Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00496/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 February 2018	**On 7 March 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

RUSLANAS BOBROVAS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before me after a hearing on 19 July 2017 following which I decided that the decision of the First-tier Tribunal ("FtT") was to be set aside for error of law. I include the error of law decision headed 'Decision and Directions' as an annex to this decision and to which reference should be made for the full background to the appeal before the Upper Tribunal.

2. However, it is as well at this point to reproduce some paragraphs of the error of law decision to put this, my further decision, into context. Thus, at [2] – [12] I said as follows:

"2. The appellant is a citizen of Lithuania, born in 1976. He arrived illegally in the UK in 1999, either in March according to the appellant, or September according to the respondent. A decision to make a deportation order against him was made on 22 September 2016 as a result of his conviction on 26 April 2013 for an offence of conspiracy to cheat the public revenue, for which he received a sentence of six and a half years' imprisonment. The decision to deport was made with reference to the Immigration (European Economic Area) Regulations 2006 (as amended) ("the EEA Regulations").

3. The appeal under the EEA Regulations was certified pursuant to reg 24AA. The human rights appeal was certified pursuant to s.94B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

4. The appellant's appeal came before First-tier Tribunal Judge Osborne ("the FtJ") on 12 January 2017, resulting in the appeal being allowed, both under the EEA Regulations and under Article 8 of the ECHR.

5. Permission to appeal against the FtJ's decision was granted on the basis that it was arguable that the FtJ erred in concluding that the appellant had acquired 10 years' residence in the UK, and in failing to take into account the significant public interest in the deportation of the appellant in the light of the fact that he was convicted of an offence involving a conspiracy to cheat the public out of £2.3 million.

6. In pursuance of the deportation order the appellant was removed from the UK on 17 December 2016 but returned illegally on 7 January 2017, without having made an application to return pursuant to reg 29AA, and he was present for his appeal. The FtJ stated at [6] that "on the basis that the Appellant had taken the trouble to travel from Lithuania to the UK for the specific purpose, I had no wish or reason to deny him the opportunity of giving evidence in his own appeal".

7. The appeal was first listed before me on 24 April 2017. The appellant was not represented. I adjourned the hearing for the respondent to consider whether the appellant's illegal re-entry to the UK invalidated the appeal before the FtT, and also to consider the question of whether it was the Immigration (European Economic Area) Regulations 2006 that applied or the 2016 Regulations.

8. Mr Jarvis very helpfully provided a detailed and comprehensive skeleton argument setting out the respondent's position on the above points, and with a note dated 18 July 2017 also considered the relevance of the decision of the Supreme Court in *Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42. I consider those matters further below. I should add that the respondent's written submissions as contained in those documents were provided to the appellant in advance of the resumed hearing, a fact which he confirmed at the hearing.

Further background to the deportation order

9. On 9 September 1999 the appellant claimed asylum in a false name, claiming to be a national of Belarus. However, the application for asylum was refused on non-compliance grounds. There was a subsequent appeal but it was dismissed without substantive consideration.

10. On 28 May 2002 the appellant was convicted of an offence of indecent assault for which he received a conditional discharge and ordered to pay compensation of £250.

11. The offence which prompted the decision to deport the appellant was one of conspiracy to cheat the public revenue, as detailed above. The sentencing remarks reveal that the offence involved the making of fraudulent claims for tax rebates. The two main methods were that workers, predominantly from Poland, were tricked into answering advertisements for jobs in newspapers and other places. The jobs were fictitious and the applicants were tricked into providing information such as their national insurance numbers, tax references, dates of birth and so forth.

12. The female telephone operators who received the information were, on the whole, illegal immigrants in the UK. About 200 bank accounts were opened as part of the conspiracy. Fraudulent claims for tax rebates were made over a five year period, amounting to £2.3 million. Many of the false claims were identified by Revenue and Customs and so the actual payments amounted to about £658,000. The appellant was found by the sentencing judge to have been fully aware of the extent of the organisation and its workings."

3. It is evident from the error of law decision therefore, that the re-making of the decision involves a reassessment of the extent to which the appellant is entitled to resist deportation under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"), and the level of protection, if any, afforded to him under the EEA Regulations against the deportation decision. To that end, I heard further evidence from the appellant.

Oral evidence and submissions

4. The appellant had the assistance of a Russian interpreter but confirmed that he would only need the assistance of the interpreter if there were any matters that he did not understand or if he felt unable to express himself in English. In fact, he gave all of his evidence in English without apparent difficulty.

5. As to why he should not be deported from the UK, the appellant said that he relied on the explanations he had previously given. He had been in the UK for about 20 years. He said that was sorry for the offences he had committed.

6. He came to the UK in March 1999 with his Lithuanian passport. He registered with the Home Office when he came back from Lithuania in August 2004. He moved to Worthing and did work buying and selling. He never knew about the need to register with the Home Office.

7. It was true that previously he had said that he paid £60 or £80 in 2006 to the Home Office in order to register as a worker. He had started looking for a job with agencies and they said he needed to register with the Home Office. They gave him about a month to do that. He paid £60 to the Home Office and showed the registration paper to the agency. He does not have that document now. When he came out of prison

everything was lost. Not every agency required registration, and everything was new for everyone. In 2009 there was no registration regime anymore.

8. It was true that he had claimed asylum as a national of Belarus. He did not speak English at the time. As soon as he got permission from the Home Office he worked. He registered for work as a Lithuanian. When he came back to the UK in 2004 he never used the name Sluzbyn, that he had previously used. He used his correct name and nationality.

9. As to the suggestion by the Secretary of State that he may commit further offences, he said that he had had enough of that last time. He had lost almost everything.

10. His daughter lives in Southampton and he is still in touch with her. He has now moved to Peterborough. As to how often he sees his daughter, he tries to contact her by phone, because he could not work. He is now working for Amazon and is due to start a job (on Monday 5 February 2018) as a bricklayer.

11. He lives with a woman called Nela who is from Latvia. She has a daughter aged 9 and he would like to carry on with family life with them. Nela knows about his case and almost everything about his situation and his past. As to whether he had asked her to attend the hearing today, his answer was "not really". He has been with her since October 2017. He thought that it would not be necessary for Nela to come to the hearing with him because she has a daughter and there is no-one to look after her.

12. In cross-examination he said that he did not ask Nela to attend the hearing today but the last time, before the New Year, he had asked her to attend the court. They just decided that he would go on his own. She is worried and keeps texting him about what is happening. She loves him and wants to stay with him. He had become friends with her daughter as well.

13. He had not asked her to write a letter about their relationship or her feelings for him. The fact is that she knows about his situation. Even the probation officer asked about that and whether she knew everything.

14. It was true that when he came back from Lithuania in 2004 he paid to register with the Home Office. Otherwise he had no contact with the Home Office.

15. He did not ask his daughter if she wanted to attend the hearing to speak on his behalf. She went last time and she had written a statement. Now she is going to college.

16. As to why he could not use the skills he has obtained from the UK to work in Lithuania, he said that he does not see himself living in Lithuania, having lived a long time in the UK. He does not know what he would do there. His Lithuanian is very poor. It was true that he committed a crime, for which he is very sorry. That crime would also prevent him from working in Lithuania.

17. He agreed with aspects of the sentencing judge's remarks which were put to him. As to whether a number of EU nationals had been lied to in order to come to the UK and that false bank accounts were set up, the appellant said that he had paid for his crime and done his time. He had learnt his lesson.

18. It was true that he was removed from the UK on 17 December 2016 (in pursuance of the deportation order). As to his having re-entered the UK illegally, he said that he does not really know about the rules and regulations. All he knew was that he came back to court because the court day was 13 January. He attended with all his luggage and expected to be detained and then deported. At Colnbrook he cried sometimes and panicked as he did not want to be deported. An officer at Colnbrook said that he does not need a visa to come back to the UK. He came back to the UK for the court hearing and not to live. He had asked his mother for money for the ticket. In Lithuania he only has his mother.

19. In submissions Mr Jarvis relied on previous skeleton arguments (all of which have been provided to the appellant).

20. It was submitted that prior to the appellant's imprisonment in 2014 there had been no five year period of lawful residence, and he did not qualify for the enhanced protection under a period of 10 years' residence. He had been residing in the UK under a false identity and nationality, and using false documents in 1999 up to 2004, pretending to be from Belarus.

21. Furthermore, there was no evidence that he had ever registered under the Accession Regulations between 2004 and 2011. The only Home Office records are that he was an absconder and the address that had been provided was not an address that he was living at, and he was not responding to mail. There was no evidence on the Home Office system that he had ever registered under the Accession Regulations. The absence of any evidence in that respect indicates that he did not register and the appellant himself had not provided any proof by way of any documentation that he did.

22. His most serious criminality began in around 2006 and continued for a number of years until he was arrested and convicted. Thus, the appellant was either deliberately working unlawfully, or was involved in a large scale criminal fraud. He had been given permission to work when posing as a national of Belarus, which does not constitute lawful working (for the purpose of the EEA Regulations).

23. His entire conduct since entering the UK in 1999 has been deplorable, it was submitted, he having used a false name and nationality and made a false asylum claim. The Tribunal and the Home Office had spent time and money attempting to contact him but he had simply left the UK to go back to Lithuania when it suited him. He re-entered under his own nationality but worked unlawfully, contrary to the Accession Regulations.

24. He had also committed an offence of indecent assault in 2002 and then the extremely serious offences resulting in the sentence of six and a half years' imprisonment. His conduct had been 'abusive' in terms of EU law.

25. Although there was no evidence of his having offended since his release from prison, he had continued to do as he pleased. I was invited to reject the appellant's claim that knew nothing about the need to apply for readmission to the UK after he was removed in pursuance of the deportation order. There was a detailed decision letter written for his benefit (F15 of the respondent's bundle) which made it clear that he would need to re-apply to come back to the UK. The appellant has no regard for immigration control or EU law, it was submitted.

26. He does represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. He is only entitled to the lowest level of protection and there is a strong public interest in expelling him from the UK.

27. Even if it has been shown that he has a permanent right of residence or 10 years' residence, his overall conduct nevertheless justifies expulsion. Whatever level of protection he is afforded, expulsion is proportionate.

28. As to his relationships in the UK, his partner has not provided any evidence to the court. However, even if the appellant does have the relationships which he claims, with his daughter and new partner, that would not outweigh the public interest. He would be able to adapt to life in Lithuania, as he is evidently an individual who is able to survive, whether posing as a national of Belarus or being involved in criminality. There are no health issues to be taken into account. It should not be accepted at face value that he would struggle to communicate. Rehabilitation does not play an important part in a case where an individual is only entitled to the lowest level of protection. In any event, the issue of rehabilitation is not strong enough in this case to outweigh the public policy interest.

29. In reply, the appellant said that he had destroyed his life when he went to prison and the Home Office wanted to destroy his life again. He had committed a crime and he had paid for it. He is on probation until 2020. He had not made lots of money from the offences. He had been working for three years in security and in a casino on the front door dealing with drunk and aggressive people.

Conclusions

30. In the error of law decision I dealt with the question of whether it is the 2006 EEA Regulations that apply or those of 2016, concluding that it is the 2006 EEA Regulations. I also dealt with issues concerning the appellant's illegal re-entry to the UK after having been deported in pursuance of the deportation order. For the reasons explained in that decision, no issue arises in terms of the validity of the appeal (either before the FtJ or before me).

31. Reg 21 of the EEA Regulations provides as follows:

"21.— Decisions taken on public policy, public security and public health grounds

(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 19891 .

(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."

32. Thus, if the appellant does not have a permanent right of residence in the UK and/or has not resided in the UK for a continuous period of at least 10 years prior to the relevant decision, he may be removed on the grounds of public policy, public security or public health. If he has a permanent right of residence he may not be removed except of serious grounds of pubic policy or public security. If he has the requisite 10 years' residence, imperative grounds of public security are required before he can be removed.

33. Certain findings of fact made by the FtJ are not infected by the error of law and can be preserved. These are as follows:

- The appellant entered the UK in March 1999.

- The appellant resided in the UK until he returned to Lithuania in 2004 for a period of up to two weeks in order to renew his passport.
- (In summary) between March 2005 and March 2009 the appellant left the UK for short periods either for work (travelling to Moscow) or for holidays, including to Tenerife, Lithuania, Egypt and Cyprus.
- He had not left the United Kingdom at all since 2009.
- Between March 1999 to 2013 the appellant was in employment for various employers (set out in detail at [26] of the FtJ's decision).
- Throughout his term of imprisonment the appellant maintained contact with his daughter through telephone, cards, Skype and visits. There is a close bond between them. He has strong links with her.
- Throughout his imprisonment he obtained many qualifications, including bricklaying.

34. It is also worth recording that the evidence that the appellant gave before the FtJ was that up to 2004 he worked under the false name of Sluzbyn, the name in which he claimed asylum in 1999. His evidence was also that from 2004 to date he had used his correct name.

35. As already indicated, if the appellant has a permanent right of residence under reg 15, he may not be removed except on serious grounds of public policy or public security. The question arises therefore, as to whether the appellant does have a permanent right of residence. He would have such a permanent right of residence if he had resided in the UK in accordance with the EEA Regulations for a continuous period of five years. In this case, that would mean that the appellant needs to establish that he had been in employment, that is working lawfully, for a continuous period of five years.

36. The FtJ accepted, without legal error, that the appellant had worked for various employers from March 1999, until 2013. He was arrested in 2011 but remained on bail and continued in his employment until his trial in 2013. These are also matters accepted by the FtJ.

37. However, the appellant came to the UK in 1999 under a false name, and under which he claimed asylum in 1999. His evidence was that he worked under that false name until 2004. He claimed to be a national of Belarus. His employment was not therefore, in that period, lawful employment. I agree with the respondent's contention that illegal working cannot qualify as residing in accordance with the EEA Regulations (see for example, *Low & Ors v Secretary of State for the home department* [2010] EWCA Civ 4).

38. The appellant is then left with the period between 2004 and 2013. Lithuania joined the EU on 1 May 2004. Under the Accession (Immigration and Worker Registration) Regulations 2004 ("the Accession Regulations"), which came into force on that date,

the appellant was required to register in order to obtain authorisation for employment.

39. On this, the appellant's evidence was inconsistent. At the hearing before me on 19 July 2017 the appellant said that he did register with the Home Office, probably in 2006, and paid £60. However, initially in evidence before me on 2 February 2018 he said that he registered with the Home Office when he came back from Lithuania in August 2004, then said he never knew about the need to register with the Home Office. He then repeated that he had in fact registered with the Home Office and had shown the registration certificate to agencies that required it. He also said in evidence before me at the hearing on 2 February 2018 that when he came out from prison everything was lost, but in evidence on 19 July 2017 he said that he lost the certificate because his ex-partner kept everything.

40. Furthermore, even if it could not be said that the appellant's evidence was inconsistent on the point, the fact is he has not produced any evidence of his having registered as required under the Accession Regulations. Furthermore, the respondent having made enquiries in response to my directions, has not been able to find any evidence that the appellant did so register.

41. I am satisfied therefore, that the appellant's employment was not lawful up until the Regulations (as amended by The Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011 ceased to have effect on 30 April 2012. In effect therefore, almost none of the appellant's employment in the UK was lawful, and thus the appellant's residence could not be said to have been in accordance with the EEA Regulations entitling him to a permanent right of residence.

42. On that analysis, the appellant is only entitled to the lowest level of protection against deportation, that is on grounds of public policy or public security (in this case).

43. I do not accept that the appellant has the requisite period of 10 years' residence in order to qualify for protection against deportation on imperative grounds. In the first place, according to the opinion of Advocate General Szpunar in Cases C-316/16 and C-44/16, *B the Land-Wuẅrttenbrberg, and Secretary of State for the Home Department v Frank Vomero*, it is necessary for the appellant to have acquired a permanent right of residence before qualifying for the enhanced protection under 10 years' residence. Having considered the Advocate General's reasoning in that case, I find myself in agreement with it. In the second place, having regard to the matters I have set out above, as well as the matters referred to below in terms of the appellant's integration in the UK, I am satisfied that the appellant's imprisonment broke the continuity of his residence, which in principle it does, and which in fact in this case it has.

44. On the basis that the appellant is only entitled to the lowest level of protection against deportation under the EEA Regulations, I have further considered the requirements set out at reg 21(5) and (6).

45. One of the questions to be answered is whether the appellant represents a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society. The OASys Assessment dated 24 November 2016 (page 103 of the appellant's bundle before the First-tier Tribunal) refers to the appellant as being a medium risk to the public in the community and a medium risk to prisoners whilst in custody. The risk to the public was described as being to females, given his conviction for a sexual assault in 2002, and to a risk of assault given that he has an adjudication for punching a cellmate and co-defendant in the head on 22 August 2013. At [27] of the respondent's decision dated 22 September 2016 it states that the offender manager found that the appellant posed a low risk of reoffending, although the only OASys report before me, from the appellant's bundle, does not contain information about that assessment. Nevertheless, given that the respondent's decision accepts that this is what is said in the OASys report, I see no reason to doubt that that is what the OASys report states in terms of the risk of the appellant's reoffending.

46. However, even if it is right that the appellant represents a low risk of reoffending, that does not mean that there is no risk. Factors to be taken into account are the appellant's conviction in 2002, the period of time over which he committed the serious offence for which he received a sentence of six and a half years' imprisonment, namely from 2006 to 2011, and the fact that whilst serving a sentence of imprisonment he assaulted his cellmate, apparently a co-defendant. The fact that it *was* an assault is evident from it having been recorded as an adjudication. The risk of harm that the appellant poses if he were to reoffend is therefore a significant one in my judgement.

47. In any event, I do not consider that the risk of the appellant reoffending is properly described as low. As was submitted on behalf of the respondent before me, the appellant does demonstrate a significant disregard for the law. Not only is that evident in his offending, but it is evident from the fact that as long ago as 1999 he came to the UK illegally, under a false name and nationality, and made a false claim for asylum. Even after he was deported from the UK in December 2016, he returned to the UK illegally. I do not accept that he was unaware of the fact that he needed to seek permission to return. The respondent's decision made it very clear that he did need to reapply for admission. It is evident that that appellant decided, yet again, to pursue a course of action that suited him, regardless of any legal restrictions.

48. In my judgement, there is a significant risk that the appellant will reoffend, and thus that the risk can properly be regarded as more than a low risk.

49. On that basis, I am satisfied that the appellant represents a genuine, present and significantly serious threat affecting one of the fundamental interests of society. However, I would have come to the same conclusion even if it could properly be said that the risk of his reoffending was only low, having regard to the matters I have referred to in the preceding paragraphs.

50. I have taken into account the matters required to be considered at reg 21(6) of the EEA Regulations. There is nothing about the appellant's age or state of health which militates against removal, or which works in his favour in terms of resisting deportation.

51. I accept that he has a close relationship with his daughter, that having been a matter that was considered by the FtJ and upon which he made the findings to which I have referred. However, in evidence before me, it was apparent that the appellant does not see his daughter face-to-face, or at least not much. His evidence was that he speaks to her on the phone. He did not give any evidence about face-to-face meetings with her. Furthermore, she lives in Southampton and he lives now in Peterborough. The appellant, according to his evidence, is making a new family life for himself with a new partner with whom he has been in a relationship, according to his evidence, since October 2017.

52. Furthermore, although in his witness statement dated 7 April 2017 at [48] the appellant says that his daughter's mother would not let her go to Lithuania to see him, and his daughter is now at college, she was born on 28 March 2001 and is now approaching an age when she will be able to make her own decisions about making visits to him in Lithuania. Whilst I accept that a father's relationship with their child is a significant matter, even where, and perhaps in particular where, a child is in their teenage years, the fact of the matter is that the appellant does not live with his daughter any longer.

53. As regards his relationship with a new partner, that relationship is of very recent duration, as inevitably is his relationship with his new partner's young daughter. That relationship is, in my view, not a legally significant consideration to be taken into account in terms of the appellant's deportation. Furthermore, there is no reason why his new partner and her daughter cannot visit the appellant in Lithuania.

54. Although the appellant claims to have nothing in Lithuania, his evidence is that his mother lives there. Between 2005 and 2009 he visited Lithuania on two occasions, having returned from there in 2004. His visits were in 2006 for a week to 10 days, and in 2008, apparently to visit family according to the evidence he gave to the FtJ.

55. Furthermore, I do not accept that the appellant would not be able to re-establish himself on return to Lithuania. After all, that is where he was born, and where he lived until he came to the UK in 1999. He has returned since and has his mother there. In addition, the appellant has gained qualifications since being in the UK, and would be likely to be able to re-establish himself on return to Lithuania, which is the country of his nationality, and where he lived as an adult before he came to the UK.

56. I do accept that he will have integrated to some extent in the UK, even if only by virtue of the length of time that he has been here. However, the extent of that integration is significantly marred because of his having entered illegally, his having claimed asylum in a false name and worked illegally, and because of his offending over a period of years. Furthermore, he spent a significant period in custody.

57. Even accepting the relationships that he has in the UK, and the fact of his having worked, the extent of his integration is such that it is not a factor that significantly affects or reduces the proportionality of the decision to remove him.

58. As to the question of rehabilitation, I accept that the appellant has undertaken courses whilst in custody. However, I cannot see that the prospects for rehabilitation are any better in the UK than they are in Lithuania, his country of nationality. Whilst the appellant says that he does not speak Lithuanian very well, I have considerable reservations about his evidence on that, given that he lived there until 1999, when he was an adult. Although he says in his witness statement that his father is Lithuanian and his mother from Belarus, I do not accept that he would have lived until 1999 in Lithuania without having a good working knowledge of the national language.

59. Taking all relevant factors into account, I am satisfied that the respondent was entitled to make a deportation order against the appellant and that that decision is proportionate.

60. Even if the appellant does have a permanent right of residence, contrary to my conclusions, in the light of my analysis above I am satisfied that the respondent was entitled to make a deportation order on serious grounds of public policy or public security, having regard to the risk of reoffending and the matters to which regard must be had under reg 21(5) and (6).

61. In all these circumstances, the respondent was entitled to make a deportation order against the appellant and the appeal under the EEA Regulations is dismissed.

62. The Article 8 ground adds nothing to the appellant's appeal, the Article 8 matters being subsumed within the considerations arising under the EEA Regulations. Thus, the appeal under Article 8 of the ECHR is also dismissed.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, the decision is re-made, dismissing the appeal on all grounds.

Upper Tribunal Judge Kopieczek 5/03/18

ANNEX

DECISION AND DIRECTIONS

1. Although the appellant in these proceedings is the Secretary of State, it is convenient to refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of Lithuania, born in 1976. He arrived illegally in the UK in 1999, either in March according to the appellant, or September according to the respondent. A decision to make a deportation order against him was made on 22 September 2016 as a result of his conviction on 26 April 2013 for an offence of conspiracy to cheat the public revenue, for which he received a sentence of six and a half years' imprisonment. The decision to deport was made with reference to the Immigration (European Economic Area) Regulations 2006 (as amended) ("the EEA Regulations").

3. The appeal under the EEA Regulations was certified pursuant to reg 24AA. The human rights appeal was certified pursuant to s.94B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

4. The appellant's appeal came before First-tier Tribunal Judge Osborne ("the FtJ") on 12 January 2017, resulting in the appeal being allowed, both under the EEA Regulations and under Article 8 of the ECHR.

5. Permission to appeal against the FtJ's decision was granted on the basis that it was arguable that the FtJ erred in concluding that the appellant had acquired 10 years' residence in the UK, and in failing to take into account the significant public interest in the deportation of the appellant in the light of the fact that he was convicted of an offence involving a conspiracy to cheat the public out of £2.3 million.

6. In pursuance of the deportation order the appellant was removed from the UK on 17 December 2016 but returned illegally on 7 January 2017, without having made an application to return pursuant to reg 29AA, and he was present for his appeal. The FtJ stated at [6] that "on the basis that the Appellant had taken the trouble to travel from Lithuania to the UK for the specific purpose, I had no wish or reason to deny him the opportunity of giving evidence in his own appeal".

7. The appeal was first listed before me on 24 April 2017. The appellant was not represented. I adjourned the hearing for the respondent to consider whether the appellant's illegal re-entry to the UK invalidated the appeal before the FtT, and also to consider the question of whether it was the Immigration (European Economic Area) Regulations 2006 that applied or the 2016 Regulations.

8. Mr Jarvis very helpfully provided a detailed and comprehensive skeleton argument setting out the respondent's position on the above points, and with a note dated 18 July 2017 also considered the relevance of the decision of the Supreme Court in *Kiarie*

and Byndloss v Secretary of State for the Home Department [2017] UKSC 42. I consider those matters further below. I should add that the respondent's written submissions as contained in those documents were provided to the appellant in advance of the resumed hearing, a fact which he confirmed at the hearing.

Further background to the deportation order

9. On 9 September 1999 the appellant claimed asylum in a false name, claiming to be a national of Belarus. However, the application for asylum was refused on non-compliance grounds. There was a subsequent appeal but it was dismissed without substantive consideration.

10. On 28 May 2002 the appellant was convicted of an offence of indecent assault for which he received a conditional discharge and ordered to pay compensation of £250.

11. The offence which prompted the decision to deport the appellant was one of conspiracy to cheat the public revenue, as detailed above. The sentencing remarks reveal that the offence involved the making of fraudulent claims for tax rebates. The two main methods were that workers, predominantly from Poland, were tricked into answering advertisements for jobs in newspapers and other places. The jobs were fictitious and the applicants were tricked into providing information such as their national insurance numbers, tax references, dates of birth and so forth.

12. The female telephone operators who received the information were, on the whole, illegal immigrants in the UK. About 200 bank accounts were opened as part of the conspiracy. Fraudulent claims for tax rebates were made over a five year period, amounting to £2.3 million. Many of the false claims were identified by Revenue and Customs and so the actual payments amounted to about £658,000. The appellant was found by the sentencing judge to have been fully aware of the extent of the organisation and its workings.

The decision of the FtJ

13. The FtJ found that the appellant had established that he arrived in the UK in March 1999. It was accepted on behalf of the respondent before the FtJ that the appellant had provided evidence of his employment in the UK since his arrival, except for the years 2008 and 2009.

14. The appellant's evidence was that he returned to Lithuania in 2004 for "up to" two weeks in order to renew his passport, and he gave evidence of a number of other absences for holidays to various places and for family visits. His evidence was that he had not left the UK at all since 2009. The FtJ accepted his evidence as to those absences.

15. In relation to his employment, the FtJ set out in detail the appellant's evidence of where he had worked and when. The appellant said that when he was arrested in 2011 for the conspiracy offence he remained on bail and working in the community until his trial in 2013.

16. The FtJ said that he was satisfied that in 2008 the appellant took over the running of the conspiracy and that he continued to head the operation until he was arrested in 2011. Given the appellant's involvement in the conspiracy and how it was run, the FtJ concluded that the appellant was in the UK in 2008 and 2009 until his removal to Lithuania on 17 December 2016.

17. He then concluded that the appellant had resided in the UK for a continuous period of at least 10 years "in accordance with the 2006 Regulations pursuant to Regulation 15", and that he had lived in the UK for a period of 10 years by March 2009. He also found that prior to his imprisonment in April 2013 the appellant had already acquired a period in excess of 10 years "provided that the period of imprisonment did not in itself break the 'integrative' link established by the Appellant's residence between March 1999 and 22 September 2016".

18. He then concluded that the appellant had acquired a permanent right of residence after his arrival in March 1999 by virtue of having resided for a continuous period of five years exercising Treaty rights. He found that in any event, even if the appellant had not acquired a permanent right of residence, such was not necessary for him to have established 10 years continuous residence prior to the deportation decision.

19. He found that in the appellant's case his imprisonment did not break his integrative links in the UK on the basis of the evidence from the appellant "and from the impressive oral evidence of his daughter". The FtJ then gave further reasons for concluding that there was a close bond between him and his daughter.

20. He also found that the appellant had an employment record that demonstrated that he is a hardworking individual who is able to obtain employment.

21. He disagreed with the respondent's contention that the appellant's offending history would justify deportation on imperative grounds, referring to various decisions of the CJEU and the ECtHR.

22. At [52] the FtJ said that the appellant's offence was undoubtedly "a most serious criminal offence", the details of which he reiterated, but finding that it was not an offence that fell within imperative grounds of public security.

23. Referring to the fact that the OASys report assessed the appellant as representing a medium risk of harm, but a low risk of offending, he found that neither the offence nor the assessed future risk of reoffending, meant that the appellant should be deported on imperative grounds of public security.

The grounds of appeal and submissions

24. At the hearing before me, Mr Jarvis sought to rely on a new argument, not previously pleaded, in terms of abuse of EU rights. However, I indicated that if an application was made to amend the grounds of challenge to the FtJ's decision I would refuse it, because the original grounds were lodged in February 2017, permission to appeal was granted in March 2017, the issue was not raised at the

earlier adjourned hearing on 24 April 2017, and the appellant was not legally represented.

25. The grounds contend that the FtJ was wrong to find that the appellant had acquired either five or ten years residence for the purposes of the EEA Regulations. The appellant had claimed to be from Belarus until 2004 when he returned to Lithuania to obtain a new passport. That was the year that Lithuania joined the EU, on 1 May. Nationals from countries that acceded to the EU on 1 May 2004 could only claim EU rights from that date, and not before. Thus, the earliest date the appellant could gain permanent residence was 1 May 2009. The appellant's offence occurred between 2006 and 2011. Furthermore, there was no evidence that the appellant had completed the necessary qualifying year under the Workers Registration Scheme.

26. Although the FtJ said that the appellant was present in the UK between 2008 and 2009, there was no documentary evidence of his exercising Treaty Rights.

27. In addition, it is said that the FtJ was wrong to conclude that the appellant did not need to have acquired permanent residence before qualifying under the 10 year period.

28. In terms of the 10 year period, the contention in the grounds is that the appellant's integrative links are undermined by his criminality. The seriousness of the offence is also relied on in terms of whether there are imperative grounds justifying the appellant's deportation.

29. In relation to Article 8, the FtJ had not adequately reasoned why he allowed the appeal on that ground.

30. In submissions before me, Mr Jarvis relied on the grounds, a skeleton argument, and a supplementary skeleton argument. It was submitted that the question of integration required a holistic assessment. One of the factors to be taken into account was the seriousness of the offence and its duration over a number of years. I was referred to the decisions in *Warsame v Secretary of State for the Home Department* [2016] EWCA Civ 16, and Case C-145/09 *Tsakouridis* [2010] ECR I-11979.

31. The FtJ had looked at one side of the coin only in terms of the issue of integration. The FtJ needed to engage with the criminal behaviour of the appellant in the period counting back from the period of imprisonment.

32. In response to those submissions, the appellant said that he did register with the Home Office, probably in 2006, and paid £60. He lost the certificate because his ex-partner kept everything. He had registered for national insurance from 2007, and before that he used a temporary NI number. From 5 April 2008 until April 2009 he worked.

33. It was true that before 2004 he used a different name and nationality as Belorussian. He had gone through a very hard time and lost nearly everything because of his

crime. There is nothing in Lithuania for him. He had served his sentence and paid the confiscation order.

Assessment

34. At the adjourned hearing of 27 April 2017, I had asked Mr Jarvis to consider two issues. Those were, whether the appellant's illegal re-entry to the UK invalidated the appeal before the FtT, and whether it was the Immigration (European Economic Area) Regulations 2006 that applied or the 2016 Regulations.

35. There is also the added question, canvassed at the earlier hearing, in terms of the appellant having come back to the UK to be present at his appeal, despite the human rights claim having been certified pursuant to s.94B of the 2002 Act.

36. In his skeleton argument dated 10 May 2017, Mr Jarvis very carefully explains why it is the respondent's view that the appellant having come back to the UK illegally did not affect the validity of the appeal to the FtT in relation to the EEA Regulations (deportation) appeal. To summarise, the respondent's view is that the FtT had jurisdiction to consider the appeal and did not procedurally err in hearing evidence from the appellant.

37. It is said in the skeleton argument that the situation is otherwise in relation to the human rights appeal which was certified under s.94B, because the appeal in that regard needed to have been brought from outside the UK. Thus, the FtJ's conclusions in relation to Article 8, allowing the appeal, were unlawful. It is acknowledged in the skeleton argument that the FtJ's main findings were in terms of the deportation appeal. In so far as an amendment to the grounds in this respect is needed, that application is made in the skeleton argument.

38. On the s.94B point, being one of jurisdiction, I do not consider that an amendment to the grounds is strictly necessary but if it is, the application is granted. However, events have overtaken that argument given the decision of the Supreme Court in *Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42. It seems to me that in the light of that decision there is no validity to any point about the FtJ's jurisdiction to hear the human rights appeal in circumstances where the appellant returned to the UK illegally.

39. As a matter of substance however, the respondent does rely on the appellant's illegal return to the UK as a further demonstration of his personal conduct indicating that the public interest does favour his deportation on the basis of his "flagrant disregard" for immigration control. That is said to be a further example of the appellant's natural inclination to do what he wants regardless of the consequences, as well as evidence of his lack of integration.

40. In relation to the appellant's illegal return to the UK, I do consider that the FtJ misjudged the situation in the sense that it appears from [6] of his decision (referred to at my [6] above) that he considered that it was a matter to be considered in favour of the appellant, referring to him as having taken the trouble to travel from Lithuania

to the UK to be present for his appeal. I cannot see how this action on the part of the appellant can rationally be seen as anything other than what the respondent suggests is a flagrant disregard for immigration control in the UK. I would add, that it has echoes of the offence for which he was convicted.

41. Mr Jarvis' skeleton argument also explains why it is suggested that it is the 2006 EEA Regulations that apply, and I accept that that proposition is correct.

42. It is asserted on behalf of the respondent that because counting back from the beginning of the appellant's imprisonment (in 2013), the necessary 10 year period (for enhanced protection from deportation) pre-dated Lithuania's accession to the EU (on 1 May 2004). It is acknowledged that on the basis of *Ziolkowski (Freedom of movement for persons)* [2011] EUECJ C-424/10 (21 December 2011) a person can *in principle* rely on a period of residence before accession of the member state in question as long as the person is in compliance with Article 7(1) of Directive 2004/38/EC (and see also *Vassallo (Qualifying residence; pre-UK accession)* [2014] UKUT 00313 (IAC) to which the respondent's attention was drawn at the hearing before me). For the purposes of this appeal, that involves a consideration of whether the appellant was a worker (or self-employed).

43. It is argued that the appellant was not a worker during that time because he was not lawfully resident in the UK, was working illegally and was not a worker within Article 39 of the Treaty of Rome. In addition, he did not reside in the UK in reliance on his UK nationality but on the basis of a claimed Belarussian nationality and false identity, until the beginning of 2004.

44. Furthermore, it is contended that the appellant did not register with the Home Office for a certificate as a worker as required under the Workers' Registration Scheme during Lithuania's accession period, and thus was not a qualified person under the EEA regulations (or their predecessor Regulations of 2000).

45. In the alternative, it is argued that for the appellant now to rely on such a period for retrospective qualification would be a "further abuse" of EU law. But I have already indicated that the respondent is precluded from advancing that particular argument, at this stage at least.

46. However, the point about the appellant's failure to register as a worker, and his employment at a time when he was claiming to be from Belarus, are matters that are relevant to the question of whether the appellant was exercising Treaty rights from the time of his arrival in 1999.

47. The question of the appellant's registration as a worker does not appear to have been raised before the FtT. The appellant said to me in reply to Mr Jarvis' submissions that he did register with the Home Office as a worker, he thought in 2006. However, that does not deal with the point made on behalf of the respondent in terms of his needed to have registered prior to that. I do consider that this is a relevant matter in terms of the question of the appellant's integration, linked to his having worked under a false premise, in the initial years at least.

48. However, it is also relevant to the FtJ's conclusion at [39] that the appellant had acquired a permanent right of residence by virtue of having exercised Treaty rights for a period of five years after his arrival in March 1999, which is a conclusion that takes no account of the issues to which I have referred in [46] and [47] above.

49. The FtJ did conclude at [40], with reasons, that the appellant did not need to have acquired a permanent right of residence in order to be able to establish 10 years' residence. However, that conclusion must be open to doubt now in the light of the Opinion of Advocate General Szpunar in Cases C-316/16 and C-424/16, *B v Land Baden-Württemberg, and Secretary of State for the Home Department v Frank Vomero*, which of course the FtJ did not have the benefit of when he made his decision.

50. I also consider that there is merit in the respondent's complaint about the FtJ's assessment of whether the appellant's imprisonment broke the 10 year period of continuous residence. The FtJ found that the appellant's imprisonment did not break the "established integrative links" that the appellant has in the UK. However, with some justification Mr Jarvis submitted that the matters that the FtJ assessed at [43]-[45] of his decision (relationship with his daughter, employment record, courses in prison, and English language ability) represent one side of the coin only. His serious offending was a matter to be considered, and the nature of that offending, as well as his conduct overall.

51. In the light of the matters I have referred to above, I am satisfied that the FtJ erred in law in allowing the appeal under the EEA Regulations. The errors of law relate to the FtJ's failure to consider the relevance of the fact that the appellant returned to the UK illegally, as explained at [40] above, and his assessment of whether the appellant had acquired 10 years residence in the UK in terms of whether his imprisonment broke the continuity of residence. Those errors of law are such as to require the decision to be set aside.

52. The issue of whether the appellant's deportation was justified on imperative grounds of public security was resolved in the appellant's favour by the FtJ who concluded that the offence of conspiracy to cheat the public revenue, considered with any risk of further offending, was not serious enough to justify that conclusion. He referred to the OASys report which assessed the appellant as representing a medium risk of harm but a low risk of reoffending.

53. If the appellant could not be said to have acquired 10 years' residence then the question of whether there are imperative grounds falls away. Mr Jarvis submitted that a case could be made for concluding that there were imperative grounds in this case, although suggesting that such an argument had not previously been advanced. Actually, it seems to me that that argument is advanced in the (original) grounds of appeal to the Upper Tribunal. However, I am inclined to the view that there is no error of law in the FtJ's assessment of this issue, although I do not need to express a concluded view on the matter in the light of my conclusions as to the errors of law otherwise in the FtJ's decision.

54. Similarly, I do not express any concluded view at this stage in terms of whether the FtJ erred in concluding that the appellant did not need to acquire a permanent right of residence in order to be able to establish that he had acquired 10 years' residence. Although the FtJ found that the appellant had given a credible account of his employment in the UK, the issue in relation to whether the appellant had acquired a permanent right of residence at all in the light of his need to have registered as a worker from an Accession State is a matter that will require further consideration.

55. The ground of appeal in relation to the FtJ's decision under Article 8 is subsumed within the matters arising under the EEA Regulations.

56. Whilst it was suggested on behalf of the respondent that were I to find an error of law requiring the decision of the FtT to be set aside, the appeal could be remitted to the FtT, I do not consider that that is an appropriate course. Some findings of fact can be preserved and there is no reason, taking into account the Senior President's Practice Statement at paragraph 7.2, for the appeal to be remitted. Accordingly, the decision will be re-made in the Upper Tribunal.

57. At the resumed hearing the level of protection to which the appellant is entitled as a citizen of the EU will be considered afresh. The question of abuse of EU rights is a matter that is open for consideration at the further hearing, given that the decision is to be re-made. Mr Jarvis indicated that, if requested to do so, he would be able to make enquiries in relation to the appellant's registration as a worker from an Accession State, and I direct that such enquiries be made.

58. In summary, the decision of the FtT is set aside for error of law. The decision will be re-made in the Upper Tribunal at a further hearing.

DIRECTIONS

1. No later than 7 days before the next date of hearing, the respondent is to file and serve a skeleton argument setting out all lines of argument on behalf of the respondent.

2. The respondent is to make the enquiries referred to at [57] above.

Upper Tribunal Judge Kopieczek 13/11/17