



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00513/2016

THE IMMIGRATION ACTS

Heard at Field House
Oral decision given following hearing
On 5 July 2018

Decision & Reasons Promulgated
On 3 August 2018

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR MM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not represented and not present, but the Tribunal heard from his father
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 17 July 1998 and is a citizen of Lithuania. It is not clear precisely when he arrived in the United Kingdom, although it is understood that he claimed to have been in this country since 2010, although for reasons which follow this has not been accepted. For some years he lived with his family. His father at some stage worked in the UK and may or may not have established a right of permanent residence himself. Again, this is a matter which will be touched on below. Regrettably, certainly since 2012 when the appellant was 13 or 14, he has committed various crimes. In 2012 for aiding and abetting the theft of a bicycle he was reprimanded in the juvenile court. On 22 May 2014 (just before his 16th birthday) for theft of a bicycle a four month

referral order was made and he was ordered to pay a victim surcharge of £15.00, again in a juvenile court. Then on 6 November 2014 for another bicycle theft and damage to property there was a six month referral order and he was ordered to pay £850.00 compensation. On 4 June 2015, just before his 17th birthday, for the more serious offences of attempted robbery and burglary, at Ipswich Crown Court the appellant was sentenced to a twelve month youth rehabilitation order together with a twelve month supervision requirement, and then a few months later, in February 2016 for an offence of battery he was conditionally discharged for twelve months and ordered to pay £50.00 compensation, again in the juvenile court.

2. None of these rather lenient sentences caused him to stop offending because on 6 May 2016 for possession of crack cocaine with intent to supply (clearly a very serious offence) at Ipswich Crown Court the appellant was sentenced to two years' detention and training order. It seems that there were various other offences which were dealt with within the offences for which he was convicted amounting to some sixteen offences in all, although this is not entirely clear.
3. The seriousness of the appellant's offending, in respect of which he was sentenced to a term of two years' detention, is apparent from the sentencing remarks of Judge Levett which is contained within the file. I set out the relevant parts below:

"You were born on 17 July 1998. You are not yet 18. When you were about 16 or 17, I sentenced you to a youth rehabilitation order for 12 months because you had admitted burglary and attempted burglary and attempted robbery and I had the youth offending team's report in front of me and I thought then that the rehabilitation order might steer you away from crime. It demonstrates how wrong I can be, but when I did make that order on 4 June, within a matter of three months later, on 26 September 2015, you stole from K B and two months later, you went into his house and attempted to rob him and just before Christmas, you ended up poking your nose into an incident which didn't even concern you and as a result of that, you got arrested and the police found four wraps of class A drugs in your buttocks, and then having been released on bail for that, within the New Year, you received some final warnings under the youth rehabilitation order. You then hit somebody when you went to the office of the youth offending team and again, within three days of that, you ended up being chased down Wherstead Road into a store where the CCTV captured you putting a package of 70 wraps of class A drugs in between (sic) the food shelves and when you got arrested, you had a telephone on you which was looked at and you admitted that it was a phone given to you for some street dealing and you described it all as being really easy money.

So, having admitted possession with intent to supply, I take the view that that's a category three offence, even though you are a young person. I can put part of it down to a bit of naivety and exploitation just because of your youth, but you are big enough, you are actually quite wise enough to know that what you were getting yourselves (sic) into and I regard you as having ... probably a more significant role than anyone gives you credit for.

As to the attempted robbery, the guidelines which have recently been issued for the full offence, I give a small reduction in terms of that but I've got to categorise it under the sentencing guidance council and it seems to me that you fit within a category 2c robbery and because each of these offences are separate ones and they are grave crime offences, you would, if you were an adult, be likely to receive a consecutive sentence and if that were the case, then I have no doubt that a judge sitting in my position would consider that if you were over 18, because of your past convictions, you would be receiving a sentence very much above six years and you would get some credit for a plea of guilty but you are young and therefore, I've got to make some significant adjustments for that fact.

... You are actually a persistent offender ... “.

4. The judge went on to make the following observations:

“... unfortunately, I believe that you are a person who seems to get your self-esteem by listening and thinking that you are bigger than in fact you are and in the report, I suspect that one of the key reasons for your offending is because you get a bit of a feeling of being a more superior person by mixing with older people and behaving in the way in which you have done, but at all odds, as I say, it seems to me that the right sentence in this case is one of a detention and training order and this is the way I'm going to construct the sentence.

...

It's a bit unfortunate those previous offences seem to have a similar pattern now that's ringing through your criminal career because on Christmas Day, you broke into someone's house, you took quite a lot of jewellery and that is a very serious offence and then, about two weeks after that, walking along the Bramford Road - I know exactly where this happened, incidentally, where you were walking along and you confronted some man, demanding his phone while very wisely, he clicked the record button on, so everything about your conduct was recorded. He did the wisest thing by walking off, calling you a wanker in the process because he felt that your intimidating remarks to him were ones that he ought to actually have thrown back at you.

...”

5. It is clear from the sentencing remarks just how serious the offending was and unsurprisingly the respondent took the view, even though the appellant is an EEA national, that it was appropriate to deport him on grounds of public policy in accordance with Regulations 19(3)(b) and 21 of the Immigration (European Economic Area) Regulations 2006. These Regulations have now been replaced by the 2016 Regulations, but in all relevant respects, the substance remains the same. The appellant appealed against this order (which had been made on 24 September 2016) but the appeal was certified under Regulation 24AA of the 2016 Regulations (it was also certified under Section 94B of the Nationality, Immigration and Asylum Act 2002) on the basis that the Secretary of State was satisfied that requiring the appellant to bring his appeal from abroad would not present a real risk of irreversible harm. The

decision having been certified the appellant was removed from the UK to Lithuania in October 2016.

6. The appellant's appeal came before First-tier Tribunal Judge Black on 12 July 2017 and Judge Black made a finding that the Section 94B certificate had been unlawful (supposedly in reliance on the decision of the Supreme Court in *Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42). She did not make a decision with regard to the appellant's substantive appeal against the deportation decision itself.
7. The respondent appealed against this decision and that appeal was successful before Upper Tribunal Judge Gleeson following a hearing before her on 8 December 2017, on the basis that the First-tier Tribunal Judge did not have jurisdiction to consider the validity or otherwise of the Section 94B certificate, which was a matter to which challenge could only be made by judicial review. I note that in any event the challenge to the decision to remove the appellant needed to be made under the EEA Regulations.
8. The whole appeal was remitted to the First-tier Tribunal where it came before First-tier Tribunal Judge S Kaler, sitting at Taylor House on 23 April 2018. In a decision promulgated on 10 May 2018, Judge Kaler dismissed the appellant's appeal.
9. The appellant was not represented before Judge Kaler and was not present either (the reasons for which will be discussed below). The only representations Judge Kaler heard were made by the Home Office Presenting Officer.
10. The appellant, in person, lodged a notice of appeal and permission was granted by First-tier Tribunal Judge J M Holmes on 30 May 2018. The appeal has now been listed before me.
11. Having considered the grounds these appear to set out assertions which were not before Judge Kaler. The appellant first of all says that his father has been living in the UK and exercising treaty rights by being in full-time employment "continuously since 2010". On this basis it is argued that the appellant's father has permanent residence and it is said "so I am as his close family member". The appellant encloses evidence said to have been received from the Government's official HMRC website "which shows that he made four years' national insurance contributions since 2010" which "is official information, which can also be checked with HMRC if necessary".
12. The appellant also says that he has not committed a single offence since being an adult and has therefore "not had a chance to prove myself" and he disagrees with the statement that "I am a serious threat to society and that there is a real risk of reoffending". He also rather curiously says that "I disagree" with the statement that "I had been convicted of a serious offence in supplying class A drugs", saying that "I have never supplied drugs or been charged for this offence, so this statement is incorrect and misleading". He said that "the respondent referred to the drug dealing fact in general but not related to me and my case". As already set out above, it is clear from the sentencing remarks and from the appellant's criminal record, that the appellant was convicted of (and indeed pleaded guilty to) possession of very many wraps of class A drugs for the purposes of dealing in it, so his statement in the grounds

that he has never supplied drugs or been charged for this in real terms is incorrect. It may be that there is a semantic point that can be made that he was convicted of being in possession of these drugs for the purpose of supply, but this is of no material significance. The social worker had expressed an opinion that this appellant “glorifies money, guns and drugs” and in the grounds the appellant disputes this saying that “my talks were common teenager’s talks” and he encloses articles showing that teenagers have problems and that this period in his life could be complicated. He also disputes that he had sixteen convictions, which is correct insofar as it appears he has six convictions, but again this is not of any material importance given the sentencing remarks which deal with his criminal history, which is set out above.

13. The appellant in his grounds complains that he had not been living off the proceeds of drug dealing and nor was he proud of having done this, but again given the number of wraps of class A drugs which the appellant was seen to have, when the appellant says that “there is no evidence that I had some sort of income of this activity”, that is also plainly incorrect, because his possession of that amount of drugs clearly leads to an overwhelming inference that he was receiving an income from drug dealing.
14. What is said at paragraph 9 of his grounds was one of the reasons which led Judge Holmes to give permission which I will deal with below, because he says that he attempted to enter the UK “to attend the hearing” but was “declined the entry”. He says that “I contacted Home Office and they mistakenly advised me that I needed to have a visa” but “they did not give me any information about which application needed to be completed in order I could get permission to come to the UK”.
15. On the basis of considering these grounds and also looking at the decision (although it is not clear whether the full decision was before Judge Holmes, because Mr Bramble on behalf of the respondent informed the Tribunal that the copy which the Home Office had missed out some pages) Judge Holmes granted permission. There are two reasons which are given by Judge Holmes for granting permission, and they are set out in paragraphs 3 and 4 of his reasons for making that decision, as follows:
 - “3. It is arguable that the Appellant was denied a fair hearing of his appeal, because the Respondent had refused to allow him to enter the UK so that he could attend it and give evidence, when that was his right pursuant to Reg 41 of the 2016 EEA Regulations [as noted above, these are the Regulations which replaced the 2006 Regulations], unless his presence would cause serious trouble to public policy or public security (which R did not allege); Reg 41(3). The Judge appears to have proceeded on the basis that a second application in some particular format was required, and in so doing arguably erred [4].
 4. The remainder of the grounds prepared by the Appellant without legal assistance appear to raise the arguable complaint that his father had acquired a permanent right of residence in the UK by 2015, and that the Appellant had derived rights from that status by virtue of the family relationship, (and/or the support received from his father) as a Family Member; Reg 7(1). He is not yet 21. Arguably the Judge approached the appeal on the wrong footing.”

16. In other words, there are two grounds which Judge Holmes considered might be arguable. The first is that there was a procedural irregularity in that the appellant had been refused permission to enter the UK as was his right pursuant to Reg 41 of the 2016 EEA Regulations; the second is that he may have acquired the right of permanent residence himself, in which case Judge Black's decision to consider the appeal on the basis that the appellant had not acquired the right of permanent residence (and with it the right to enhanced protection against deportation, because the respondent would require "serious" grounds to justify his removal in these circumstances) which went with it.
17. I have the advantage of seeing the complete decision of Judge Black, and also the documents which were before previous judges, in particular the skeleton argument of Mr Jarvis, representing the respondent at the hearing before Upper Tribunal Judge Gleeson on 7 December 2017. I have also been referred to the decision letter itself which is under challenge in these proceedings dated 24 September 2016, which has a significant bearing on the suggestion that the appellant was "refused" permission to return to the Tribunal in order to allow him to take part in the hearing.
18. I deal with this ground first. The current position is dealt with under the 2016 Regulations, but as already noted above the position is substantially the same as it was under the 2006 Regulations. I set out first what is set out within Regulation 41 of the 2016 EEA Regulations, as follows:

"Temporary admission to submit case in person

41. – (1) This regulation applies where –
- (a) a person ('P') is subject to a decision to remove made under regulation 23(6)(b);
 - (b) P has appealed against the decision referred to in sub-paragraph (a);
 - (c) a date for P's appeal has been set by the First-tier Tribunal or Upper Tribunal;
 - (d) P wants to make submissions before the First-tier Tribunal or Upper Tribunal in person; and
 - (e) P is outside the United Kingdom.
- (2) P may apply to the Secretary of State for permission to be temporarily admitted ... to the United Kingdom in order to make submissions in person.
- (3) The Secretary of State must grant P permission, except when P's appearance may cause serious troubles to public policy or public security.

...".

19. These provisions mirror what was set out in the 2006 Regulations at Regulation 29AA. I set out for comparison what is said at Regulation 29AA(2):

“(2) P may apply to the Secretary of State for permission to be temporarily admitted (within the meaning of paragraphs 21 to 24 of Schedule 2 to the 1971 Act, as applied by this regulation) to the United Kingdom in order to make submissions in person”.

20. It is relevant that within the decision letter itself, the provisions of Regulation 29AA are set out and the appellant is advised as to precisely what he ought to do if he wishes to be present in person at the hearing. I set out from paragraphs 106 onwards of this decision letter, as follows:

“Re-admission to the United Kingdom for the purposes of making submissions in person at any appeal hearing

106. Pursuant to regulation 29AA of the 2006 Regulations, you may apply from outside the United Kingdom for permission to re-enter the United Kingdom in order to make submissions in person at your appeal hearing (where relevant), if you meet the following conditions:

- p. you appealed within time against the notice of a decision to make a deportation order (or appealed out of time with the permission of the Tribunal);
- q. you were deported from the United Kingdom pursuant to regulation 19(3)(b) of the 2006 Regulations before your appeal was finally determined;
- r. a date for your appeal has been set; and
- s. you want to make submissions before the First-tier Tribunal or Upper Tribunal in person.

107. You should not apply for permission to re-enter unless you have been given a date for your appeal hearing by the First-tier or Upper Tribunal (Immigration and Asylum Chamber) and you should provide us with evidence of the date of your appeal hearing.

108. It is your responsibility to notify the relevant Tribunal of your location and contact details and to update the Tribunal in the event of any changes to your location and contact details.

109. If you meet these criteria then you may apply for permission to re-enter the United Kingdom. You can make this application by contacting Immigration Enforcement at [the e-mail address is then set out].

110. Permission will not be granted if the Secretary of State considers that your presence would cause serious troubles to public policy or public security.

111. You must apply for permission in advance of attempting to re-enter the United Kingdom or you will be refused admission at the United Kingdom's border. If permission is granted, it will be a temporary admission pursuant to Schedule 2 of the Immigration Act 1971.

...”.

21. In other words, the procedure which would have to be followed by the appellant if he sought to re-enter this country in order to be present at his hearing is set out in detail.
22. Within the decision, Judge Kaler at paragraph 4 noted as follows:
 - “4. The Appellant has not made any application to re-enter the UK under Regulation 41 of the 2016 Regulations [and obviously under paragraph 29AA either]. It is noted that he did try to enter the UK to be present at the earlier appeal hearing, but he had not made the necessary application for admission and was denied entry.”
23. Although Judge Holmes when granting permission seemed to believe that “The Judge appears to have proceeded on the basis that a second application in some particular format was required”, it appears that he may well have misunderstood what actually had occurred; the circumstances in which the appellant attempted to re-enter the country appear to be that he had attempted to re-enter on 28 July 2017 on the basis that he thought his deportation order had been revoked (because at that stage Judge Black had purported to allow his appeal, certainly against the certification under Section 94B of the Nationality, Immigration and Asylum Act) while failing to recognise that until the respondent's appeal rights against that decision had been determined the deportation order was still in place.
24. What the appellant never did, and before this Tribunal the appellant's father did not suggest that he had ever done, was make any application in the required or any other format to be allowed to enter the UK in order to be present at the hearing. So when Judge Holmes referred in his grant of permission to the judge appearing to believe that a “second” application was needed, that is not what the judge in fact decided. What the judge found was that no application had been made, which appears to be correct. In these circumstances there was no procedural irregularity in the Tribunal going ahead and hearing the appeal in the absence of the appellant. He had had the right to make an application under what is now Regulation 41(2) to be present at this hearing but did not make such an application, and indeed he did not make an application prior to this hearing either, and so in these circumstances the respondent did not “refuse” such an application, because it had never been made.
25. The other ground which Judge Holmes considered was arguable was that the appellant might have acquired the right of permanent residence in which case (and Judge Holmes was correct at least in considering what the consequence would be if this was so) the judge would have considered the appeal on the wrong basis. Certainly, if the appellant had been entitled to permanent residence in this country then serious reasons would have been required to show that there was a serious threat to public order (quite what difference this makes is not a matter which I need to

consider for the purposes of this hearing). The judge did consider whether or not this was the case but decided that the appellant had not established that he had permanent residence for two reasons. The first is set out at paragraph 11 of the First-tier Tribunal decision and is as follows:

“11. The documents in the Tribunal file show that the Appellant’s father was issued with a State Worker Registration Card on 3 November 2010. Various documents show that he worked here between 2014 and 2016. He was registered as a jobseeker in January 2012 and also in April 2013. There are no documents to show what the Appellant’s father was doing between 2010 and 2012. There is no evidence from any of the schools the Appellant has ever attended.”

26. In other words, the appellant had not put evidence before the Tribunal capable of establishing that he had been in his father’s household for a continuous period of five years while his father was exercising treaty rights, because there were no documents to show that the father had been exercising treaty rights between 2010 and 2012. Whether or not I would now be in a position to find that the appellant’s father had in fact been exercising treaty rights is not to the point; what this Tribunal now has to consider is whether the judge’s finding that the appellant has not established this is sustainable on the material before the judge at the time of the hearing. Clearly in my judgement the judge was entitled to make this finding, because there was a lack of evidence. There is no reason why this evidence could not have been put before the judge at the time of the hearing and there was no procedural irregularity in the judge considering the appeal on the basis of the evidence which was then before her.

27. This aspect of the case does not end there either, because when setting out the “established facts” Judge Kaler from paragraphs 27 onwards, found as follows:

“27. The Appellant has not satisfied me that he has been here since the age of 12. His offending history tells me that he has been here since 2012. I accept he first entered the UK in or about 2012 when he was 14 years old. He was 18 years old when the deportation order was made so he had been in the UK for at least 4 years. He has not established 5 years residence.

28. The documents satisfy me that the Appellant’s father was exercising treaty rights at some stage, but only from January 2012 at the earliest. He was registered a worker before then but there is no evidence that he was actually working. The deportation order was made in September 2016. On this evidence, I am not satisfied that the Appellant’s father was in fact exercising treaty rights for a continuous period of five years prior to the making of the deportation order.

29. There is no evidence that the Appellant was attending school or accessing education for a five year period. There is no evidence of the Appellant’s entry into the UK.

...”

28. Essentially for these reasons, at paragraph 31 Judge Kaler found that "I am not satisfied that the Appellant has achieved permanent residence in the UK. He is not entitled to the added protection of Regulation 21(3)".
29. In other words, not only had the appellant not established that his father had been exercising treaty rights for a five year continuous period but he had not established either that he had been in that household for the requisite period.
30. Again on the material before the judge the judge was entitled to reach these conclusions.
31. It follows that neither of the reasons which were given by Judge Holmes for granting permission are in the event arguable and there is no other basis either on which Judge Kaler's decision can be impugned. This was a careful decision which is fully reasoned and is sustainable.
32. It follows that there being no material error of law within Judge Kaler's decision, the appellant's appeal must be dismissed and I so order.

Decision

There being no material error of law in the decision of the First-tier Tribunal, the appellant's appeal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

A handwritten signature in black ink that reads "Ken Craig". The signature is written in a cursive style with a long, sweeping tail on the letter 'g'.

Upper Tribunal Judge Craig

Date: 27 July 2018