Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00121/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 May 2019	**On 31 May 2019**

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

TOMAS VILKAS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr McTaggart, instructed by McCourt & Maguire Solicitors.
For the Respondent: Mr Clarke, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant, Mr Tomas Vilkas, is a national of Lithuania. He appealed to the First-tier Tribunal against a decision made by the Secretary of State on 18 January 2018 to make a deportation order against him. The decision is, because of his nationality, taken under the provisions of the Immigration (European Economic Area) Regulations 2016. The regulation particularly relevant to the decision is Reg 27(5) which I do not need to set out: it was set out in full by the judge who dealt with his appeal and the grounds of appeal before me do not specifically relate to the judge's application of that regulation.

2. The appeal was heard on 12 February 2019 by Judge Gillespie in Belfast. He dismissed the appeal. The grounds of appeal are that it was unfair for the judge to deal with the appeal on that occasion. Two issues are raised. The first is that it was wrong in law for the judge to proceed to deal with and determine a deportation appeal when there were extradition proceedings outstanding in relation to the appellant, as indeed there were, and which I shall refer to in a moment. The second ground is that it was unfair for the judge to proceed because the appellant was represented newly by a firm of solicitors who had not had proper time to take instructions.

3. So far as the extradition is concerned, the position is as follows. Extradition proceedings have been taken under a European arrest warrant in relation to this individual and a number of others from Lithuania. The Northern Ireland court system has before it a number of appeals against the extradition proceedings by Lithuanian nationals of whom the appellant is one. They are being dealt with by Her Honour Judge Smith in Belfast; she has so far issued two intermediate judgments. The first sought specific undertakings or indicated that certain undertakings would need to be given by the Lithuanian government in relation to prison conditions in Lithuania. The second seeks specific undertakings. I am told by Mr McTaggart who appears on behalf of the appellant before me that the last set of undertakings have not, at present been given. Thus, so far as the extradition proceedings are concerned, they are outstanding before the Northern Ireland judicial system. There is the possibility of a judicial review of Judge Smith's decision when it is eventually given but the extradition proceedings have to be regarded as in progress and currently undetermined for the purposes of the proceedings in this Tribunal. Those proceedings raise, of course, different matters from those to be considered by the Upper Tribunal. Nevertheless, if the challenge to the extradition proceedings is successful it is unlikely that the appellant could properly be removed to Lithuania. If, however, the challenge is unsuccessful, the appellant might be able to resist removal to Lithuania on the basis of matters relating to his own circumstances.

4. Why are there extradition proceedings raised by Lithuania? The position is as follows; and in looking at that issue I shall try and summarise the little that is known of the appellant and his movements. He was in Lithuania on 26 October 2012 - that is the last date given by him in oral evidence before the judge, on which he was convicted of an offence in Lithuania. It appears that on that occasion he was sentenced to a term of imprisonment in Lithuania of, in total, four years. However, by December 2012, two months later he is recorded as entering the United Kingdom. Nothing else is known about that entry other than its approximate date. It was, however, evidently very shortly after his sentence in Lithuania and the position appears to be that he managed to escape prison in Lithuania in order to come to the United Kingdom on that date. Nothing then appears to be known about him until there were proceedings in the Republic of Ireland for his extradition to Lithuania. I know little about the date of those proceedings other than that they continued for some time in

the Republic, going as far as the Supreme Court, which then made a reference to the Court of Justice of the European Communities; and thereafter the final decision by the Supreme Court of the Republic was issued on 5 December 2018.

5. Those proceedings were also extradition proceedings raised by the government of Lithuania. I do not know, and Mr McTaggart has not told me, the circumstances under which the appellant was in the Republic of Ireland during the course of those proceedings. However, it is apparent that if there were any provisions restricting his movement, he probably breached them because on 11 April 2017 he was in the United Kingdom. We know that because on that date he was arrested for possession of false documents, which he said later that he obtained in order to work in the United Kingdom. On 20 April an extradition warrant was signed against him in relation to his extradition from the United Kingdom. He has, I understand it, been in custody ever since. The false documents offence was dealt with by a separate suspended sentence.

6. So far as his presence in the United Kingdom is concerned, therefore, all that is known is that he was here for at least part of one day in December 2012 and that he was here on 11 April 2017. There is, so far as Mr McTaggart has been able to tell me, no other evidence of his presence in the United Kingdom except in custody. His criminal record shows, apart from the offences in Lithuania, apparently a breach of the Republic's conditions, under which he was kept pending his extradition proceedings there; and false documentation in the United Kingdom. There is also what appears to be a persistent difficulty in that he does not receive, or claims not to have received, official notices sent to him in custody: that indeed is part of the history of the proceedings before Judge Gillespie in relation to the appeal.

7. So far as the United Kingdom is concerned however, he has been throughout, in what may be called a rather intermittent way, he has been represented by solicitors. The position is that the deportation proceedings with which Judge Gillespie was concerned were originally listed for hearing in July 2018. At that time Mr McTaggart, who appears before me today representing him, sought an adjournment: on that occasion Mr Vilkas was represented by Rafferty and Donaghy Solicitors. There were further hearings, and as I have said some of them were affected by claims that notices had not arrived. When the hearing was listed for 12 February 2019 a Notice of Hearing was sent on 2 November 2018 to the appellant in custody; the appellant claimed that he had not received that. There was then also a letter of 8 January 2019 to the Governor of the prison. The appellant nevertheless, as I understand it, complained on 12 February 2019 that he had no idea that he had an appeal hearing.

8. What also happened was that the solicitor at Rafferty & Donaghy who had been representing him, a Mr Ruairi Maguire, had moved firms to McCourt and Maguire and had become indeed a principal in that firm (as perhaps its name reflects). On Friday 8 February, it is said the appellant instructed

McCourt and Maguire. On 12 February, the following Tuesday, Mr McCourt of that firm appeared before Judge Gillespie and sought an adjournment apparently solely on the basis that he had not had time properly to prepare. I say 'apparently solely on that basis' because there has been no evidence before this Tribunal which might supplement what is in the judge's decision. What is in the judge's decision is an account of Mr McCourt's indication that he had not had time to prepare, followed by "Mr McCourt requested an adjournment." The judge indicated that he was satisfied that the Notices of Hearing had been properly served and that the history of the proceedings indicated that it was now right to proceed.

9. Mr McCourt's further contributions appear to have been limited to indicating with some brevity the progress of the extradition proceedings in Northern Ireland and also saying that he would not continue with the hearing as he did not have sufficient material to enable him to do so.

10. The appellant therefore presented his case in person and was able to tell the judge about his own perception of the proceedings against him and about his own personal life; and the facts that I have already related in relation to his movements from Lithuania to the United Kingdom, from the United Kingdom to the Republic, and from the Republic back to the United Kingdom are derived from what he told the judge on that occasion.

11. It is, I think, convenient to deal first with the second ground, that is to say, the unfairness of proceeding, separated for the moment from the issue as to extradition, although in the grounds of appeal it is asserted that the second ground really interacts with the first. As I have said, there has been no evidence in relation to the appeal to this Tribunal. Of what happened before the judge I am limited to what is found in the judge's decision, and indeed Mr McTaggart did not suggest that I should go outside that decision for consideration of these issues. The judge was aware of the extradition proceedings. He was made further aware of them by Mr McCourt's brief submission about them. He was essentially being asked however, to adjourn, not because there was an argument that in law he should not proceed because of the pending expedition proceedings, but because the solicitor had not had time to prepare the case.

12. It seems to me that the judge was wholly entitled to reach the view he did on the history as he knew it. This was not a case where the appellant was taken by surprise in the sense of needing to prepare a case. He had, after all already prepared a case in a different country, and had had in the circumstances of the present appeal ample time to get the material together. He had been represented for a considerable length of time by a solicitor who was now a member of the very firm of solicitors who had been recently instructed and who said they had not had time to represent him. But even if Mr McCourt had only heard on 8 February that he was instructed, there was still time to do more than he appears to have been able to do, which is to say that he wrote on 11 February, three days later (I accept that there is a weekend but it is three days later) to Mr McGuire's old firm seeking the papers. There cannot have been any realistic

prospect that that was acting quickly enough for a hearing, which following earlier adjournments, was to take place on the Tuesday. It seems to me that if the appellant's appointed solicitors knew little about the case on 12 February then that is a matter which was not primarily one for the judge to do other than make a decision about. It was not one which ought to have caused the judge to think that it would be unfair to proceed. The lack of knowledge was `the result of a combination of the appellant's and his solicitors' conduct over many months previously.

13. For that reason, I regard Ground 2 as not made out.

14. I turn then to ground 1, which is the ground that it was wrong to proceed on the basis that the extradition proceedings were outstanding. As I have said, the extradition proceedings relate to different issues and different considerations; and the outcome of the extradition proceedings might have an effect of the eventual fate of the appellant. But there are a number of other factors to bear in mind, of which the crucial one is that noted by the judge: that the matters were different; and further that this was a case where, although on 12 February 2019, the date of the hearing, the appellant was represented, the point that an adjournment should be granted because of the continuing extradition proceedings does not appear to have been specifically made: as I have indicated, the only ground for the adjournment appears to have been Mr McCourt's ignorance of the case. Under those circumstances it appears to me that there is no proper basis for saying that this judge should not have proceeded. He dealt with the issues before him, in circumstances where, although the appellant was represented by a solicitor, it was not agreed that it would be wrong in law for him to proceed. For those reasons I reject Ground 1.

15. That means that my judgment is that the Ground fails and it follows that the determination dismissing the appeal should stand. Mr McTaggart has been anxious to say that I ought to be concerned with the appellant rather than his solicitors. That is quite a difficult argument to make, bearing in mind that the appellant was represented by solicitors and unless a judge has taken the view that the solicitors are incompetent, the judge probably ought to deal with the case as presented by the solicitors. In any event, what is the real position?

16. The judge, as I have said, applied Reg. 27(5); he noted the appellant's criminal convictions; he noted his lack of any real evidence of presence in the United Kingdom other than in custody. He had to determine whether the decision of the Secretary of State complied with the principle of proportionality; was based exclusively on the personal conduct of the appellant; and whether that personal conduct represented a genuine present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account his past conduct and that the threat does not need to be imminent. It seems to me that the judge dealt with those factors properly in paragraph 35 in particular of his decision, and as I have said there is no specific challenge to the merits of the judge's decision.

17. So far as matters which might go to proportionality are concerned, the position is that the appellant has, as I have indicated, failed to show that he was in the United Kingdom, other than in custody, except on one day in 2012 and one day in 2017. On the occasion in 2017 he appears to have been working but the work was evidently unlawful and was supported by unlawful documentation. He has been in custody in the United Kingdom for a considerable period of time, I assume he has also been in custody in the Republic.

18. In the United Kingdom it is said that he has a mother and perhaps some siblings (in Great Britain, not in Ireland) and that his mother has visited him in prison. There are no details of that. As I indicated to Mr McTaggart the matters that can be adduced on his side going to the proportionality of the decision are laughably inadequate. The judge was right to consider that there was really nothing to be weighed on the appellant's side in that respect.

19. There is a further issue, however, raised by Mr McTaggart today, but not so far as I can see at any stage raised in the appeal proceedings previously, which is precisely the issue which is raised in the deportation proceedings: that is to say that prison conditions in Lithuania to which he will have to return if he is removed or extradited are a breach of article 3 and possibly of article 8. That is a matter which has not been argued in the deportation proceedings. It would have been a new matter before Judge Gillespie if it had been argued. There seems no reason to suppose that bearing in mind the continuation of the extradition proceedings the Secretary of State would have consented for Judge Gillespie to deal with it. If the outcome of the extradition proceedings merits it, no doubt further issues along those lines may be raised by the appellant in due course; but as I have said they are not part of these proceedings. So far as these proceedings are concerned it seems to me that not merely is the decision to dismiss this appeal the right one on the grounds, but that looking at the merits in the way that I have done it is difficult to see that any injustice is suffered by the appellant by a determination to that effect.

20. I therefore dismiss the appeal and order that Judge Gillespie's decision shall stand.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 21 May 2019

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