



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00803/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On Tuesday 2 July 2019

Decision & Reasons Promulgated  
On Wednesday 17 July 2019

Before

MR JUSTICE MURRAY  
(SITTING AS AN UPPER TRIBUNAL JUDGE)  
UPPER TRIBUNAL JUDGE SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FERNANDO PEREZ OLMEDILLO  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: The Respondent did not attend and was not represented

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department (“the Secretary of State”) against the decision of First-Tier Tribunal Judge Chana promulgated on 12 March 2019, in which she allowed Mr Olmedillo’s appeal against the decision of the Secretary of State dated 17 December 2018 (“the Decision”) to remove him from the United Kingdom pursuant to the Immigration (European Economic Area)

Regulations 2016 (“the 2016 Regulations”) on the grounds that Mr Olmedillo’s removal is required by public policy.

2. Mr Olmedillo did not attend at the time scheduled for the hearing of this appeal, although a Spanish language interpreter had been booked for him and was in attendance. We put his case to the back of the list and proceeded with other matters. When those were concluded and Mr Olmedillo’s case was again called on, he was still not present. We asked the clerk to verify whether he had booked in, and she confirmed that he had not. We verified that he had been served with notice of the date and time of the hearing at his address. Mr Clarke, representing the Secretary of State, verified that, according to Home Office records, his address had not changed, and therefore we had no reason to believe that he had not received the notice. There was no application or correspondence on the file from Mr Olmedillo seeking an adjournment. The interpreter was still present and available. We decided that it was in the interests of justice to proceed in Mr Olmedillo’s absence, and the interpreter was released.
3. Mr Olmedillo, a citizen of Spain, was born on 31 May 1988. It is not certain when he entered the United Kingdom. Being a European Economic Area national, he would have entered under his right of free movement within the EEA.
4. The first official record of Mr Olmedillo’s presence in the UK arose as a result of his conviction at Lewes Crown Court on 27 March 2015, when he was 26 years of age, of three counts of burglary and theft from a dwelling, and two counts of possessing a prohibited weapon (namely, a weapon for the discharge of noxious liquid gas etc.). For these offences, he received a two-year community order with a supervision requirement and a requirement to perform 160 hours of unpaid work. He was also convicted of one count of possessing a controlled drug of Class B (cannabis/cannabis resin) for which he received a twelve-month conditional discharge. The court also ordered the destruction of the drugs and the weapon.
5. On 9 December 2015 Mr Olmedillo received a caution from Essex Police for theft (shoplifting).
6. On 16 January 2017 at Sussex Central Magistrates’ Court, Mr Olmedillo was convicted of two counts of theft (shoplifting), for which he was sentenced to six weeks imprisonment, suspended for 12 months.
7. On 27 February 2017 at Lewes Crown Court Mr Olmedillo was convicted of failing to comply with the requirements of the community order he had received on 27 March 2015, as a result of which the community order was revoked, and he received a sentence of three months’ imprisonment in respect of the original offences.
8. Following this conviction, the Secretary of State sent Mr Olmedillo a letter dated 28 March 2017 warning him that if he committed any further offences, the Secretary of State might seek to deport him.

9. Notwithstanding that warning, on 14 November 2018 at North West London Magistrates' Court, Mr Olmedillo was convicted of racially or religiously aggravated common assault/assault by beating, for which he received a sentence of 8 weeks' imprisonment.
10. On 27 November 2018 the Secretary of State notified Mr Olmedillo that he intended to make a deportation order against him on grounds of public policy in accordance with regulations 23(6)(b) and 27 of the 2016 Regulations on the ground of public policy. In response, Mr Olmedillo submitted representations dated 28 November 2018. These were considered and rejected by the Secretary of State for the reasons given in the Decision, which, as we have noted, was dated 17 December 2018. On the same day the Secretary of State made a Deportation Order in respect of Mr Olmedillo, to deport him to Spain, and served it on him on 18 December 2018. Mr Olmedillo lodged an appeal with the First-tier Tribunal against the Deportation Order on the same day.
11. On 21 December 2018, Mr Olmedillo applied for immigration bail, which was granted on 28 December 2018.
12. On 1 March 2019 Mr Olmedillo's appeal was heard by First-tier Tribunal Judge Chana, on which occasion he appeared in person. The Secretary of State was represented by Mr M Grennan.
13. In her judgment promulgated on 12 March 2019, the judge allowed Mr Olmedillo's appeal for, in summary, the following reasons:
  - a. "There is no evidence to suggest that appellant has not been exercising his treaty rights in the United Kingdom since his arrival in the country in 2016 [sic]." (para 18 of the judgment)
  - b. The Secretary of State had failed to put forward credible evidence that Mr Olmedillo is a threat to the public interest or constitutes a present threat to the requirements of public policy and public security. He had therefore failed to satisfy the requirements of regulations 23(6)(b) and 27 of the 2016 Regulations. (paras 15, 21 and 22 of the judgment)
  - c. The Secretary of State's decision to deport Mr Olmedillo:

"... was not proportionate on the grounds of public policy and public security as the appellant's criminality has been low level *committed at the age of 24*" (emphasis added) (para 21 of the judgment)
14. At paras 12 to 13 of the judgment, the judge reviewed the evidence concerning Mr Olmedillo's employment history in the UK and his income during the period 2016 to 2018. He said that he entered the UK in May 2014, and he accepted during cross-examination that "given his time in prison he has been in this country for four years and five months". When he first arrived in the UK, Mr Olmedillo found a job at a bar, where he worked for seven months, first clearing glasses and then as a

bartender, before working in the catering business of Hilton for two years. He did various other jobs at restaurants and then moved to London to start a business management course, which he did not complete. The judge noted Mr Olmedillo's explanation that "... the reason he burgled [for which he was convicted in 2015] was because he did not have any money." He also claimed to earn "a little money" from playing music.

15. At para 13, the judge noted the evidence that Mr Olmedillo paid no income tax in 2016, earned only £368 in 2017 and only £59 in 2018. When it was put to Mr Olmedillo during cross-examination that he was in "marginal employment", he responded that had "not ever earned over £12,000 which is why his income tax is so low".

16. Relying on this evidence, the judge reached the following conclusion regarding Mr Olmedillo's exercise of his rights under Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 ("Treaty rights") (at para 18):

"18. There is no evidence to suggest that the appellant has not been exercising his treaty rights in the United Kingdom since his arrival in the country in 2016 [sic] even if his income was not very high. There is no evidence that he has claimed benefits in this country. Therefore, I can only assume that he must be looking after himself financially by working."

17. At para 14, the judge recorded Mr Olmedillo's evidence about his offending history as follows:

"14. The appellant committed a crime and even after a warning given to him by the respondent, he ... still flouted his community order. The appellant's evidence is that he now has a job and that his boss is supporting him and will continue to employ him. The appellant said that he has never been charged or convicted of any violent behaviour. He said that he is trying to change and that the theft occurred when he was in student accommodation and stole because he did not have any money for Christmas. He said that he shoplifted a part of sunglasses and a T-shirt. He said that he has paid for his mistake and he was only 24 years at the time and now he has matured and understands the error of his ways. He said that he has done a course on anger management and equality and diversity training."

18. The judge then set out her conclusions as to his offending history and its materiality to the Secretary of State's decision to deport him as follows (at paras 17, 20 and 21 of the judgment):

"17. The appellant has only been in this country for four years and five months and therefore his deportation should be justified on grounds of public policy, public security or public health. I have no reason not to accept his evidence that he has made a mistake at the age of 24

because I found the appellant to be sincere in his remorse and accepted his criminality without making any excuses. The appellant shoplifted a pair of sunglasses and a T-shirt and failed to comply with the sentence of a community order for which he was sentenced again. However, I do not find the criminality sufficiently serious to warrant his deportation as a European Union Citizen who has been in this country for nearly 5 years.

...

20. The appellant's very low sentences reflect the low level of his criminality. The appellant has not continued to offend, and I accept his evidence that he is trying to put himself on the straight and narrow path and intends to work. It particularly resonated with me when he said at the hearing that he knows that if he commits any further crimes, he will be deported.
  21. I find [that,] given the appellant's circumstances, the respondent's decision ... is not proportionate on the grounds of public policy and public security as the appellant's criminality has been low level committed at the age of 24. There is no credible evidence that the appellant is a threat to the public interest or constitutes a present threat to the requirements of public policy and public security."
19. The Secretary of State filed an application for permission to appeal the judge's decision to the Upper Tribunal on 18 March 2019 on the following grounds (summarised):
    - a. The judge failed to give sufficient reasons for finding that the Secretary of State had failed to establish that Mr Olmedillo posed a sufficiently serious threat to the public interest or to the requirements of public policy and public security, and she also made material errors and findings that conflicted with the evidence.
    - b. The judge erred in reversing the burden of proof by finding that there was no evidence that Mr Olmedillo was not exercising his Treaty rights.
  20. On 14 May 2019 FTTJ O'Brien granted permission to the Secretary of State to appeal against the judge's decision, on the basis that:
    - a. the judge's reasons for accepting that Mr Olmedillo has been exercising Treaty rights in the UK were arguably inadequate and/or resulted from the misapplication of the burden of proof; and
    - b. the judge's assessment of threat and/or proportionality were arguably based on a material mistake of fact.
  21. We find that the grounds of appeal have been made out, and that Judge Chana's judgment contains errors of law. We have a number of concerns about the judge's analysis.

22. In para 1 of her judgment, she states that Mr Olmedillo's date of birth is 31 May 1988, which appears to be undisputed. This means that he was 26 years old at the time of his first conviction on three counts of burglary and theft from a dwelling and two counts of possession of a prohibited weapon at Lewes Crown Court on 27 March 2015 and at the time of his caution by the Essex Police for shoplifting on 9 December 2015. Mr Olmedillo was 28 years old at the time of his subsequent conviction on two counts of shoplifting at Sussex Central Magistrates' Court on 16 January 2017 and at the time of his conviction on 27 February 2017 for failing to comply with the 2015 community order. He was 30 years old at the time of his conviction for racially/religiously aggravated common assault at North West London Magistrates' Court on 14 November 2018.
23. It appears, however, that despite having, with sufficient accuracy, set out his offending history, including the relevant dates, at paras 3 to 7 of her judgment, the judge appears to rely thereafter on his having been only 24 years old at the time of his offending as a material factor in her assessment of the credibility of the evidence presented by the Secretary of State to support his deportation decision. At para 14 of her judgment, she appears to accept Mr Olmedillo's evidence that:
  - a. he has never been charged or convicted of any violent behaviour, despite his having been convicted only four months before the FTT hearing of aggravated common assault; and
  - b. he was 24 years old at the time of the shoplifting offence (relating to the theft of a pair of sunglasses and a t-shirt), despite his having been 26 years old, if he was referring to the shoplifting for which he received a police caution on 9 December 2015, or 28 years old, if referring to his convictions for shoplifting on 16 January 2017.
24. Against that background, it is surprising that the judge, at para 14, appears to accept (as is clear from para 17) Mr Olmedillo's self-serving statement that "now he has matured and understands the error of his ways".
25. In the second sentence of para 17 of her judgment and in the first sentence of para 21, both of which we have set out above, the judge appears to consider that Mr Olmedillo's offending occurred at age 24 and only at age 24, whereas it is clear that his offending began when he was 26 years old and continued until he was 30 years old. This, in our view, is a material error.
26. At para 17 of her judgment, where she sets out her principal assessment of Mr Olmedillo's criminality, she makes no reference to his offences of burglary, possession of a prohibited weapon, breach of a community order and racially/religiously aggravated common assault. In other words, the judge does not appear to have addressed her mind in her analysis to his full history of offending, despite having set it out at paras 3 to 7 of her judgment. Her reasons for concluding that his criminality between 2015 and 2018 is not sufficiently serious to warrant his deportation are therefore inadequate.

27. At para 20, the judge comments that Mr Olmedillo’s “very low sentences reflect the low level of his criminality”. It does appear that Mr Olmedillo has been dealt with surprisingly leniently by the courts, particularly in relation to his offences of burglary and theft from a dwelling in 2015. That is, as far as it goes, a fair observation. It is hard, however, to understand her conclusion that Mr Olmedillo “has not continued to offend”, given that his latest conviction was only four months prior to the FTT hearing. It “resonated” with her that he acknowledged at the hearing that he was aware that if he committed a further offence, he would be deported. At para 6 of her judgment, however, she had noted that he had received such a warning from the Secretary of State (which we note from the documents before us was sent on 28 March 2017). Despite that warning, he went on to commit racially/religiously aggravated common assault. His failure to heed that warning was arguably material to his credibility as to his desire and intention to reform but does not appear to have been taken into account by the judge. It was also relevant that the latest conviction was one of assault and therefore involved at least some level of violence in spite of Mr Olmedillo’s protestations that he had never been charged or convicted of any offence of violence. The circumstances of that offence should at the very least have been taken into account when considering whether Mr Olmedillo constituted a present and sufficiently serious threat.
28. At para 18 of her judgment, the judge has wrongly reversed the burden of proof on the question of whether Mr Olmedillo was exercising Treaty rights in the UK. It was for Mr Olmedillo to establish that he was exercising Treaty rights. Had she applied the current burden of proof, she may well have reached the opposite conclusion that he was not genuinely exercising Treaty rights in light of the evidence set out at paras 12 and 13 of her judgment on his income and resources. However, this is a weaker ground and we would not have found a material error on this point alone. As it is though, the Secretary of State has established a clear error on the first ground and therefore the errors combined are material.
29. In light of the foregoing, we find that the grounds of appeal have been made out. We are satisfied that the judgment contains errors of law and we set it aside. We have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:
- “[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that :-
- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
  - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”

30. In light of our reasons for finding errors of law, there has been no proper determination of the central issues of fact and law in this case. The Judge should have but did not properly determine the two central issues whether Mr Olmedillo constitutes a “genuine, present and sufficiently serious threat” and whether he is exercising Treaty rights in the UK. For those reasons, we consider it appropriate to remit this appeal to the First-tier Tribunal due to the extent of fact finding which is necessary to re-make the decision.

**Notice of Decision**

**We are satisfied that the First-tier Tribunal’s judgment does contain material errors of law. We set aside the decision of First-tier Tribunal Judge Chana promulgated on 12 March 2019. We remit the appeal to the First-tier Tribunal for re-making before a Judge other than Judge Chana.**



Signed      Dated 11 July 2019

Mr Justice Murray sitting as an Upper Tribunal Judge.