Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17690/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given immediately following hearing	
On 12 September 2018	**On 5 December 2018**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANDRIUS [K]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr I Jarvis, Home Office Presenting Officer
For the Respondent: Mr R Singer, Counsel instructed by Kothala & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Cockrill. For ease of convenience I shall throughout this decision refer to Mr [K], who was the original appellant as "the claimant"

and to the Secretary of State, who was the original respondent, as "the Secretary of State".

2. The claimant is a national of Lithuania who was born in March 1971. He arrived in this country in or about 2014. Although the Secretary of State did not appreciate this at the time he entered, he had only recently been released from a long sentence of imprisonment which had been imposed in Lithuania in 2005 for murder. He was released on 1 April 2014. The decision of the court in Lithuania is contained within the file and was also before the First-tier Tribunal when that Tribunal considered this issue.

3. When the Secretary of State appreciated that the claimant had been convicted of murder she (as the Secretary of State then was) made a decision to deport him. The decision was not appealed and although it was not served personally at that time because the Secretary of State did not know where the claimant was, it was subsequently served on him in 2015 when the Secretary of State became aware that he was about to travel to Lithuania.

4. The Secretary of State certified under Regulation 24AA of the 2006 Immigration (European Economic Area) Regulations (which were then in force, subsequently having been replaced by the 2016 Regulations) that the appeals process not having been begun or not having been finally determined the claimant's removal would not be unlawful under Section 6 of the Human Rights Act 1998. The effect of this certification which can only be made when the Secretary of State considers that a person would not face a real risk of serious irreversible harm if removed to the country to which he is proposed to be removed, notwithstanding that the appeal process has not yet begun and/or been exhausted, is that the claimant was to be removed prior to the hearing of any appeal he might chose to bring. In cases where certification is made under Regulation 24AA (or its successor under the 2016 Regulations) there is also provision under Regulation 29AA for notice to be given by an applicant so that he can be permitted to come back for this appeal. However, in this case the claimant did not appeal against the decision.

5. While in the UK the claimant had begun a relationship with a Ms [P], and they had commenced living together in September 2014. Ms [P] has two children and there does not appear to have been any particular problem within the relationship.

6. Having been removed, the claimant made two attempts to come back, even though his return was unlawful. On the first occasion he came over on Eurostar but was stopped and sent back again. On the second occasion he successfully came in and was not discovered until a later stage when he was again removed.

7. Having not appealed against the original deportation decision the claimant subsequently made an application to revoke the deportation order which had been made but that application was refused by the Secretary of State.

It is in respect of this refusal that he appealed to the First-tier Tribunal and it is that appeal which was considered by First-tier Tribunal Judge Cockrill sitting at Hendon Magistrates' Court on 14 June 2018.

8. In a Decision and Reasons promulgated shortly thereafter, on 3 July 2018, Judge Cockrill allowed the claimant's appeal.

9. The Secretary of State now appeals to this Tribunal against that decision with leave granted by First-tier Tribunal Judge Andrew on 23 July 2018.

10. It is not necessary for the purposes of this decision to do more than summarise the grounds. As explained to this Tribunal by Mr Jarvis acting on behalf of the Secretary of State the first ground is that the judge failed to apply binding European and domestic law, in particular the decision of the Grand Chamber in *Bouchereau*, (EU:C:1977: at 172, and in particular at paragraph 29) and also the recent decision of the Court of Appeal in *Robinson (Jamaica)* [2018] EWCA Civ 85, in particular at paragraph 84. The decision of *Bouchereau* was affirmed and applied in the very recent case, also in the Grand Chamber, of *K* [2018] EUECJ C-331/16.

11. It is common ground that in order to justify deportation of an EU national who does not have a permanent right of residence in this country (and it is not suggested that this claimant does) the Secretary of State has to show that the deportation is justified on the basis that "the personal conduct of [the claimant] must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". The respondent, through Mr Jarvis, refers in particular to what is set out at paragraph 43 of Judge Cockrill's decision, as follows:

> "43. The point made by [the claimant's Counsel], in my judgment, is entirely sound. The Appellant, as matters stand, simply does not represent a threat, let alone a serious threat, affecting one of the fundamental interests of society. All that the Respondent can rely upon is the bare fact that the Appellant committed this act of murder and was convicted and sentenced for that offence in Lithuania. It should be recalled, of course, that previous convictions do not, in themselves, justify the decision. As has been highlighted this is precisely what the Respondent has done in this case. She made the decision before really carrying out any full and proper assessment of the Appellant and his family's situation. He had not done anything in this country of any adverse nature that would possibly justify this decision to deport him".

12. This follows on from what had been said at paragraph 36 where the judge had stated that:

> "There is no suggestion whatsoever that the Appellant had any other convictions at all in Lithuania and it is striking that the Appellant has had absolutely no criminal convictions in the United Kingdom".

13. Also, at paragraph 39, the judge stated that:

> "The Respondent made this Deportation Order against the Appellant not as a result of anything which the Appellant had done in the United Kingdom, but simply upon the basis that it was identified that he had been convicted and sentenced for the grave offence of murder".

14. The point which Mr Jarvis made is that this overlooks what was stated within *Bouchereau*, as affirmed in *K* which is summarised within paragraph 56 of *K*:

> "Moreover, while, in general, the finding of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, within the meaning of the second subparagraph of Article 27(2) of Directive 2004/38, implies the existence in the individual concerned of a propensity to repeat the conduct constituting such a threat in the future, it is also possible that past conduct alone may constitute such a threat to the requirements of public policy (judgment of 27 October 1977, *Bouchereau*, 30/77, EU:C:1977:172, paragraph 29)".

15. Then at paragraph 58 of *K*, the court went on to state as follows:

> "However, the possible exceptional gravity of the acts in question may be such as to require, even after a relatively long period of time, that the genuine, present and sufficiently serious threat affecting one of the fundamental interests of society be classified as persistent".

16. Then, at paragraph 60 the court went on as follows:

> "60. In that regard, it must be observed that, however improbable it may appear that such crimes or acts may recur outside their specific historical and social context, conduct of the individual concerned that shows the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, such as human dignity and human rights, as revealed by those crimes or those acts, is, for its part, capable of constituting a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, within the meaning of the first sentence of the second subparagraph of Article 27(2) of Directive 2004/38".

17. The Secretary of State also relies upon the decision of the Court of Appeal in *Robinson (Jamaica)* [2018] EWCA Civ 85, where at paragraph 84, Singh LJ stated as follows:

> "Although the CJEU did not expressly refer to *Bouchereau* with approval in *CS*, nor did it in terms overrule it or depart from it. Further, there is no reason, in my view, to regard the two decisions as being necessarily inconsistent with each other. This is because, as I have said in my earlier analysis of *Bouchereau*, that case itself recognised that what one is looking for is a present threat to the requirements of public policy; but it also recognised that, in an extreme case, that threat might be evidenced by past conduct which has caused deep public revulsion".

18. The second main submission made on behalf of the respondent was that when considering the claimant's conduct, the judge had failed to have

regard, or at any rate, adequate regard to the claimant's persistent breach of the order which had been made removing him from the country. Although the judge does make one reference to the return of the claimant to this country in breach of the order, he does not refer to the previous attempt and therefore to the fact that this was a repeated breach of the Rule as Mr Singer was obliged to accept in argument before the Tribunal. The way in which Mr Jarvis says this is relevant is that it shows that not only was this claimant someone who has shown that he is capable of committing such a serious offence as to show in the terms suggested in previous authority that he is hostile to the fundamental values enshrined in the European law such as human dignity and human rights, but that he remained someone who is prepared to flout orders which have been made.

19. On behalf of the claimant Mr Singer, both in his very concise and persuasive Rule 24 response and also in oral argument, sought to argue that the judge had in fact considered all the matters he ought to have done. However, the difficulty with this submission is that the judge did not only make no reference to the authorities to which I have referred above, but there is another fundamental error which is contained in what I have already quoted from paragraph 36 of his decision where he said that there was "no suggestion whatsoever that the Appellant had any other convictions at all in Lithuania and it is striking that the Appellant has had absolutely no criminal convictions in the United Kingdom".

20. Regarding the second part of this sentence first, it is hard to see what real weight can be given to the fact that somebody who does not arrive in this country until late 2014 and is served with a deportation decision in 2015 and thereafter comes back twice knowing he has no right to return, has not been convicted of anything else within that very brief period of time. But there is one further very serious problem with this statement which is that it is clear from the judgment of the Lithuanian court, which was before the judge, that the judge was simply wrong when he stated that the claimant did not have any other convictions at all. The judgment of the Lithuanian court sets out that in 1998 (when the claimant would have been 17) he received a suspended sentence of imprisonment of one year six months and that subsequently within the period of suspension in 1990 he received a further sentence of two years' imprisonment for another offence, which sentence was consolidated with the earlier sentence "using partially cumulative sentence method" so that "the final sentence of imprisonment of three years was imposed". The claimant was released from imprisonment in November 1992.

21. Although it is not stated within the judgment what that sentence was for, it could not have been a minor matter because he would not have received a sentence of imprisonment totalling three years if it had been, and clearly this is a relevant matter which the judge was obliged to take into account before considering whether or not the claimant could be said to represent a serious threat to one of the fundamental interests of society. His failure to do so was an error of law.

22. Mr Jarvis did not seek to persuade the court that it would be appropriate now for this Tribunal simply to remake the decision by dismissing the claimant's appeal, (and indeed accepted that it would not), but he did submit that the errors were sufficiently serious that it could not be said that they were not material.

23. In my judgement, Mr Jarvis is undoubtedly correct when he submits that the errors were material, because all the factors to which he had regard are relevant factors.

24. On behalf of the claimant, Mr Singer submitted that were I to find that there was a material error of law it would follow that none of the findings could stand and that there would have to be a de novo hearing and in these circumstances, having in mind the relevant Practice Direction and also that if the decision was to be re-made in the Upper Tribunal the claimant would be deprived possibly of one layer of appeal, it would be appropriate for the case to be remitted for rehearing before the First-tier Tribunal. On behalf of the respondent Mr Jarvis did not seek to persuade the Tribunal that the appeal should remain in the Upper Tribunal.

25. Accordingly, I agree that the appropriate course will be to remit the appeal now to the First-tier Tribunal for rehearing by a new judge other than Judge Cockrill, and my decision is as follows:

Decision

The decision of First-tier Tribunal Judge Cockrill, allowing the claimant's appeal against the Secretary of State's decision refusing to revoke the deportation order which had been made, is set aside and the appeal will be remitted to the First-tier Tribunal, sitting at Taylor House, for rehearing de novo (with no findings retained) before any judge other than First-tier Tribunal Judge Cockrill.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Dated: 28 November