Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/06047/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons promulgated**
On 6 March 2018	**On 20 March 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

I O G S
[ANONYMITY ORDER MADE]

Respondent

Representation:

For the appellant: Ms Z Ahmed, a Senior Home Office Presenting Officer
For the respondent: Mr D R F O'Dair, Counsel instructed by OTS Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against her refusal on 13 April 2016 to refuse to revoke a deportation order made on 3 October 2014, which he had already breached on several occasions. The claimant is a citizen of Romania and contended, *inter alia,* that he had been in the United Kingdom in accordance with the Regulations for sufficient time to entitle him to a permanent right of residence pursuant to Regulation 15 of the 2006 Regulations.

Application to attend the hearing

2. Immediately before the hearing, the claimant made an application to attend the hearing and give evidence. His application was made through his solicitors on 28 July 2017,

but refused by the Secretary of State on 3 August 2017. The application was erroneously based on the relevant provision of the 2006 Regulations but the Secretary of State correctly applied Regulation 41(1)(a) and Regulation 23(6)(b) of the revised Immigration (European Economic Area) Regulations 2016 (as amended), citing the claimant's multiple breaches of the deportation order made in 2014, and his criminal history.

3. The appeal hearing took place on 10 August 2017 in the claimant's absence. His second wife and his employer gave evidence and there was a witness statement from the claimant, from each of his wives, and from a work colleague.

Background

4. The claimant has a poor immigration history. He entered the United Kingdom in 2007 under the Accession provisions for Romanian workers, with his first wife, who was also a Romanian citizen. The couple had a child, a daughter, born in September 2008 who has always lived in the United Kingdom. In June 2010, he was cautioned for common assault. In 2011, the claimant divorced his first wife. In May 2012, the claimant is said to have met his second wife, while living in the United Kingdom. They began to live together in September 2013, and in May 2014, they decided to marry, opting to do so in Romania, rather than incur the expense of family members travelling to the United Kingdom for the ceremony.

5. On 27 May 2014, the claimant was convicted at Snaresbrook Crown Court on charges of unlawful wounding and threats to kill, and damage to property, all committed while he was intoxicated. The trial Judge's sentencing remarks recorded that on 7 September 2013, while under the influence of alcohol, the claimant had attacked two people:

> "Unfortunately, you then set about trying to injure and threatening to kill two people, one of whom was terrified and locked himself in a bathroom, he was so scared about what you might do to him. You ended up taking a knife and you stabbed, or attempted to, [name]. He blocked the blow and as a result received two injuries to his arm. 10 to 12 sutures to repair his arm as he blocked, thankfully from his point of view, the knife. …these are people you terrorised. You then gratuitously broke somebody else's windscreen."

The claimant was sentenced to 21 months' imprisonment.

6. On 3 October 2014, the Secretary of State made a deportation order pursuant to Regulations 19(3) and 21 of the 2006 Regulations and since that time, the claimant has had no lawful right to be in the United Kingdom.

7. The claimant was removed to Romania on 1 November 2014. He has committed no further offences of violence in the United Kingdom, but has repeatedly breached the deportation order by re-entering the United Kingdom unlawfully, and working without permission to do so, whenever he is here.

8. When he re-enters the United Kingdom in breach of his EEA deportation order, the claimant returns to live at the home he shares with his second wife, who is also a Romanian citizen. His second wife has an adult son, who was age 22 when his mother

remarried. The son lives in Romania with his maternal grandmother, has completed a University course and is now in employment there.

9. There is disagreement between the claimant and the Secretary of State as to how many times, and when, he was removed to Romania, but it seems clear that the claimant was removed initially in November 2014, then at least once in 2015, and three times in 2016, the last such removal being on 25 May 2016. On 16 March 2016, the claimant submitted an appeal against the deportation order to the First-tier Tribunal, which was rejected as out of time.

10. In their covering letter, the claimant told the Secretary of State that the claimant had only indirect contact with his daughter from his first marriage, due to an acrimonious break up, but that prior to his latest detention, he had been working to improve his relationship with his daughter and his first wife, with the help of his solicitors.

11. On 18 March 2016, the claimant applied to the Secretary of State to revoke the deportation order, stating through his lawyers that he had private life here; that he suffered from depression and was tearful whenever he spoke to his lawyers; that he had a subsisting relationship with his second wife and indirect contact with his daughter from his first marriage. On 13 April 2016, the Secretary of State refused to revoke the deportation order. It is that refusal which is the subject of the present appeal.

12. Following his detention in May 2016, the claimant was anxious to appeal against the Secretary of State's decision not to revoke the deportation order, which could be done only once he had left the United Kingdom: the claimant offered to pay his own ticket and return voluntarily but the Secretary of State insisted that he must be escorted. Removal was delayed for about 2 months because the escort was unwell. The claimant appealed promptly, once he was outside the United Kingdom and able to do so.

13. It seems that since the hearing in August 2017, the claimant has returned unlawfully to the United Kingdom and is again living with his second wife. On 18 February 2018, he was encountered at his matrimonial home, hiding in the garden shed. He was arrested and detained.

Refusal letter: 13 April 2016

14. On 13 April 2016, the Secretary of State refused the claimant's application to revoke the deportation order. She did not accept that the claimant was living in the United Kingdom in accordance with the Regulations; nor that he had ever done so for long enough to entitle him to a permanent right of residence. From November 2014, all of his residence was unlawful, because there was a deportation order in force.

15. The Secretary of State considered the principles set out in Regulation 21(5) of the 2006 Regulations, which were the applicable Regulations at that date. She noted that the claimant had lived in Romania until the age of 27, his youth and formative years. His mother still lived there. When he committed his 2013 offence, the claimant lived with

his first wife and child, but that the bond of affection between the claimant and his first family had not been sufficient to prevent him from offending.

16. The Secretary of State noted that there was no medical evidence of the claimant's alleged depression or about the treatment for depression in Romania and that there was no evidence beyond the solicitors' assertion, that the claimant had a continuing relationship with his child from his first marriage, albeit by indirect contact. The Secretary of State considered that there was no positive evidence that the claimant's first wife and his daughter were still in the United Kingdom.

17. The Secretary of State reminded herself of the sentencing remarks of the trial Judge. She took into account the previous caution for common assault, and considered that this suggested that the claimant's 2013 offence was part of a pattern of violence. There was no evidence to suggest that the claimant had addressed his offending behaviour by completing an Enhanced Thinking Skills or Victim Awareness Course. The Secretary of State considered that the claimant had a propensity to re-offend and constituted a genuine, present and sufficiently serious threat to the public to justify his maintaining his exclusion from the United Kingdom on public policy grounds.

18. The Secretary of State considered the claimant's Article 8 ECHR rights and his child's section 55 best interests, as well as his family life with his second wife. She was not satisfied that he had shown very compelling circumstances for which leave to enter or remain should be given outside the Rules. The refusal letter informed the claimant that he had an out of country right of appeal against the decision not to revoke his deportation order.

Appeal to First-tier Tribunal

19. The claimant was removed on 23 May 2016 and on 1 June 2016, he appealed against the decision not to revoke the 2014 deportation order. He said that he would wish to attend the hearing and give oral evidence. He asserted that the Secretary of State's decision violated his right to private and family life and was disproportionate. The grounds of appeal said that the claimant had 'suffered procedural unfairness as I was not advised [he does not say by whom] that I could appeal against the decision to deport me. I was advised that I should go and can just come back. So, I did not appeal against it'. The claimant added a one-line assertion that his human rights were in play, saying that he would elaborate in his witness statement.

20. The grounds of appeal asserted the claimant's permanent right of residence, arguing that the deportation order was disproportionate; that he did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society; and that there was a change of circumstances in that his daughter from his first marriage, a Romanian citizen born in the United Kingdom in September 2008, had been in the United Kingdom for 7 years, and the claimant had remarried to his second wife, a Romanian citizen exercising her Treaty rights here.

Witness evidence before the First-tier Tribunal

21. The claimant's witness statement dated 26 July 2017, which was not disputed at the hearing, was that he had always worked while in the United Kingdom, that the relationship between him and his first wife ran into difficulties and in 2011, they decided to divorce. He met his second wife at a party in May 2012, and married her in Romania in 2014. The claimant found the separation from his daughter and his wife very painful and was trying to get back to them, because he missed them and did not want his daughter or wife to suffer for the mistake he made in 2013, for which he had served his time. He had continued to pay money to his first wife for his daughter's maintenance.

22. The claimant had never applied for a permanent right of residence although he had been working continuously in the United Kingdom. Regarding the index event, the claimant expressed remorse. He had been caught in a drunken fight and been punished, but was not a violent person.

23. There was a statement dated 25 July 2017 from the claimant's first wife, confirming that her daughter loved her father and they used to spend a lot of time together, but had not done so for a time. However, the claimant was now putting a lot of effort to be present in her life, supporting his daughter financially, supporting her summer activities and spending quality time with her. His presence in the United Kingdom was important to his daughter's life and growth.

24. The claimant's second wife also provided a witness statement dated 21 July 2017, in which she said that they were in a very settled and happy married relationship, and that the day of their marriage had been one of the great days of her life. The wife was working at the Intercontinental Hotel and was almost at the point where she could apply for a permanent right of residence. The claimant had a daughter from his first marriage, whom he simply adored. He cared for her and had been contributing financially to her growth in the United Kingdom.

25. The second wife's understanding of the index event, which occurred before she met the claimant, was that, although he had been unable to prove it in Court, the claimant had been defending himself from three people involved in the fight. The claimant had been under the influence of alcohol. His second wife's evidence was that her husband was not a violent man: he was caring, loving and hard-working and his employer was supportive of his return.

26. A statement from a colleague at the claimant's employers said that they had been good friends since 2012 and worked together from 2013. The claimant was hard-working, kind, and always happy to help. He was married, and they all used to go out for dinners. The claimant his second wife and his daughter and could not live without them: when he was abroad, the colleague would speak to the claimant on the telephone or by skype. The claimant was devastated, sometimes crying over all of these problems and being far away from his family.

First-tier Tribunal hearing

27. There was a preliminary issue in the First-tier Tribunal as to whether the appeal should proceed in the absence of the claimant. The Home Office Presenting Officer was not prepared to undertake to allow him to enter the United Kingdom if the appeal was adjourned for that purpose. For the claimant, Mr O'Dair indicated that he would be prepared to proceed, in the claimant's absence, subject to reservations which he expressed following the decision in *R on the application of Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42.

28. The hearing proceeded in the claimant's absence. The claimant's employer told the Tribunal that the claimant had worked for him on the construction of frames to hold the concrete mix in the structure of new buildings. The work was hard and inherently dangerous; most of those in the employer's employment who did this work were Romanian. Those who constructed these frames were a tight knit group. The employer said that he was prepared to re-employ the claimant if he were available, and that he was in telephone contact with the claimant in Romania. They had last spoken during the week before the First-tier Tribunal hearing; they had not discussed whether the claimant had employment in Romania, just the forthcoming hearing.

29. The claimant's second wife gave evidence. She told the Tribunal that the claimant had elected to return to Romania during his prison sentence under the Early Removal Scheme, which the couple thought would enable the claimant to leave prison earlier and return to work in the United Kingdom while he appealed the deportation decision. She acknowledged that if she had to return to Romania with her husband, she would have the family support of her own mother and her son from her first marriage who live there. The claimant's offence had been committed when he was intoxicated: his second wife told the Tribunal that her experience of him was that he did not have a drink problem and she considered he had no need to address his offending behaviour. Her opinion was that he had committed only one offence and would not commit any more.

30. The second wife gave evidence about contact between the claimant and his daughter from his first marriage. She said that the first wife and the claimant's daughter lived in Hoxton, about 40 minutes by train away from where the claimant lived with his second wife. She and her husband would make the trip together for him to visit his daughter, every 2/3 weeks. The second wife usually was not directly involved, but she accompanied him, and she also said she spoke regularly to the child on FaceTime. The claimant's daughter was a very sensitive girl, a 'daddy's girl' who loved cuddles, always wanted to know when she could come and stay for the weekend, and for whom electronic contact would not be enough.

31. The second wife said that the claimant had been giving his first wife money on a 'cash in hand' basis to help support his daughter: more recently, it had been done by bank transfer and the second wife was able to produce evidence of those transfers from the claimant's bank account to that of his first wife, the earliest being 11 July 2016, following his escorted removal on 25 May 2016. There was no corroborative evidence

of payments before that from the first wife, other than the first wife's witness statement.

First-tier Tribunal decision

32. The First-tier Tribunal Judge considered that the Secretary of State's decision to refuse to permit the claimant to return to the United Kingdom and be detained, for the sole purpose of attending the hearing, was 'at the very least unfortunate'. It is clear from his decision that the description of the August 3 refusal decision as being refused 'on the technical ground that it had been made by way of reference to the wrong Regulation' originated with the Home Office Presenting Officer, not the claimant's representative.

33. The Judge found that the claimant was not entitled to a permanent right of residence as there was insufficient evidence to show 5 years' uninterrupted residence in accordance with the Regulations before his incarceration, and that after his release, he was not lawfully in the United Kingdom. That assessment is unarguably correct.

34. The Judge then considered risk and rehabilitation, taking account of the absence of the claimant, stating that he might have had more information on which to base his assessment if the claimant had been present and subjected to cross-examination. The claimant had wanted to come and give evidence: it was the Secretary of State's decision to refuse him permission. The Judge had regard to the evidence of the claimant's employer that he would re-employ him for a difficult and dangerous job whenever the claimant was available, and the evidence of his second wife that he was not a violent man and had no drink problem, and had committed no further offences since 2013. The absence of any formal rehabilitation training was neutral, weighing neither in his favour or to his detriment.

35. The Judge did not seek to go behind the conviction but he considered that if the claimant had anger or alcohol problems, he would not have been able to sustain his difficult and dangerous employment and that there was no evidence which satisfied the Judge that the claimant lacked anger management skills or had a propensity to reoffend.

36. The Judge considered the limited evidence on both sides, taking into account all relevant matters, and reached the conclusion that the appeal succeeded under the Regulations.

37. The First-tier Tribunal Judge considered in the alternative whether the claimant could succeed under Article 8 ECHR. The Secretary of State had not challenged the validity of the claimant's second marriage and there was evidence that the second wife was exercising Treaty rights here. The Judge accepted also that the claimant had a genuine and subsisting relationship with his daughter, maintained under considerable difficulties, since he had been in prison and/or removed to Romania intermittently during the 9 years the claimant's daughter had lived in the United Kingdom. She was a qualifying child, well established in primary school education and probably 2 years away from secondary transfer. The Judge acknowledged that it was difficult to apply the seven *Zoumbas* principles on such limited evidence (from both sides), including the

total absence of the claimant, but was persuaded that the impact of the claimant's exclusion from the United Kingdom for a substantial period would be unduly harsh for his child.

38. The First-tier Tribunal Judge had regard to the statutory presumptions in section 117A and 117B of the 2002 Act. were counterbalanced by other interests, especially those of the claimant's daughter. He noted that between 2008 when she was born and 2014, when the deportation order was made, the claimant had been lawfully in the United Kingdom and that his relationship with his child had been established during that period. The First-tier Tribunal Judge considered that the claimant's continued exclusion would breach his Article 8 ECHR private and family life, in particular with his daughter. He was satisfied, applying paragraph 117B(6) of the 2002 Act, that the relationship between the claimant and his daughter was genuine and subsisting, involving contact on a regular basis, and that it would not be reasonable to expect her to leave the United Kingdom and go with him to Romania.

39. The Judge allowed the claimant's appeal both under the 2006 Regulations and Article 8 ECHR. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

40. The matters raised in the Secretary of State's grounds of appeal were as follows:

    (a) **Ground 1.** The First-tier Tribunal materially erred in law in not giving adverse weight to the claimant's inability to provide the refusal of entry decision of 3 August 2017, accepting instead his assertion that his application for entry was refused 'because of a technical error in the application'. The Secretary of State attached the decision to her grounds and contended that if the Judge had insisted on seeing it, or been told what it contained, he would have concluded that her decision under Regulation 41(1)(a) of the Immigration (European Economic Area) Regulations 2016 (as amended) was lawful.

    (b) **Ground 2.** The First-tier Tribunal Judge did not direct himself properly as to the claimant's poor immigration history, including 4 removals from the United Kingdom following 3 unlawful re-entries after the deportation order had been executed

    (c) **Ground 3.** The First-tier Tribunal's approach to the evidence and burden of proof was erroneous in law, unlawfully reversing the burden of proof to the Secretary of State to explain the circumstances of the undisputed caution for common assault in 2010, which should have been treated as adverse personal conduct, absent any explanation from the claimant to the contrary.

    (d) **Ground 4.** The First-tier Tribunal failed to have regard to the alternative remedy available to the claimant in relation to the deportation order, to apply from outside the United Kingdom to set it aside. Absent that consideration, the Secretary of State contended that insufficient weight was given to the claimant's conduct since his first deportation in 2014, impermissibly reducing the

seriousness with which the Judge viewed the claimant's conduct in the United Kingdom.

(e) **Ground 5.** It was not open to the First-tier Tribunal to accept the employer's evidence that the claimant had no problems with alcohol or temper, when assessing whether the claimant remained a present risk. There was no medical or other expert evidence to suggest that the claimant would be unable to function as an employee with either or both of those problems. The claimant had carried out a very serious criminal act whilst intoxicated, and whether he was also an alcoholic was of limited relevance. In considering that he had not been shown to have anger issues at work, the Judge had taken into account immaterial matters. Nor was it open to the First-tier Tribunal to find that if this appeal were allowed, the claimant would be able to settle in the United Kingdom, absent a lawful application for the deportation order to be revoked, made from abroad.

41. Permission to appeal was granted by Upper Tribunal Judge Martin on the basis that the Secretary of State's grounds of appeal 'are lengthy and clear and I will not repeat them here. They raise arguable errors of law'.

Rule 24 Reply

42. There was no Rule 24 Reply on behalf of the claimant. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

43. Mr O'Dair for the claimant relied on his skeleton argument of 5 March 2018, arguing that it was a breach of the Secretary of State's duty as a public authority under section 6 of the Human Rights Act 1998 not to allow the claimant to come to the United Kingdom for the hearing. The claimant argued that the decision of the Supreme Court in *Kiarie and Byndloss* could not be confined to section 94B of the 2002 Act, that the principles applied to any out of country right of appeal, and that the alternative route of an application for re-admission followed by judicial review if that application were unsuccessful was not an answer to the *Kiarie* point. His human rights were engaged, and oral evidence as to the quality of his private and family life and his character would inevitably have assisted the First-tier Tribunal. There were no video facilities available to permit him to give evidence remotely.

44. The claimant should not be penalised for not having judicially reviewed the decision to refuse to allow him to attend his appeal hearing. The Secretary of State had it in her power to prevent the claimant appearing as a witness and in this case, the claimant was the party with the burden of proof. The First-tier Tribunal was able to draw adverse inferences against the Secretary of State and therefore permission for judicial review have been refused, if sought.

45. The claimant disputed the assertion that the error about the content of the refusal of admission came from him; the First-tier Tribunal decision at [16] recorded that the assertion came from the Home Office Presenting Officer at the hearing. The First-tier Tribunal Judge had been entitled to rely upon that representation, and the Secretary of

State could not be heard now to say to the contrary. As to the factual error made by the First-tier Tribunal as to the number of times the claimant had been removed, that was immaterial.

46. The First-tier Tribunal had been entitled to infer that the breaches the claimant committed by ignoring the deportation order were not such as to indicate that he was likely to commit any other offences. The First-tier Tribunal had rightly directed itself that the claimant's case should not be weakened by the Secretary of State's decision not to allow him to attend the hearing. The First-tier Tribunal decision should be upheld.

47. The First-tier Tribunal had directed itself correctly on the burden of proof, applying *Straszewski v Secretary of State for the Home Department* [2015] EWCA Civ 1245, [2016] I WLR 1173 at [12], in the judgment of Lord Justice Moore-Bick, with whom Lord Justice Davis and Lady Justice Sharp agreed, holding that, in EEA cases which prima facie would interfere with the exercise of such a person's Treaty rights, the primary burden of proof as to the legality of removal lay on the Secretary of State as the Member State making the removal decision. It was for the First-tier Tribunal to decide whether the Secretary of State had presented sufficient evidence such that, absent rebuttal by the claimant, the appeal would fail. A caution for common assault, without any evidence about the surrounding circumstances, was not sufficient to meet that test.

48. In oral argument, Mr O'Dair asserted that error of law which the Upper Tribunal identified would need to be material. The issue was always whether the claimant was a person who, as a matter of public policy, should be excluded from the jurisdiction. The decision to refuse entry stood or fell on an out of time challenge to the deportation order in 2014 and both parties had so treated it. Mr O'Dair relied, in particular, on ground 1 of his skeleton argument and contended that the First-tier Tribunal Judge had not erred in his approach to the substantive law. The decision might be surprising, but it had been open to the Judge, and the Secretary of State's challenge was to the judge's findings of fact, not law.

49. The question for the Upper Tribunal was whether the First-tier Tribunal had been entitled, as a matter of law, to take account of the claimant's absence from the hearing as a matter in his favour. The Judge had dealt carefully and correctly with Part VA of the 2002 Act. The claimant's application to come to the United Kingdom raised human rights issues and therefore engaged the *Kiarie* principle. The Home Office Presenting Officer, Ms Mackenzie, had explained to the Judge what the reason was for refusal. The Judge had not seen the August 3 decision at the hearing as neither party had provided a copy.

50. For the Secretary of State, Ms Ahmed relied on the Secretary of State's grounds for review. The First-tier Tribunal had looked at this appeal through completely the wrong prism. The appeal should be allowed and the decision remade.

51. I reserved my decision, which I now give.

Discussion

52. I have been provided with a copy of the 3 August 2017 decision by the Secretary of State's to refuse leave to enter for the hearing. It says this:

> "I am writing in reply to your communication of 2 August 2017 requesting in permission for your client to re-enter the United Kingdom in order to make submissions in person at the hearing of his appeal on 10 August 2017 in accordance with Regulation 41(1)(a) of the Immigration (European Economic Area) Regulations 2016. Regulation 41(1)(a) of the EEA Regulations 2016 explains that the provision for re-admission to attend an appeal hearing in person under regulation 41 applies where a person "is subject to a decision to remove made under regulation 23(6)(b)".
> Regulation 23(6)(b) provides for the removal of a person "who has entered the United Kingdom" where "the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27". …
> As the appeal under regulation 27(1)(d) against refusal of admission under regulation 19(1A) is exercisable only from outside the UK, and does not pertain to a decision to remove your client either under regulation 23(6)(b) of the EEA Regulations 2016 or under regulation 19(3)(b) of the EEA Regulations 2006, the provisions of regulation 41 (and the previous, similar provisions of regulation 29AA) do not apply."

53. So far as relevant to this appeal, Regulation 23(6)(b) of the 2016 Regulations provides as follows:

> "23(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom …may be removed if – (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with Regulation 27. …
>
> (8) A decision under paragraph 6(b) must state that upon execution of any deportation order arising from that decision, the person against whom the order was made is prohibited from entering the United Kingdom – (a) until the order is revoked; …
> (9) A decision taken under paragraph 6(b) or (c) has the effect of terminating any right to reside otherwise enjoyed by the individual concerned. "

54. Regulation 41 provides for temporary admission to submit a case in person in the following circumstances:

> "**Temporary admission to submit case in person**
>
> **41.**—(1) This regulation applies where—
> (a) a person ("P") is subject to a decision to remove made under regulation 23(6)(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;
> (d) P wants to make submissions before the First-tier Tribunal or Upper Tribunal in person; and
> (e) P is outside the United Kingdom.

(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, 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."

55. The right to enter and be heard in an appeal in the 2016 Regulations derives from Article 31 of Directive 2004/58/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States:

"**Article 31: Procedural safeguards**

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health. …

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. 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."

56. The claimant in this appeal at all material times was subject to a decision to remove him from the United Kingdom on public security grounds (the 2014 deportation order, and a number of subsequent decisions to remove him). The Secretary of State's refusal decision on 3 August 2017 does not engage with the question whether the claimant would cause 'serious troubles to…public security' during the proposed period of entry for the August 2017 hearing. Nor did she apply her mind to the 14 June 2017 Supreme Court decision in *Kiarie and Byndloss*, as set out in the opinion of Lord Wilson JSC, with whom Lady Hale PSC, Lord Hodge JSC and Lord Toulson JSC at [61]-[63]:

"61. The next question is whether, if he is to stand any worthwhile chance of winning his appeal, an appellant needs to give oral evidence to the tribunal and to respond to whatever is there said on behalf of the Home Secretary and by the tribunal itself. By definition, he has a bad criminal record. One of his contentions will surely have to be that he is a reformed character. To that contention the tribunal will bring a healthy scepticism to bear. He needs to surmount it. I have grave doubts as to whether he can ordinarily do so without giving oral evidence to the tribunal. In a witness statement he may or may not be able to express to best advantage his resolution to forsake his criminal past. In any event, however, I cannot imagine that, on its own, the statement will generally cut much ice with the tribunal. Apart from the assistance that it might gain from expert evidence on that point (see para 74 below), the tribunal will want to hear how he explains himself orally and, in particular, will want to assess whether he can survive cross-examination in relation to it. Another strand of his case is likely to be

> the quality of his relationship with others living in the UK, in particular with any child, partner or other family member. The Home Secretary contends that, at least in this respect, it is the evidence of the adult family members which will most assist the tribunal. But I am unpersuaded that the tribunal will usually be able properly to conduct the assessment without oral evidence from the appellant whose relationships are under scrutiny; and the evidence of the adult family members may either leave gaps which he would need to fill or betray perceived errors which he would seek to correct.
>
> 62. …It is also worthwhile to note that, even if an EEA national was removed from the UK in advance of his appeal, he had, save in exceptional circumstances, a right under regulation 29AA of the 2006 Regulations (reflective of article 31(4) of Directive 2004/58/EC) to require the Home Secretary to enable him to return temporarily to the UK in order to give evidence in person to the tribunal.
>
> 63. The Home Secretary submits to this court that the fairness of the hearing of an appeal against deportation brought by a foreign criminal is highly unlikely to turn on the ability of the appellant to give oral evidence; and that therefore the determination of the issues raised in such an appeal is likely to require his live evidence only exceptionally. No doubt this submission reflects much of the thinking which led the Home Secretary to propose the insertion of section 94B into the 2002 Act. I am, however, driven to conclude that the submission is unsound and that the suggested unlikelihood runs in the opposite direction, namely that in many cases an arguable appeal against deportation is unlikely to be effective unless there is a facility for the appellant to give live evidence to the tribunal."

57. Although that analysis is *obiter dicta* in the context of the Supreme Court's decision, it reminds me that the right to enter and give evidence is to be abrogated only in exceptional circumstances. It is hard to see what those circumstances were here, save for the claimant's repeated attempts to return to the United Kingdom. He has served his time and committed no further offences now for almost 5 years. His circumstances have changed, in that he is happily remarried and supported in his application by both his first and second wife, and contact has been re-established with his daughter, as well as better relations with his first wife.

58. I turn, therefore, to the Secretary of State's grounds. Ground 1, which concerns the absence and the misdescription of the August 3 decision not to admit the claimant to give evidence at his hearing, is unarguable. The First-tier Tribunal records that it was the Home Office Presenting Officer who so described it. The document in question was available to the Secretary of State at all material times and she cannot be heard to say that having failed correctly to describe it at the hearing, that is a material error of law in the First-tier Tribunal's decision.

59. As to ground 2, it is right that the Judge directed himself that the claimant returned unlawfully twice, when in fact he did so on four occasions. Nothing turns on that; the point which the Secretary of State makes is that the claimant disregarded the deportation order, which is not in dispute. The claimant has provided reasons for so doing. The Judge gave weight to the gravity of that disregard, but also to the explanation advanced. There is no material error of law in his approach.

60. Ground 3, regarding the common assault conviction, also is not material to the outcome of the appeal. As regards ground 4, there is no merit in it and to a large extent, it duplicates the earlier grounds. The Judge gave proper, intelligible and adequate reasons for his findings as to whether there was a genuine, present and serious risk arising from the claimant's temper or drink problem, if he had one. The Judge was entitled to find that if the Secretary of State had permitted the claimant to attend the hearing, and cross-examined him, the position might have been different, but that was her decision and she cannot be heard to complain of it.

61. For all of the above reasons, there is no material error of law in the decision of the First-tier Tribunal and I uphold it.

DECISION

62. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of no error on a point of law.
I do not set aside the decision but order that it shall stand.

Date: 16 March 2018 Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson