



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/07690/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 12th June 2017**

**Decision & Reasons Promulgated
On 16th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

**MR SEBASTIAN WOJCIECHOWSKI
(NO ANONYMITY DIRECTION MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No attendance

For the Respondent: Ms Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Mr Sebastian Wojciechowski date of birth 13 September 1977, is a citizen of Poland. Having considered all the circumstances, I do not consider it necessary to make an anonymity direction.
2. The appellant was not in attendance at the hearing. It appears that the appellant has been removed to Poland. The representative for the respondent indicated that there may have been judicial review proceedings to stay removal but such had been unsuccessful. It is unclear whether the appellant has sought to return to pursue his appeal. He has not instructed representatives. He did not have representatives in the First-tier Tribunal.
3. Having considered all the circumstances I decided to proceed with the hearing in the absence the appellant. I am satisfied taking account of the

Tribunal Procedure (Upper Tribunal) Rules 2008 that the appeal could be justly determined in the circumstances.

4. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Kaler promulgated on 26th October 2016, whereby the judge dismissed the Appellant's appeal against the decision of the Respondent to refuse him a residence card as a European Union citizen, who is exercising treaty rights in the UK.
5. By a decision of 4th April 2017 Upper Tribunal Judge William granted permission to appeal to the Upper Tribunal. The permission is granted in the following terms: -

The judge records that the decision of the respondent was made under 21B (2) of the regs. It is arguable that if there was a decision under 21B(2) the judge did make of finding as to whether there had been an abuse of rights.

6. The appellant's immigration history is as follows: -
 - a) The appellant having been in the United Kingdom on 13 March 2012 he was extradited to Poland. The reasons for his extradition are not set out within the letter of refusal.
 - b) On or about 1 April 2013 the appellant appears to have returned to the United Kingdom.
 - c) On 24 May 2016 the appellant was seen by Immigration Officers in Warrington city centre after attending at a police station. He was at that stage served with documentation indicating that as he was not exercising treaty rights he would be removed from the United Kingdom.
 - d) On 28 June 2016 the appellant was again encountered by Cheshire police. He was at that stage detained.
 - e) A decision was made to remove the appellant from the United Kingdom.
 - f) The appellant lodged an appeal against the decision taken to remove him from the United Kingdom
7. The decision by the respondent is under the Immigration (EEA) Regulations 2006 and is in the following terms:-

A decision has now been taken to remove you from the United Kingdom in accordance with Section 10 of the Immigration and Asylum Act 1999 (which applies by virtue of Regulations 19(3)(a)/19(3)(c) pursuant to regulation 21 B(2) and 24(2) of the EEA Regulations.

8. In accordance with the Regulations the power to remove an EU citizen is under Regulation 19. The criteria for making decisions based upon abuse of rights or fraud are set out within Regulation 21 B. Accordingly whilst the judge has identified that the decision to remove was taken under Regulation 21B, a close examination makes clear that the decision was in fact taken under Regulation 19.
9. The decision, as made, contains alternative basis for removal of the appellant, in that the appellant is either to be removed in accordance with Regulation 19(3)(a) or in accordance with Regulation 19(3)(c).

10. The relevant provisions of Regulation 19 (3) provide:

(3) Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if-

a) that person does not have or ceases to have a right to reside under these Regulations; or

...

c) the Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with regulation 21B (2).

11. Regulation 21B sets out the criteria which are relevant with regard to abuse of rights or fraud. Regulation 21B provides:-

Abuse of rights or fraud

21B- 1) The abuse of the right to reside includes-

a) engaging in conduct which appears to be intended to circumvent the requirements to be a qualified person.

b) attempting to enter the United Kingdom within 12 months of being removed pursuant to regulation 19(3)(a) , where the person attempting to do so is unable to provide evidence that, upon re-entry to the United Kingdom, the conditions for any right to reside, other than the initial right of residence under regulation 13, will be met;

c) entering, attempting to enter or assisting another person to enter or attempt to enter, a marriage or civil partnership of convenience; or

d) fraudulently obtaining or attempting to obtain, or assisting another to obtain or attempt to obtain, a right to reside.

(2) The Secretary of State may take an EEA decision on the grounds of abuse of rights where there are reasonable grounds to suspect the abuse of a right to reside and it is proportionate to do so.

12. In deciding the case the judge at the commencement of the decision has only cited that the decision by the respondent was taken pursuant to Regulation 21B(2). Clearly the basis of the removal is set out in Regulation 19.

13. On the facts before the judge the appellant was not working and had not worked during the time that he was in the United Kingdom. The appellant was otherwise sleeping rough in the street. He had certainly come to the attention of the authorities on more than one occasion for criminal offences. There is also reference in the papers to the fact that he had been produced before the Magistrates Court.

14. The issue with regard to abuses of rights relates to the appellant sleeping rough. It is clear that the appellant has no intention of working. The appellant had not been exercising treaty rights.

15. The evidence disclosed that the appellant was in receipt of Jobseekers allowance but that he was residing at a YMCA and his benefits were limited to 91 days. Given that the appellant had been in the United Kingdom for a number of years it is questionable whether or not he had already exceeded the period of not working permitted by the Regulations. He had not provided any evidence of working in the United Kingdom. His only means of support was state benefits.
16. Further to that there was evidence that the appellant had been sleeping rough on occasions, had been arrested for various offences relating to drink and had appeared before magistrates with regard to offences relating to drink.
17. The only grounds that the appellant had raised related to the fact that he feared friends in Poland who would lead him into bad ways. The appellant had not sought to seek protection in the United Kingdom and in any event Poland is a member of the European Union. The judge properly found that that would not amount to a fear of persecution or give right to protection in the United Kingdom.
18. There was no evidence that the appellant had formed any family life. No evidence had been given otherwise that the appellant had any material aspect of private life. In any event given the cases of TY EWCA Civ 2015 EWCA Civ 1233 and Amirteymour 2015 UKUT 466 the appellant had not made an application in respect of human rights.
19. The judge was satisfied on the facts that the conduct of the appellant was such as to constitute an abuse of rights. That was a finding fact the judge was entitled to come to the basis of the evidence. The evidence was clear the appellant had no intention of working and had not worked in time that he had been in the United Kingdom. In the circumstances the judge was entitled to come to the conclusion that the appellant was abusing the rights given under the Regulations and Directives.
20. In any event proceedings on the alternative basis under Regulation 19 (3) (a) the appellant clearly has ceased to have the right to reside. He has been in the United Kingdom for a number of years and has not worked. He is therefore not a qualified person and is not exercising treaty rights. Accordingly the judge would be entitled to dismiss this matter on the alternative basis had it been necessary to do so.
21. For the reasons set out I do not find that there is any error for in the decision of the First-tier Tribunal.

Notice of Decision

22. I dismiss the appeal by the Appellant.
23. I do not make an anonymity direction.

Signed

Date 15.6.2017

Deputy Upper Tribunal Judge McClure