**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00259/2017

**THE IMMIGRATION ACTS**

| **Heard at Bradford** | **Decision & Reasons Promulgated** |
|---|---|
| **On 12 March 2019** | **On 15 March 2019** |

**Before**

**UPPER TRIBUNAL JUDGE LANE**

**Between**

**MAGOMEDS HIZRIJEVS**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Karnik, instructed by Turpin & Miller, solicitors
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant was born on 28 October 1993 and is a citizen of Latvia. The Secretary of State decided to deport the appellant to Latvia by decision dated 30 March 2017. The First-tier Tribunal, in a decision promulgated on 2 January 2018, dismissed the appellant's appeal against that decision. The appellant now appeals, with permission, to the Upper Tribunal.

2. The First-tier Tribunal (Judge Saffer) found that the appellant had been living in the United Kingdom for more than five years and had acquired a permanent right of residence [16]. The judge found that the appellant is a

persistent offender (shop-lifting/driving offences) and that there were no obstacles to his returning to live in Latvia, the country of which he is citizen, where he can speak the language work and 'fend for himself.' The judge acknowledged that the appellant has a partner living in the United Kingdom who is a Latvian citizen and that the couple have a child who was born in November 2016. The judge considered the child's best interests (section 55 of the Borders, Citizenship and Immigration Act 2009) and Article 8 ECHR [22] but concluded that the decision to deport the appellant was in accordance with the Immigration (European Economic Area) Regulations 2016 and proportionate.

**The decision of the judge to proceed in the appellant's absence**

3. Notice of the hearing before the First-tier Tribunal was served on the appellant of his last known address in Barnsley by first class post on 13 November 2018. The hearing was fixed for 10 December 2018. The appellant had previously been represented by solicitors but the Tribunal considered that they had removed themselves from the record and accordingly a copy of the notice of hearing was not served on the solicitors. The judge waited until 11:30 am when a call was put out for the appellant but he did not attend court. The judge's decision records that he was satisfied that the notice of hearing had been effective and that it would not be unfair for the Tribunal to hear the appeal in the absence of the appellant who, the judge recorded, 'has a history of not attending where he is required to attend.' The judge also recorded that he had a 'detailed and substantial bundle of evidence filed on [the appellant's] behalf dealing with the issues.'

4. The appellant submits that the decision to proceed in his absence was unfair. The appellant had attended a number of hearings between 2017 – 2018 in Birmingham and Bradford so the judge's characterisation of him as a non-attender was not accurate. Matters having a serious impact on the appellant's life and those of his partner and child were raised in the appeal and which required the appellant's attendance.

5. I note that there was a hearing at Bradford on 8 November 2018. Judge Kelly recorded that the appellant, summoned to attend at 10 am, had eventually reached court 12:50 pm by which time the court interpreter had been released. Turpin & Miller, the appellant's former solicitors, faxed the court on 8 November 2018 and stated that, '[the appellant] informs us that the judge is today prepared to adjourn the appeal if the appellant can confirm that we can represent him at any adjourned hearing.' The letter went on to say, 'we can confirm that we are ready to represent [the appellant] on condition that: (i) [the appellant] maintains contact with us to enable us to prepare properly for a future hearing (ii) [the appellant] provides sufficient information for us to obtain legal aid funding to represent him.' The solicitors asked for a minimum of 25 working days to complete a legal aid application. Judge Kelly adjourned the hearing to the first available date after 25 days. There is a note endorsed on the court file (which I showed both representatives) which indicates that the Tribunal

took the view at the time of the service of the notice of hearing on 13 November 2018 that the solicitors were not acting for the appellant. No notice was therefore sent to Turpin & Miller.

6. I find that the Tribunal did not err in law by proceeding with the hearing in the absence of the appellant. First, I do not consider the letter from Turpin & Miller to constitute an unequivocal direction to the tribunal that they should be placed on the record as acting for the appellant. I note that there has been no subsequent correspondence from the solicitors notifying the tribunal that their conditions for acting for the appellant had actually been met. Without such notification, I consider that the Tribunal acted properly by serving notice of hearing on the appellant only. Secondly, the appellant himself was validly served in accordance with the procedure regulations with the notice of hearing. I am told by his counsel that the appellant changed address before the service of the hearing notice for 10 December 2018. However, the appellant did not notify the Tribunal of that change and, even if he notified the solicitors, such notification was ineffective because they were not on the record as acting for him at the relevant time. Irrespective of whether the appellant had a solicitor acting for him, he himself was obliged to notify his correct address to the Tribunal and to attend the hearing. The judge was entitled to conclude, having read the court file which showed that the notice had been posted to the appellant's last known address on 30 November 2018, that service had been properly effected. I find that the judge was also entitled to have regard to the fact that the appellant had not attended other court hearings and had attended late on the last occasion before Judge Kelly. Moreover, the fact that the appellant had previously instructed solicitors and that a bundle of relevant documents on his behalf had been prepared and filed supported the judge's decision to proceed.

**The respondent's amendment to the basis of the deportation decision.**

7. Mr Karnik, who appeared for the appellant before the Upper Tribunal, submitted that the basis of the Secretary of State's decision to remove the appellant had altered between the date of the deportation decision and hearing before the judge. At [37], the decision letter records that the Secretary of State took the view that the appellant represented 'a genuine, present and sufficiently serious threat to the public to justify [his] deportation on grounds of public policy.' The judge's finding that the appellant had acquired permanent residence meant that 'serious grounds of public policy and public security' under Immigration (European Economic Area) Regulations 2016, regulation 27(3) must now be established. The appellant had been denied the right to respond to this change to the basis of the decision to deport him.

8. I do not agree with Mr Karnik. The court file contains a copy of a letter dated 19 April 2018 and sent to the appellant's solicitors (who were on the record at the time) recording that the Secretary of State was aware that, should the Tribunal conclude at the forthcoming hearing that the appellant

had acquired a right of permanent residence then 'serious grounds' would need to be shown in support of the decision to deport him. I find that the appellant was well aware, from the date of receipt of that letter by his then solicitors, that the Secretary of State had made out a case for deporting him on 'serious grounds' and that he has not been denied the opportunity to develop the defence. I find also that the judge was entitled to conclude that the persistence of offending by the appellant, a complete absence of any evidence of rehabilitation and his finding that 'offending continued unabated after his probation officer said that he appeared to be motivated not to offend' amounted to behaviour posing a genuine present and sufficiently serious threat to the reduction of crime and disorder, a fundamental interest of society.

**Article 8 ECHR**

9. The appellant's appeal falls to be considered under the 2016 Regulations. In that circumstance, it is unclear why Article 8 ECHR may be engaged at all. Even if it is engaged in the appeal, I find that the judge's findings at [22] need not be disturbed. I say that notwithstanding the fact that the judge appears to have overlooked the fact that a consequence of the appellant having achieved permanent residence is that his child is a British citizen. The reference by the judge to the test of 'undue harshness' at [22] would appear to be incorrect. If Article 8 ECHR is engaged, then, as a British citizen, the child is a 'qualifying child' for the purposes of section 117 B (6) of the 2002 Act. The proper test, therefore, is one of reasonableness, not undue harshness. However, I find that, even if the judge had considered the test of reasonableness, he would reach the same conclusion. As the judge correctly observed at [22] the child is not required to leave the United Kingdom although the family, who are all Latvian citizens, could choose to accompany the appellant. For the avoidance of any doubt, I find that it would be reasonable for a 3 year old child to move within the EU to Latvia, one of his countries of nationality, to continue family life there with his Latvian parents.

## Notice of Decision

10. This appeal is dismissed.

Signed Date 13 March 2019

Upper Tribunal Judge Lane