IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: UI-2021-001282**
HU/05891/2020

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On the 5 May 2022 **On the 01 September 2022**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SEFER SAMI KAMBERAJ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr P Blackwood, Counsel instructed by WH Solicitors

DECISION AND REASONS

Background

1. The Secretary of State appeals with permission against a decision by First-tier Tribunal Judge Abebrese sent on 19 April 2021 allowing Mr Kamberaj's appeal against a decision of the respondent dated 10 June 2020 entitled "Entry in Breach of a Deportation Order".

2. Mr Kamberaj is a national of Bulgaria born on 11 July 1978. On 25 February 2008, he was sentenced at Canterbury Crown Court to seven years' imprisonment for the offence of being "knowingly concerned in a fraudulent evasion of the prohibition on the importation of class A controlled drug". He was deported from the United Kingdom on 2 July 2010. He re-entered the United Kingdom in breach of the deportation order in August 2011. On 29 March 2015 he sought admission to the UK via the Coquelles Tourist Control Zone. He was refused admission and removed from the UK Control Zone. At some point in 2015 he entered the United Kingdom, again in breach of the deportation order. On 8 July 2015 he applied for an EEA registration certificate. The application was refused on 8 October 2015. An appeal against that decision was dismissed on 30 January 2017. On 14 November 2019 he applied from within the UK to revoke the deportation order.

Secretary of State's Decision

3. It is said by the Secretary of State that the deportation order prohibits Mr Kamberaj's admission to the United Kingdom whilst it is in force and it remains in force until it is revoked by the Secretary of State or for the period specified in the order. The deportation order was made on 17 June 2010 and Mr Kamberaj entered the United Kingdom at some point in 2015. The Secretary of State's view is that Mr Kamberaj is liable to be removed from the United Kingdom as an illegal entrant under Schedule 2 of the Immigration Act 1971 in accordance with Regulation 32(4) of the Immigration (European Economic Area) Regulations 2016.

4. The position of the Secretary of State is that applications to revoke deportation orders are governed by Regulation 34 of the EEA Regulations 2016. In particular, Regulation 34(4) states that an application to revoke such an order "must set out the material change in circumstances relied upon by the applicant and may only be made whilst the applicant is outside the United Kingdom". In light of this, the respondent does not accept that the representations are an application to revoke the deportation order. The decision was certified pursuant to Regulation 36(7), the effect of which is said to be that Mr Kamberaj may not rely on a ground of appeal relied on in a previous appeal.

5. The Secretary of State went on to give reasons why Kamberaj should be removed from the UK. In her view the seriousness of his previous offence, lack of evidence that he has addressed his offending behaviour as well his disregard of UK immigration laws means that he has a propensity to reoffend and that he represents a genuine, present and sufficiently serious threat to a fundamental interest in society. It is also considered that the decision to remove him is proportionate and in accordance with the principles of Regulations 27(5) and (6) because Mr Kamberaj was integrated into Bulgaria and could be rehabilitated there and his wife and children could visit.

6. The Secretary of State then went on to consider whether maintaining the deportation would be a disproportionate breach of Article 8 ECHR against the backdrop of Section 117A- D of the Nationality, Immigration and Asylum Act 2002.

7. The public interest requires his deportation unless there are "very compelling circumstances" over and above those described in the Exceptions to the deportation. The Secretary of State took into consideration her duty to safeguard the welfare of the children as set out in Section 55 of the Borders, Citizenship and Immigration Act 2009 as a primary consideration but balancing this factor against other factors decided that although the children are British and Mr Kamberaj has a genuine and subsisting relationship with them, it is not accepted that it would be unduly harsh for Mr Kamberaj to be deported to Bulgaria whilst the children remain in the United Kingdom because they will continue to live with their primary carer, will continue to attend school and can have contact with Mr Kamberaj through visits.

8. The Secretary of State gave consideration to the documents submitted in support of the application including a social work report, family photographs and family drawings and decided that it is the best interests of the children to remain in the care of their mother in the United Kingdom. It is not unduly harsh for Mr Kamberaj's partner to remain in the United Kingdom with her children. It is not accepted that Mr Kamberaj was lawfully resident in the United Kingdom for most of his life, that he is socially and culturally integrated into the United Kingdom or that there would be very significant obstacles to his integration in Bulgaria. It is not accepted that there are very compelling circumstances to outweigh the public interest in upholding the deportation order.

9. It is said that he has a right of appeal against a decision to refuse his human rights claim under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 but because his claim has been certified under Regulation 36(7) of the Immigration (European Economic Area) Regulations 2016 he has no right of appeal against the decision to remove him as an illegal entrant pursuant to Regulation 32(4).

Mr Kamberaj's submissions

10. Mr Kamberaj's arguments were set out in the skeleton argument which submits that the Tribunal has jurisdiction to hear the appeal on EEA grounds following the decision of Michael Fordham QC in <u>BXS v Secretary of State for the Home Department</u> [2014] EWHC 737 in which it was found that there may be cases in which the requirement to leave the United Kingdom to pursue an application or an appeal are incompatible with the respondent's duty under Section 6 of the Human Rights Act 1998. It is argued that the case engages the threshold in <u>BXS</u> and that it was for the Tribunal to address these issues as a question of fact. It is argued that the 2017 appeal related to Mr Kamberaj's application for a registration

certificate, not the revocation of an extant deportation order. It was then further submitted that the certification of the claim was irrational.

11. The position of Mr Kamberaj is that there has been a material change to his circumstances. His son S was born on 12 August 2002 two years after the deportation was issued. All of his family are now British citizens. He has spent ten years with his son since the deportation order was issued and there has been no reoffending during this decade. It is argued that it is not proportionate in line with Regulation 34(5) to deport the appellant from the United Kingdom. The children have never spent any significant time apart from their father. The older child is currently in year 13 at school and at a crucial stage of his education. Forcing Mr Kamberaj to depart the United Kingdom would have unjustifiably damaging consequences on both the children, in particular the younger one who is having problems at school. It is also argued that Mr Kamberaj does not present a genuine, present and sufficiently serious threat to society because his conviction and offending behaviour is so old. There has been no reoffending, and evidence is that his behaviour and way of thinking have taken a considerable turn for the better. Mr Kamberaj and his family are in a secure financial situation and his children and their future are strong deterrents. Matters of general prevention do not justify the decision.

12. The appeal should also be allowed under Article 8 ECHR.

Decision of the First-tier

13. The decision is very brief stretching to seventeen paragraphs in total. At [6], [7], [8] and [9] the judge sets out Mr Kamberaj's immigration history, details of the deportation order pursuant to Regulation 27(5) and the details of the criminal offence. At [10] the judge sets out the Secretary of State's case, and at [11] the judge briefly summarised the evidence-in-chief, and at [12] the evidence given in re-examination. At [13] the judge briefly stated that Mr Kamberaj's older son was called to give evidence of his close relationship with his father and the impact of the deportation on him and his family. At [14] the judge records the submissions by the Secretary of State. The judge then records Mr Kamberaj's representative's submissions at [15] and in the same paragraph goes on to make findings which I will set out below. The judge allowed the appeal "on all grounds".

Grounds of Appeal

14. The grounds of appeal are as follows:

Ground 1: Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome of the fairness of the proceedings.

The First-tier Tribunal refused an application for an adjournment by the Home Office Presenting Officer who, having replaced a sick colleague at

short notice, was ambushed by the late service of an additional bundle and only given a short time to read it. IT issues resulted in the Presenting Officer losing access to the Tribunal portal during Mr Kamberaj's submissions and he was unable to reconnect. The judge fails to acknowledge these problems in the decision. It is submitted that these matters resulted in a significant unfairness capable of making a material difference to the outcome of the proceedings.

Ground 2: Misdirection of law

The judge failed to take into account that Mr Kamberaj re-entered the UK in breach of a deportation on two occasions shortly after being deported, once in 2010 and again in 2015. This conduct may be taken into account under Regulation 27(5)(b) and (c) of the EEA Regulations 2016 in respect of the personal conduct of the person concerned. Further, the judge failed to have regard to Schedule 1 of the EEA Regulations 2016 which set out what those fundamental interests are, and in particular Schedule 1(7)(g) in respect of drugs offences is particularly pertinent.

Further, in respect of the judge's findings on proportionality the judge has failed to take into account that there is no reason why the children as British citizens could not stay in the United Kingdom with their mother. The judge misdirected himself by failing to consider whether the children's mother would be able to cope with the children during the appellant's absence. The judge failed to have regard to the relevant caselaw.

Permission

15. Permission was granted on 24 January 2022 by Judge Saffer on the basis that all grounds were arguable.

Rule 24 response

16. It is submitted that there was no procedural unfairness, and that the decision was not irrational and was open to the judge on the evidence. It is said that the judge was aware of Regulation 27(5) and schedule 1 of the EEA Regulations and the Article 8 ECHR decision is sustainable.

Discussion and Analysis

Ground 1 - Unfairness.

17. The view of the permission judge was that this was not the strongest ground. Mr Walker's submission is that the judge did not make any record of the fact that the Presenting Officer had applied for an adjournment in the decision itself. However, he acknowledged that in the note prepared by the Presenting Officer attached to the grounds, the Presenting Officer commented that he was given a short period of time to read the bundle of the documents adduced by Mr Kamberaj on the morning of the hearing. He also acknowledged that the Presenting Officer's note did not state that

he had made a further application for an adjournment having been given time to consider the documentation.

18. I had regard to the Rule 24 response in respect of unfairness and agree with Mr Kamberaj that although there may be procedural unfairness if a judge fails to record that there has been an application for an adjournment and the reasons for the refusal, in this instance there does not appear to have been any prejudice or unfairness caused to the Secretary of State. This is because having applied for an adjournment the Secretary of State was given time to read the bundle and then did not make any further application for an adjournment asserting unfairness. I also note that it is good practice for a judge to record whether there are IT problems. In this appeal however, Mr Walker was not able to explain why those IT problems caused unfairness to the Secretary of State who appears to have been able to cross-examine the witnesses and put forward her legal submissions despite the connection ending prior to Mr Kamberaj's representative finishing his own submissions. In the absence of any particulars of what unfairness arose I am not satisfied that there was such procedural unfairness that it is appropriate to set the decision aside on that basis.

19. I turn to the remaining grounds.

Ground 2 – Misdirection in law in respect of the EEA Regulations.

20. Mr Walker's submission is that there was nothing in the determination to indicate that the judge had taken into account the interests of society given the seriousness of the offence. The crime attracted a sentence of seven years for importing a large value of cocaine across borders. In the grounds of appeal, it is asserted that the judge also failed to take into account Mr Kamberaj's immigration history in that he had no regard to Uk Immigration law by virtue of the fact that he had entered the United Kingdom twice in breach of his deportation order.

21. Mr Blackwood's submission is that although the decision is very brief and the judge does not set out all stages of his reasoning and despite the wording being rather loose in that at [9] the judge refers to "the respondent in dismissing the appeal" when the judge clearly meant to say the "respondent in refusing the application" and at [17] the judge referred to the "Tribunal" should have weighed the effect and impact of Section 55 when the judge clearly meant to say the "respondent or the Secretary of State", the reasoning is tolerably clear and it is possible to discern from the decision why the judge made the decision he did.

22. Mr Blackwood argued that Schedule 1(7)(5) was considered at [14], that the judge does in fact deal with Mr Kamberaj's immigration history at [2], [6] and [7]. The judge was clearly aware of the severity of Mr Kamberaj's offences and that he had re-entered the United Kingdom in breach of the deportation order. These factors were taken into account when assessing the risk and these factors were in his mind. The judge is not obliged to set out every step of his reasoning. The judge deals with the threat at [23]

and [24] of his witness statement and this is sufficient to show that the judge has made clear findings which are adequately reasoned. In respect of proportionality the judge took into account all of those factors in Schedule 1. It was open to the judge to conclude that the best interests of the children tipped the proportionality in favour of Mr Kamberaj.

23. In my view there is a more obvious flaw in respect of the EEA part of the appeal and that is the question of jurisdiction. It was incumbent on the judge to decide whether he had jurisdiction to consider the EEA grounds of appeal.

24. Mr Blackwood's position in respect of jurisdiction was that the judge agreed with the submissions made by Counsel at [15]. The issue of jurisdiction was not challenged by the Secretary of State in the grounds of appeal to the Upper Tribunal and is therefore irrelevant. Mr Walker had little to add on this point.

25. I am not in agreement with Mr Blackwood. The Tribunal either had jurisdiction to consider the EEA grounds or it did not. If the Tribunal went on to determine a ground of appeal which it had no jurisdiction to determine, it matters not that this error was not raised in the grounds of appeal to the Upper Tribunal. It is an obvious error that the Upper Tribunal must address.

26. The appeal had been certified which has the effect that there is no right of appeal against the EEA ground at all. The appropriate manner in which to challenge a certificate would be by way of judicial review. It was not for the judge to decide for himself that the certificate was irrational. The skeleton refers to <u>BXS,</u> however <u>BXS</u> related to a different factual scenario in that the appellant in that appeal had not been removed from the UK and had remained in the UK following his deportation order. Further <u>BXS</u> makes it clear that jurisdiction is limited to considering whether there would be a breach of Article 8 ECHR for an appellant to be required to leave the UK to pursue an appeal or application. <u>BXS</u> reiterated that the EEA Regulations are clear that an application for revocation of a deportation order must be made from outside the UK and the appeal against revocation can only be exercised from outside the UK.

27. In my view the judge has not dealt adequately with the issue of jurisdiction. This is the totality of what the judge had to say in the subject:

> "15. It was submitted by Mr Blackwood on behalf of the appellant that the revocation should be revoked and he referred me to paragraphs 28 to 37 of his skeleton argument. It was further submitted that there was authority to waive the requirements in relation to revocation and that in any event the reliance of the respondent on Regulation 34(4) was in doubt. I considered all of the evidence and submissions of both parties to the appeal and I make the following findings. I accept the arguments put forward by Mr Blackwood in relation to the revocation and I do not consider it appropriate in these circumstances for the revocation to stand. <u>I find that the fact the appellant was in the UK at</u>

> the time of the revocation to irrelevant (sic). The relationship which of the appellant and his wife were entered into and established before he committed the offence. The appellant has two young children and I note that the second child was born after the offences were committed. It was apparent that the appellant's personal circumstances have altered in relation to his family life. I note the impact that the decision would have on both of his children but in particular S who he seems to be particularly close to and it is (sic) a very sensitive and important time in his life where he needs the presence of his father. (My emphasis).

28. I do not understand what the judge meant by "the revocation should be revoked" or "there was authority to waive the requirements in respect of revocation" or "the reliance on the respondent on Regulation 34(4) was in doubt". When the judge finds "I do not consider it appropriate in these circumstances for the revocation to stand", I do not understand what the judge meant. This sentence is nonsensical. It may be that the judge meant that he did not find it appropriate for the deportation order to stand or that the deportation order should be revoked but that is not what the sentence says.

29. Although the judge did consider the EEA grounds of appeal because he refers to revocation, he does not make a explicit finding that he had jurisdiction or explain why he believed he had jurisdiction. It was manifestly irrational for the judge to find that the fact that the application for revocation was made outside the UK is irrelevant. It was clearly relevant to the issue of jurisdiction. This part of the decision is inadequately reasoned.

30. This error is clearly material to the judge's ultimate decision allowing the appeal "on all grounds" which encompassed the EEA grounds. I therefore set aside that part of the decision allowing the appeal on EEA grounds in its entirety.

31. It also has the effect that the Secretary of State's grounds of appeal to the Upper Tribunal in respect of the asserted errors in respect of the EEA Regulations fall away and I do not go onto consider them.

Article 8 ECHR

32. If the judge's findings on Article 8 ECHR are sustainable the error in relation to the EEA grounds is not material to the ultimate decision to allow the appeal "on all grounds".

33. Below are the totality of the judge's findings on Article 8 ECHR:

> 16. I found all the witnesses to be credible and consistent in the evidence which they provided. I find it significant the (sic) the appellant's family have obtained British citizenship in this country and this has been taken into account when considering the best interest of the children and their status as British citizens. I accept the submissions of the

appellant that the true position of the appellant's family has not properly been considered by the respondent and that they have upgraded their status from permanent residence to British citizens.

17. I do not consider that the decision is proportionate in that it does take into consideration all of the relevant factors such that of the children (sic) and whether it would be in the public interest for them to be deported. The Tribunal should have weighed the effect and impact of Section 55 the Borders, Citizenship Immigration Act 2009 and it has clearly not and the appeal must succeed".

34. I am in agreement with Mr Blackwood that the wording of this decision is very loose and that the judge has made several errors. There was a reference to the "Tribunal" weighing up the effect and impact of Section 55 when the judge presumably meant the Secretary of State.

35. There is also a contradiction between the judge stating that he does not find the decision to be proportionate and yet the decision "does take into account all of the relevant factors".

36. The judge's findings on proportionality appear to be based on the fact that the Secretary of State did not adequately consider the position of the appellant's family and that "the respondent has not considered the effect and impact of Section 55".

37. I agree with the Secretary of State that the judge has misdirected himself in law. I cannot determine from this paragraph which factors the judge took into account for himself in the Article 8 ECHR balancing exercise and whether the judge found that there were very compelling circumstances.

38. It is trite law that the Tribunal must give adequate reasons for their findings so that the losing party is able to understand why they have lost. I am well aware of those authorities which recommend judicial restraint before characterising as an error of law what is no more than a disagreement with the assessment of facts such as MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49 and Jones v First Tier Tribunal & Anor (Rev 1) [2013] UKSC 19. I am also aware that the trial judge would have regard to the whole sea of evidence presented to him.

39. Nevertheless, I am satisfied that in this appeal which concerned the proportionality of the removal of an individual sentenced to a seven years' custodial sentence for knowingly being concerned with the importation across borders of class A drugs with a street value of £195,337 who had entered the UK in breach of his deportation order on more than one occasion and who had remained in the UK unlawfully, that the reasoning on proportionality is not tolerably clear and is irrationally based on the Secretary of State's alleged failure to consider the family's circumstances. This error is compounded by the loose and ungrammatical wording.

40. There is also a failure to make clear and unambiguous findings.

41. I am satisfied that these errors are so fundamental that they are material to the outcome of the appeal on Article 8 ECHR grounds.

42. I am satisfied that the decision should be set aside in its entirety with no findings preserved. Indeed, I find that there are very few findings to be preserved.

Disposal

43. Both Mr Walker and Mr Blackwood were of the view that if I set aside the decision the appeal should be remitted to the First-tier Tribunal. I am in agreement because of the extent of fact finding needed and the fundamental nature of the error.

44. As I have decided to set aside the decision in its entirety, my view is that the issue of jurisdiction has not been settled and will need to be considered as a preliminary issue by the First- tier Tribunal when the appeal is re-heard.

Notice of Decision

45. The decision of the First-tier Tribunal involved the making of a decision of law.

46. The decision is set aside in its entirety with no findings preserved.

47. The decision is remitted to the First-tier Tribunal to be heard de novo by a judge other than First-tier Tribunal Judge Abebrese.

Anonymity

48. The judge made an anonymity direction confirming that no report of the proceedings was to directly or indirectly identify the appellant or any member of his family. I observe that the starting point for consideration of such a direction in this chamber of the Upper Tribunal as in all courts and Tribunals is open justice. The principle of open justice is fundamental to the common law. The rationale for this is to protect the rights of the parties and also to maintain public confidence in the administration of justice. Revelation of the identity of the parties is an important part of open justice. Mr Kamberaj’s civil trial was public and I find that there is no prejudice to him being identified in this appeal. I see no reason to denigrate from the principle of open justice in respect of him. I have not identified the children of the appellant nor the names of their school nor teacher with whom they are concerned which will protect their identity. I therefore set aside the anonymity direction of the judge.

Signed
Date: 07 July 2022

Upper Tribunal Judge Owens