence. We note, in passing, that it is perhaps unlikely that a provision contained in secondary legislation (the 2016 Regulations) should operate as an absolute bar when a statutory provision (the 2012 Act) does not. The bar contained in Regulation 37, therefore, is an example of a point "which can but need not be taken". Given what we have said above regarding what occurred at the First-tier Tribunal hearing, in particular the remarks of the Presenting Officer (see [11] above), we find that, although the jurisdiction point was raised, the point was not taken by the respondent. Moreover, it was, not surprisingly in the light of the Presenting Officer's comments, taken by the judge.

15. The Court of Appeal in *Nirula* [2012] EWCA Civ 1436 made it clear that exists a conditional rather than the absolute bar to proceedings being brought whilst in the United Kingdom [31]:

> If the Home Office does not think it fair or right to take the point [appealing from abroad] it can always say so (and in the case of *Anwar* it may have a public duty to say so) and the Tribunal can then proceed.

16. The Court of Appeal went on at [32] to say:

> Mr Ockelton also thought (para 47(c)) it wrong to say that a failure to consider the issue of jurisdiction can give a tribunal a jurisdiction it would not otherwise have. Anwar does not so say. What it does say is that the Secretary of State can choose not to take any jurisdictional objection if she wishes to take that course, just as a defendant can waive his entitlement to plead limitation or, more likely, choose not to plead a limitation defence. If a tribunal gives a decision without anybody considering the jurisdictional position, the decision may be precarious but as Mr Ockelton himself points out in para 53 the decision stands until set aside. It will become less precarious once the time for applying for permission to appeal has expired

17. In the light of *Nirula*, it is apparent that the Secretary of State is wrong to submit in the instant case that the decision of Judge Moran was void *ab initio* for want of jurisdiction; the decision shall stand unless we decide to set it aside. Moreover, given that the issue was raised and determined following the Presenting Officer's concession, the decision is not "precarious" which would have been the case had the Tribunal proceeded "without anybody considering the jurisdictional position".

18. We are clear, therefore, following the authority of *Nirula*, that (a) jurisdictional issue raised by Regulation 37 is not "absolute" (b) if issue had been taken by the Presenting Officer as regards jurisdiction, then, notwithstanding what had been said in the notice of decision, the judge would have been bound to have found that he had no jurisdiction to hear the appeal (c) once the Presenting Officer had clearly indicated to the judge that the Secretary of State did not rely upon the jurisdictional bar of Regulation 37, it was open to the Tribunal to proceed (d) the Tribunal did not err in law by proceeding with the hearing and reaching a decision (e) the Secretary of State cannot now rely upon the jurisdictional point in order to argue that the First-tier Tribunal erred in law such that its decision falls to be set aside.

The Judge's Decision on "Imperative Protection"

19. First, we shall deal with the question of material change in circumstances (Regulation 34(3)). The judge addressed this issue directly at [36]:

> 36. Is there a material change in circumstances as required by Regulation 34? The deportation order was made on 3 March 2016. I accept there has been a material change in circumstances, namely his mother's early death at the age of 45 and the consequent change in his attitude and intentions for the future. Whilst he remains a high risk and is lacking in remorse for the attempted robberies the OASys Report supports the evidence from his family that there has been a significant change in his outlook since his mother's death. He is said to now be very motivated to address his offending and that this is a change. I accept this assessment. I also accept his evidence as the oldest sibling he has genuine aspirations of leading a more productive life for the benefit of his family. This is not a finding that he would necessarily do so, whether he would will depend on whether he maintains this resolve if allowed to return to his family.

20. The Secretary of State submits [16] that, "the respondent does not consider A has provided a valid argument since his mother had nothing to do with the justification for making the deportation order and neither did the reasons given at [36]. It is noted that shortly before being released from prison A was made guardian to his siblings but no explanation was given why his father who is well enough to work would ordinarily hold such a position is not doing so in this instance. It also appears that some of his siblings are adults themselves".

21. With respect to the Secretary of State, we consider that this challenge amounts to nothing more than a disagreement with findings which were available to the judge on the evidence. The Secretary of State (and, indeed, another judge) might take a different view, but that is not the point. Judge Moran has made a finding which is not perverse but which is supported by cogent reasons drawn from the evidence. We see no reason to interfere with this finding.

22. The judge was alert to the argument that the appellant's criminal offending may have interfered with his integration within United Kingdom society. The judge was aware [40] to the question as to whether a period of imprisonment can "cancel out the previous period of residence in some way" had been referred by the Supreme Court to the European Court. In the absence of any definitive guidance, the judge concluded that he would "accept that in RK's [the appellant's] case he has the

necessary ten years' continuous period prior to the relevant decision and this is not nullified by him serving some of his custodial sentence before the deportation order was made". The judge considered this was the only way that he could give "practical effect to the clear intention to give enhanced protection to EU citizens that have resided in the UK for ten continuous years but then committed an offence punished with imprisonment". We find that there is nothing in the grounds of appeal which should lead us to interfere with that conclusion. We find that it was open to the judge on the evidence to conclude that the appellant was entitled to "imperative" protection and that, notwithstanding his serious criminal offending, the Secretary of State should not have refused to revoke the deportation order. In the circumstances, the Secretary of State's appeal is dismissed.

Notice of Decision

23. This appeal is dismissed.

24. No anonymity direction is made.

Signed Date 17 January 2018

Upper Tribunal Judge Lane