



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00209/2017

THE IMMIGRATION ACTS

Heard at Field House
On 26 June 2018

Decision & Reasons Promulgated
On 10 July 2018

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR ZAKARIYA AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Gill QC, Counsel, instructed by Thompson & Co Solicitors
(Wimbledon)

For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who was born on 14 October 1996, is a national of Finland, who was originally from Somalia. Although the circumstances are not clear, it appears that his family sought protection in Finland, which is how they (including the appellant) acquired Finnish nationality. It is not disputed that the appellant is of Finnish nationality.
2. It is the appellant's case that he arrived in the UK in around 2006/2007 at the age of 6, and that he has been here ever since. Regrettably, from a very young age, the appellant started offending. On 20 January 2011 he was convicted at Thames Magistrates' Court of possessing a knife or sharp blade in a public place, and was given a six month

referral order. He would at that time have been 14. On 11 October 2012 he was convicted of possession of a class B drug and conditionally discharged. On 13 August 2013 he was convicted of possession of a class B drug and ordered to pay a £30 fine. He was also in breach of the conditional discharge which had been imposed the previous year. On 18 November 2013 the appellant pleaded guilty to possession of a class B drug (cannabis) and was given an absolute discharge. On 2 January 2014, he pleaded guilty to theft and was given another conditional discharge. Eight days later, at Snaresbrook Crown Court, the appellant pleaded guilty to attempted robbery and was sentenced to a youth rehabilitation order for twelve months with a supervision requirement. Then on 9 October 2015, at Portsmouth Crown Court, the appellant was convicted of supplying class A drugs, heroin and crack cocaine, for which he was sentenced to 42 months' detention in a young offender institution.

3. Following this conviction, having considered the requirements set out within the 2006 EEA Regulations (and in particular Regulations 19 and 21(5)), the respondent made a decision to deport the appellant.
4. The appellant appealed against this decision and his appeal was heard before First-tier Tribunal Judge S Taylor, sitting at Taylor House on 5 February 2018. In a Decision and Reasons promulgated some two weeks later, on 19 February 2018, Judge Taylor dismissed his appeal.
5. The appellant now appeals to this Tribunal.
6. Permission to bring this appeal was initially granted by First-tier Tribunal Judge Ford on 13 March 2018, but that appeal was limited to grounds 1 and 8 of the grounds; Judge Ford refused to grant leave on the remaining grounds. Following a renewed application to the Upper Tribunal, Upper Tribunal Judge King TD, noting that permission had already been granted on grounds 1 and 8, then found that ground 3 was arguable and that grounds 4 - 6 were linked. He extended time to renew the application. He did not grant permission on the remaining grounds (being grounds 2 and 7). His decision is silent with regard to these grounds.
7. Judge King also directed that the appellant was to submit a detailed skeleton argument, with a bundle of authorities in support of the amended grounds, by no later than 4pm on 26 April 2018 in time for the hearing which had been listed for 30 April 2018.
8. On 26 April 2018, the appellant's solicitors wrote to the Tribunal further to the direction that a skeleton argument was to be filed and lodged together with an authorities bundle by that day. They advised the Tribunal as follows:

"Unfortunately, Counsel has advised us that he has been engaged on other matters and therefore has been unable to file this today. Counsel advises that the skeleton argument and authorities bundle should be filed tomorrow".
9. The following day the appellants, through their solicitors, applied for an adjournment of the proceedings, and although they lodged a bundle of authorities, no skeleton argument was lodged. The application to adjourn the proceedings was granted.

10. The appeal was then listed for hearing before me on 26 June 2018, which was some two months after the date on which the appellant's solicitor had assured the Tribunal that a skeleton argument would be lodged, in accordance with Judge King's directions.
11. Before me, Mr Gill QC, appearing on behalf of the appellant, apologised for the failure to comply with Judge King's direction, which he said was the result of a "lack of coordination" although he did not specify any further details regarding this. He also said that having looked at the matter the previous day, he would rely on the grounds.
12. Mr Gill sought to rely on all the grounds, and when it was pointed out to him by the Tribunal that neither Judge Ford nor Judge King had granted permission to rely on grounds 2 and 7, he replied that he had understood that Judge King had given permission to rely on all the grounds, although he had not in fact seen that grant of permission himself. Having looked at the grounds, he attempted to maintain his argument that permission had been granted on all grounds, on the basis that one should look at this grant "holistically".
13. I do not consider that Mr Gill's submission is correct, but nonetheless, to the extent that this is necessary, I grant permission out of time to rely on such of the grounds as are necessary for the purposes of enabling me to deal with the two aspects of the appeal which, after argument, I consider to be material. For the reasons which follow, it is not necessary for me to consider any of the other grounds.
14. The first of these grounds is the challenge made with regard to the burden of proof. At paragraph 4 of his decision, Judge Taylor stated as follows:
 - "4. In this nature of appeal, the burden is on the appellant to demonstrate on the balance of probabilities that returning him to the Finland would cause the UK to be in breach of the Regulations and his protected human rights under the ECHR" [I have set out precisely the words used within the Decision].
15. Within the grounds, and in oral argument, it was the appellant's case that pursuant to the relevant Directive and the EEA Regulations 2006, the burden of showing that the deportation of an EU citizen from a host member state is justified and proportionate is on that member state, and not on the claimant. On behalf of the respondent, Ms Willocks-Briscoe did not challenge this proposition and she was right not to do so. The judge made an error of law in stating that in this regard the burden was on the applicant; as advanced before this Tribunal, the respondent's case was that this error was not material, because from looking at the judgment as a whole, the judge made his decision on the basis that the respondent had in effect come to a reasoned conclusion that the applicant "represented a genuine, present and sufficiently serious threat to the public to justify his deportation" because of his "propensity to re-offend" (see paragraph 10 of the decision).
16. The second ground which this Tribunal now considers material was the argument that there was procedural unfairness within the decision, because of the way in which the judge concluded that the applicant had not established that the person who claimed to be his father (in respect of whom he had submitted documentary evidence to the effect

that that person had been exercising treaty rights in the UK) was indeed his father. The respondent had not accepted that the appellant's father had been exercising treaty rights and noted that evidence with regard to the relationship had not been submitted until the appellant had put in his bundle for the purposes of this appeal, about a week before the hearing. In his witness statement, the appellant had accepted that his father had left the family home when he was aged 14 (although it should be noted that by that time the appellant had been living in that home, with him as part of his father's family, for in excess of five years). It is also the case that certainly since that time his father had had very little contact with him until very recently. The appellant's father had not attended the Tribunal, although it was the appellant's case that this was for medical reasons, and the appellant's representative was able to provide medical evidence from the appellant's father stating his reasons for non-attendance.

17. At paragraph 19 of his decision, setting out his findings, Judge Taylor, at the end of the paragraph, stated as follows:

"The appellant has submitted evidence of a person named Mohamed Ahmed working in the UK but has submitted no documentary evidence that this person is his father. Given the background and the lack of documentary evidence I cannot be satisfied that the person living in West London is indeed the appellant's father, and I cannot be satisfied that the appellant is a family member of his claimed father in accordance with the Regulations".

18. Attached to the grounds is a witness statement from Mr Andrew Jones, a trainee solicitor employed by the appellant's solicitors, who represented him at the hearing before the First-tier Tribunal. In that statement, Mr Jones states as follows, at paragraph 4:

"4. The findings of the Immigration Judge at paragraph 19, that the appellant was not the son of his father, Mohamed Ahmed Nur, are based on issues which were not live before the court. This point was never taken by the respondent in their refusal letter, cross-examination or oral submission. Further, it was not apparent to the representatives that this point would be taken by the judge, and if this were the case, the judge never sought to clarify this".

19. In order to establish the materiality of this procedural unfairness (if that is what it is) Mr Jones states that Mr Nur would have attended the hearing had he been able to do so and that medical evidence had been provided to state his reasons for non-attendance (at paragraph 5 of his witness statement). He states that: "I consider it to be procedurally unfair for this issue, as to whether Mr Nur was the father of the appellant, and which is taken as a fundamental point by the Immigration Judge to be only raised in the decision". He also states (at paragraph 6) that if he had known this issue was going to be raised, he would have applied to adjourn the hearing in order to obtain DNA evidence in this respect, but that he did not realise this was a live issue, because the respondent "had never disputed that Mr Nur is the appellant's father".
20. Having looked at all the material contained within the file, it certainly appears that the basis of the respondent's refusal to accept that the appellant has acquired a permanent

right of residence was not because the respondent did not accept who the appellant's father was, but rather was founded on the appellant's failure to provide sufficient evidence that he was part of a family where the father had been exercising treaty rights. Evidence was adduced at the hearing, and while it may have been open to the judge to conclude first that the evidence was insufficient to establish that Mr Nur has indeed been exercising treaty rights as claimed and/or secondly that Mr Nur was not in fact the appellant's father, if the latter point was to be taken, the appellant, and his representatives, ought to have been put on notice that this point might be taken. It does not appear from the papers that this specific issue was seriously challenged on behalf of the respondent.

21. In these circumstances I am obliged to find that, to this extent at least, there was a procedural irregularity, in that the appellant was not given a proper opportunity to make out his case.
22. On the appellant's case, he was a member of his father's household for around eight years, between the ages of 6 to 14, and during that time his father had been exercising treaty rights in the UK. If that is correct, then he would have acquired a right of permanent residence in the UK, which right would not have been lost by his father's subsequent desertion of his family and the family home.
23. Had the appellant acquired a right of permanent residence, the decision to deport "may not be taken in respect of a person with a permanent right of residence under Regulation 15 except on serious grounds of public policy or public security (see Regulation 21(3) of the 2006 Regulations, and now under Regulation 27(3) of the 2016 EEA Regulations, which in this regard are the same). As the judge properly understood, in any event, "the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" (by Regulation 21(5)(c) of the 2006 EEA Regulations, now re-enacted in Regulation 27(5)(c) of the 2016 EEA Regulations), but whatever the exact meaning to be given to the need to establish "serious grounds of public policy" in which the personal conduct of the potential deportee must represent a "sufficiently serious threat affecting one of the fundamental interests of society", it is clear that someone with a permanent right of residence has an enhanced right to remain. It is also clear that although the *Maslov* line of cases would be unlikely to assist a claimant who did not have a permanent right of residence (see in particular paragraph 59 of the European Court decision in *Vomero*), in the event that this appellant was found to have had a permanent right of residence, then the judge's failure to give sufficient reasoning to the *Maslov* line of cases (which is challenged in ground 8, which he was undoubtedly given permission to argue) becomes a relevant consideration.
24. In my judgment, Judge Taylor ought not to have made a finding that the appellant had not established that Mr Nur was his father (which was not specifically challenged by the respondent) without giving the appellant an opportunity of at least appreciating that this was now a live issue, which it is clear from Mr Jones' statement he did not appreciate. The error was material, because if the appellant (perhaps having applied for an adjournment on the basis that Mr Nur had not been well enough to attend the hearing) could have established that he had acquired a right of permanent residence,

then the deportation decision would have had to be considered through the prism of the respondent needing to establish “serious grounds of public policy”, which is a more difficult task; this is more so when coupled with the judge’s apparent belief (accepted rightly as incorrect on behalf of the respondent before this Tribunal) that the burden in this regard was on the appellant, which it was not.

25. It does not follow that had Judge Taylor accepted that the appellant had acquired a permanent right of residence, he would not have been able to conclude, on the basis of the material before him, that there were serious grounds of public policy justifying the deportation of this appellant; it might very well have still been open to the judge to find that the appellant represented a sufficiently serious threat to society’s right to be protected from someone who, if he continued to offend, could continue supplying class A drugs, as to outweigh the factors which weighed in his favour. The judge might have concluded that his family life in his country was very low and the public interest in his removal so high that even if the appellant had acquired a right of permanent residence, the deportation decision was still justified. However, that is not the decision which was made, and this Tribunal cannot find, on these facts, that the judge would have been bound to come to this conclusion. This is an issue which will have to be considered afresh.
26. Accordingly, there will have to be a fresh hearing, and in these circumstances, none of the findings can be retained. For this reason, it is not necessary for me to consider Mr Gill’s other submissions. As the appeal will now be reconsidered afresh, whoever represents the appellant at the fresh hearing before the First-tier Tribunal may make whatever submissions he or she considers appropriate. Accordingly, I make the following decision:

Decision

There having been a material error in the decision of First-tier Tribunal Judge S Taylor, that decision is set aside. The appeal will be remitted to be reheard by any judge, other than Judge S Taylor, sitting at Taylor House.

No anonymity direction is made.

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: 6 July 2018