In the Upper Tribunal (Immigration and Asylum Chamber)

R (on the application of Kasicky) v Secretary of State for the Home Department (Reg 29AA: interpretation) IJR [2016] UKUT 00107 (IAC)

Heard at Field House
on 14 October 2015

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

The Queen on the Application of
ROMAN KASICKY

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Mr D O'Callaghan, instructed by South West Law, appeared on behalf of the Applicant.

Mr Sternberg, instructed by the Government Legal Department, appeared on behalf of the Respondent.

1. *In reg 29AA(3) of the Immigration (European Economic Area) Regulations 2006, the word "appearance" refers to P's formal presence at his appeal.*

2. *In ascertaining whether the exception in reg 29AA applies, the possibility of managing risk by detention or conditions is a factor to be taken into account.*

JUDGMENT

1. The applicant is a national of Slovakia. He entered the United Kingdom as an Accession State Worker on 23 March 2006 and has since been working in the United Kingdom in the exercise of Treaty rights. Following a number of convictions, the Secretary of State issued a deportation order against him on 26 January 2015 and certified under reg 24AA of the Immigration (European Economic Area) Regulations 2006 that his removal would not be unlawful under s 6 of the Human Rights Act 1998, on the ground that there was no real risk of serious irreversible harm if he were to be removed pending full determination of any appeal he might bring.

2. The applicant challenged the certification by judicial review (JR/2505/2015). Patterson J refused permission. On 15 May 2015 the applicant was removed to Slovakia.

3. He has appealed to the First-tier Tribunal against the decision to deport him. The appeal was listed to be heard at the Newport hearing centre on 30 July 2015. On 3 July 2015 he applied under reg 29AA of the 2006 Regulations for permission to re-enter the United Kingdom to attend his hearing. The respondent refused the application on 17 July 2015. When the appeal hearing began there was (it appears) some surprise that the appellant was not present. When the judge was informed of the reason he adjourned the hearing in order to afford an opportunity for the applicant to attend. A further request under reg 29AA was made on 31 July 2015 and refused on 2 September 2015. A third request was made on 26 September 2015 and refused on 30 September 2015. By then the appeal had been relisted to be heard on 19 October 2015. The present proceedings, challenging the refusal or refusals under reg 29AA, were brought on 9 October 2015.

4. In view of the urgency of the matter I attempted to direct in advance that the application for permission be adjourned into Court as a "rolled-up" hearing. At the hearing before me it was apparent that the parties were unaware of that, but both counsel expressed their willingness to work to a tight timetable. Having heard oral submissions, I indicated the probable line of my decision, giving Mr Sternberg an opportunity to make further written submissions after considering the matter overnight. On consideration of those submissions I made on 15 October 2015 an order granting judicial review, quashing the decisions refusing the applications made under reg 29AA, and requiring the respondent to grant the applicant permission to be temporarily admitted in order to make submissions in person at the hearing of his appeal on 19 October 2015.

5. Regulation 29AA of the Immigration (European Economic Area) Regulations 2006 is as follows:

> "Temporary admission in order to submit case in person
> 29AA. – (1) This regulation applies where –
> (a) a person ("P") was removed from the United Kingdom pursuant to regulation 19(3)(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; and
(d) P wants to make submissions before the First Tie Tribunal or Upper Tribunal in person.

(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(a), as applied by this regulation) 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.

(4) When determining when P is entitled to be given permission, and the duration of P's temporary admission should permission be granted, the Secretary of State must have regard to the dates upon which P will be required to make submissions in person.

(5) Where –
(a) P is temporarily admitted to the United Kingdom pursuant to this regulation;
(b) a hearing of P's appeal has taken place; and
(c) the appeal is not finally determined,
P may be removed from the United Kingdom pending the remaining stages of the redress procedure (but P may apply to return to the United Kingdom to make submissions in person during the remaining stages of the redress procedure in accordance with this regulation).

(6) Where the Secretary of State grants P permission to be temporarily admitted to the United Kingdom under this regulation, upon such admission P is to be treated as if P were a person refused leave to enter under the 1971 Act for the purposes of paragraphs 8, 10, 10A, 11, 16 to 18 and 21 to 24 of Schedule 2(b) to the 1971 Act.

(7) Where Schedule 2 to the 1971 Act so applies, it has effect as if –
(a) the reference in paragraph 8(1) to leave to enter were a reference to admission to the United Kingdom under these Regulations; and
(b) the reference in paragraph 16(1) to detention pending a decision regarding leave to enter or remain in the United Kingdom were to detention pending submission of P's case in person in accordance with this regulation.

(8) P will be deemed not to have been admitted to the United Kingdom during any time during which P is temporarily admitted pursuant to this regulation."

6. The regulation implements art 31.4 of the Citizens Directive 2004/38/EC:

> "Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory."

7. I was not referred to any relevant authority on the meaning of any part of reg 29AA. I was, however, referred to the Secretary of State's guidance, in s 5 of the guidance on *Regulation 24AA Certification Guidance for European Economic Area Deportation Cases*, version 2.0 dated 20 October 2014. That guidance summarises reg 29AA and its effect. At para 5.3 it indicates the standard paragraphs to be inserted in a decision to make a deportation order, which indicate the person's ability to

make an application under the regulation. Amongst those paragraphs are the following:

> "Permission will not be granted if the Secretary of State considers that your presence would cause serious troubles to public policy or public security.
>
> You must apply for permission in advance of attempting to re-enter the UK or you will be refused admission at the UK Border.
>
> If permission is granted, it will be a temporary admission pursuant to Schedule 2 of the Immigration Act 1971. If you were deported under the Early Removal Scheme then you will be recalled to prison if you are admitted to the UK before the expiry of your sentence. In any other case you are liable to be held in immigration detention for the duration of your stay.
>
> You must leave the UK immediately after your appeal hearing or you will be enforcedly removed.
>
> In the case of any subsequent hearing at which you wish to submit your case in person, you must apply again for permission to re-enter.
>
> Any return to the United Kingdom is entirely at your own cost."

Paragraph 5.4 reads as follows:

> "Under regulation 29AA the Secretary of State must grant such permission, except where the person's re-admission for the purpose of appearing and making submissions at their appeal hearing may cause serious troubles to public policy or public security."

8. It is immediately apparent that the Secretary of State has a general duty to grant permission for these purposes, subject to an exception. It is also immediately apparent that the exception is expressed in three different ways in the materials to which I have made reference. The Directive, and the regulation itself, phrase the exception as "except when P's [in the Directive, "his/her"] appearance may cause serious troubles to public policy or public security". In the guidance, at para 5.4, the exception is phrased as "except where the person's re-admission for the purpose of appearing and making submissions at their appeal hearing may cause serious troubles to public policy or public security". In the letter to be sent to an affected person, the exception is expressed as "if the Secretary of State considers that your presence would cause serious troubles to public policy or public security".

9. The legal test must be that set out in the Regulations. If the guidance indicates a wider exception, it is wrong; and if the Secretary of State applies a wider exception her decision may be challengeable. The primary question must therefore be the true construction of the phrase "when P's appearance may cause serious troubles to public policy or public security". It is necessary to start with the meaning of the word "appearance". It might have, I think, three meanings. The first is, in general terms, his presence on the scene; the second is what he looks like; the third is the formal sense of attendance at Court to take part in the proceedings. The second meaning appears to me to be so unlikely to be the sole intended meaning that I

exclude it; although, for example, a person who had a racist slogan tattooed on his forehead might be a person whose appearance in either of the other senses might cause serious troubles. The general meaning of "presence on the scene" appears to be that adopted by the draftsman of the standard sentences to be included in decision letters. In my view that is unlikely to be the correct meaning of the word "appearance" in either reg 29AA or art 31(4). If that is the sense intended, it is extremely surprising that either the word "return" or the phrase "presence in the Member State" was not chosen, rather than a word which has a precise meaning in the very context of the matter being regulated.

10. Indeed in art 31.4, the phrase under discussion is the exception to the rule that the Member State "may not prevent the individual from submitting his/her defence in person" which in my judgement gives a clear indication that the word "appearance" is specifically directed to the process of making representations in person before a Court or Tribunal. I conclude that "appearance" in reg 29AA means appearance in the appeal process: it does not mean presence in the United Kingdom in any general sense.

11. I was not asked to look at the versions of the Citizens Directive in any other language. Such comparison as I have been able to make, however, does not suggest an interpretation different from that which I have already set out. In German the phrase is 'sein persönliches Erscheinen', in which the noun has much of the wide sense of the English 'appearance'. In French, however, it is 'sa comparution', which unambiguously refers to one's presentation before authority, in particular before a Court.

12. It has to be recognised, however, that a person entering the United Kingdom in order to attend a hearing is certain to be in the United Kingdom for a period of time longer than the hearing itself, and will have to travel from the point of entry to the hearing. It seems to me that the process of getting to and from the hearing, as well as the hearing itself, needs to be incorporated in the interpretation of reg 29AA as a matter of common sense. For this reason I think that the guidance, at para 5.4, is probably more or less accurate: but the standard paragraph set out in para 5.3 of the guidance expresses the exception much too widely.

13. I do not think that the phrase "serious troubles to public policy or public security" is capable of precise definition in the abstract, but clearly there is an echo of the "grounds of public policy, public security or public health" that under regs 19 and 21 permit an EEA national's exclusion or removal from the United Kingdom. It is, however, of some interest that the public health ground does not appear in art 31.4 or reg 29AA: I shall return to this in a moment.

14. One issue of considerable difficulty, which formed the basis of both oral submissions at the hearing and Mr Steinberg's subsequent written submissions, concerns the extent to which, in considering whether the person's appearance may cause serious troubles to public policy or public security, it is right to take into account the fact that any such troubles can be ameliorated by the Secretary of State's dealings with the person while he is in the United Kingdom. I have already

noted that, if he is a prisoner released on licence, his return to the United Kingdom will (according to the standard paragraphs) result in his return to custody. It does seem very difficult to say that a person who will spend his time in the United Kingdom in custody will pose any serious risk to public policy or public security. The next question is therefore whether, in considering whether a person who is not released on licence is to be allowed to return, consideration should be given to the fact that, under the general law and again by reference to the standard paragraphs, he can be detained under the Immigration Acts, or, if not detained, can be subject to reporting, residence and other conditions. In both these cases I do not think it can be right to say that the possibility (or moral certainty) of the person's being in detention wholly removes the risk of serious troubles to public policy or public security: if it did, it might be difficult to justify such a person's removal or exclusion from the United Kingdom in the first place by reference to grounds of public policy or public security. On the other hand, given the phrasing of art 31.4 and reg 29AA, and the clear presumption that a person is to be allowed into the United Kingdom subject only to the exception, in my judgment the means available for reducing any risk of serious troubles is a factor which must be taken into account in determining whether permission to re-enter is to be granted.

15. I notice that, although a person can be excluded from the United Kingdom on grounds related to public health, the continued existence of those grounds does not apparently prevent his claiming to be allowed to re-enter the United Kingdom in order to present his case. That is the effect of the omission of the health grounds from reg 29AA (and indeed art 31.4). That seems to me to point to the correctness of the view just expressed in relation to public policy and public security. The fact that a person whose state of health may pose a risk to the United Kingdom is nevertheless entitled to be remitted to argue an appeal, appears necessarily to suggest that his re-admission will need to be under such conditions as would prevent the eventuation of the risk he poses. Thus, the Secretary of State's powers of constraint must be part of the general context of decision-making under reg 29AA.

16. I summarise my interpretation of reg 29AA(3) as follows. There is a presumption of a person's re-admission to make submissions in person before a Tribunal hearing his appeal. The exception is when his appearance before the Tribunal, including necessary arrangements for getting him to and from the hearing may cause serious troubles to public policy or public security. In deciding whether the exception applies, the possibility of the person's detention, under the Immigration Acts or otherwise, does not of itself remove the risk of trouble, but is a factor to be taken into account.

17. I turn now to the actual decisions made in the present case. The first decision is that of 17 July 2015. It sets out the applicant's history, noting that in relation to violent offences, "the circumstances of these offences are unknown", but setting out two paragraphs of the judge's sentencing remarks in the most recent case. The letter adds the observations that the applicant has the potential to act violently whilst under the influence of alcohol and is capable of causing psychological and physical harm to others; and that he has been convicted of failing to comply with the requirements of suspended sentence and community orders. He is thus, it is said,

unlikely to comply with reporting restrictions. Further, there is no evidence that he has adequately addressed the reasons for his persistent violent offending, and that there is consequently reason to believe that there is a real risk of his reoffending. The final paragraph is as follows:

> "15. Accordingly it is considered that granting [the applicant] permission to temporarily re-enter the United Kingdom to attend the hearing may cause serious trouble to public policy or public security and so, pursuant to Regulation 29AA(3), permission is refused."

18. The second decision is that of 2 April 2015. I was not asked to consider it in detail: indeed the bundles do not appear to contain a complete copy of it. This decision apparently made reference to reasons for considering that the applicant presented a threat to anyone involved with managing his detention. The decision expressed as a decision to maintain the refusal to grant the applicant permission "to temporarily enter the United Kingdom to attend a hearing, on the ground that to do so may cause serious trouble to public policy or public security".

19. Following that decision there were representations on behalf of the applicant, dated 26 September 2015. Those representations were in part directed to suggesting that, at the previous hearing before the First-tier Tribunal, the Presenting Officer had said or done something that might now bind the Secretary of State to grant the applicant permission to re-enter. That position is not now maintained. But so far as concerns the question whether the applicant might pose a risk to those detaining him, the applicant's solicitors write as follows:

> "[The applicant] was detained in the UK when serving his sentence. We understand that he has always been classified as being a low risk of serious harm to staff and other prisoners".

The third decision, dated 30 September 2015, is a response to those submissions, and does indeed respond to the first point, but does not mention the second.

20. As I indicated at the hearing, I consider that each of these decisions is unlawful, for reasons which appear from the first part of this judgment. First, it appears to me that the decision-maker was not properly alive to the rule that the applicant was entitled to enter the United Kingdom for his hearing unless his appearance at that hearing (as distinct from general matters relating to his presence in the United Kingdom) would cause serious troubles to public policy or public security. It is to be noted that none of the decisions make any reference to difficulties that might arise at or in connection with the hearing itself. Secondly, none of the decisions takes properly into account the facilities available to the Secretary of State for managing and reducing any risk that she might fear. When it was specifically put to her that the evidence appeared to show that there would be no risk to staff managing the applicant's detention, the Secretary of State did not respond. Thus, in making her decisions, the Secretary of State failed to take into account two relevant factors. That is the reason for quashing the decision or decisions in question.

21. Given that the Secretary has had three discrete opportunities to establish that the exception to the principle of re-admission applied and had failed to do so, and given also the timescale, I considered that the right thing to do was to take the view that the exception did not apply. I therefore ordered that the Secretary of State grant permission under reg 29AA.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 15 January 2016