IN THE UPPER TRIBUNAL

EXTEMPORE JUDGMENT GIVEN FOLLOWING HEARING

R (on the application of Gabor) v Secretary of State for the Home Department (Reg 29AA: interpretation) [2017] UKUT 00287 (IAC)

Field House
London

19 October 2016

THE QUEEN
(ON THE APPLICATION OF MILAN GABOR)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

THE HONOURABLE MR JUSTICE COLLINS

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Mr D Chirico, Counsel, instructed by Wilsons appeared on behalf of the Applicant.

Mr B Keith, Counsel, instructed by the Government Legal Department appeared on behalf of the Respondent.

1. *An application for Temporary Admission pursuant to reg 29AA of the Immigration (EEA) Regulations 2006 must be granted unless the applicant's appearance may cause serious troubles to public policy or public security. Proportionality is not the test, and the cost of facilitating*

the applicant's appearance is not a relevant consideration. The test is whether it can be said properly that there is the necessary basis for refusing leave pursuant to para 29AA(3).

2. *"Appearance", in this context, means presence in the UK for the purpose of attending the hearing (Kasicky doubted).*

3. *Where admission is granted for this purpose it must take place within a reasonable time to allow the applicant properly to instruct his solicitors. Normally, some 2 or 3 days before the hearing will be required.*

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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MR JUSTICE COLLINS:

1. The applicant in this case is from Slovakia. He came to this country but committed serious offences and as a result it was decided that he should be removed on grounds of public policy and that he qualified under the relevant Regulations to be removed. He appealed against that decision and what is in issue in this case is his right to be returned in order to appear in person at the hearing of his appeal. That is fixed for 8 November next, which is a Tuesday.

2. The relevant provision is paragraph 29AA of the Immigration (European Economic Area) Regulations 2006. So far as material this states:

> "(1) This Regulation applies where —
>
> (a) a person ("P") was removed from the United Kingdom pursuant to Regulation 19(3)(b); (which is the position here)
>
> (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; and

(d) P wants to make submissions before the First Tier Tribunal or Upper Tribunal in person."

All those sub-paragraphs apply to this applicant.

The following sub-paragraphs provide:

"(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.

(4) When determining when P is entitled to be given permission, and the duration of P's temporary admission should permission be granted, the Secretary of State must have regard to the dates upon which P will be required to make submissions in person.

(5) …

(6) …

(7) Where Schedule 2 to the 1971 Act so applies, it has effect as if —

(a) the reference in paragraph 8(1) to leave to enter were a reference to admission to the United Kingdom under these Regulations; and

(b) the reference in paragraph 16(1) to detention pending a decision regarding leave to enter or remain in the United

Kingdom were to detention pending submission of P's case in person in accordance with this regulation."

It is also provided that the applicant can be kept in detention if that is considered necessary.

3. It is to be noted that in sub-paragraph (3) the Secretary of State is required to grant permission unless the appearance may cause serious troubles to public policy or public security. Sub-paragraph 3 is somewhat badly drafted because on the face of it, it is the appearance which actually causes serious trouble rather than simply the presence in this country. The approach that has been adopted by the Secretary of State, and it seems to me to be the sensible approach, is that one has to look at the presence in this country, the presence being as a result of the appearance that will take place. These particular provisions have been considered by Mr Ockelton, Vice-President in R (Kasicky) v SSHD [2016] UKUT 00107 (IAC), a case decided in October 2015, which also involved a Slovakian national as it happened and Mr Ockelton had to decide amongst other things what was the meaning of sub-paragraph 3 and the question of appearance. As he said in paragraph 14 of his judgment "It does seem very difficult to say that a person who will spend his time in the United Kingdom in custody will pose any serious risk to public policy or public security". That seems to me to be an eminently sensible decision and of course as Mr Ockelton indicated it is important to bear in mind that it is a requirement that leave be given to enter to appear.

4. He also at paragraph 9 considered the meaning of sub-paragraph 3 and what was covered by the word "appearance", and as he indicated there were three possible meanings. The first was, in general terms, his presence on the scene; the second, what he looks like, and that was clearly discarded as impossible, and the third is the formal sense of attendance at court to take part in the proceedings. The general meaning of "presence on the scene", Mr Ockelton said, appeared to be that adopted by the draftsman of the standard sentences to be included in

decision letters. In his view that was unlikely to be the correct meaning of the word appearance in either Regulation 29AA or Article 31(4) of the Directive which had given rise to the Regulation. If that was the sense intended, he continued, it was extremely surprising that either the word "return" or the phrase "presence in the Member State" was not chosen rather than the word which had a precise meaning in the very context of the matter being regulated. He concluded that appearance in Regulation 29AA meant appearance in the appeal process. It did not mean presence in the United Kingdom in any general sense.

5. As I have said sub-paragraph 29AA(3) is very badly drafted but it does seem to me that when one looks at this it is a matter of considering what was the purpose behind this provision. It is very difficult to limit it to appearance in that sense because clearly the concern must be that coming back here will create the necessary troubles within the provisions in sub-paragraph 3. I am afraid I do not agree with Mr Ockelton's narrow construction albeit I can see the logic that lies behind it because otherwise it seems to me that the provision lacks any sensible application. It seems to me that what is covered is that the appearance before the Tribunal will mean that the applicant is in this country and it is that wider sense of appearance that is to be covered by that sub-paragraph. In many cases it will make little difference because obviously if there is considered to be a problem in relation to a violent offender then he will no doubt be kept in custody and as Mr Ockelton, as I have already indicated, stated, and I entirely agree, it would be very difficult to envisage a case in which there would be the necessary troubles created if the applicant is to be kept in custody. Obviously if there is any further risk that he might be of trouble when appearing that can be taken into account but it seems to me to be somewhat unlikely.

6. Let us then look at the decision letter which is in issue here which led to the refusal. The point was made that he had been convicted of serious offences in Slovakia, namely sexual abuse and various dishonesty offences and blackmail. He has been convicted in 2006 of a number of offences

including causing grievous bodily harm and he was sentenced for those to 93 months' imprisonment and a probation period of five years. I should add too there were sexual offences involved but there has been no conviction of any offence since those matters. Again what was stated was that there would be a potential to commit further offences of the nature that had led him to be dealt with in Slovakia and that he therefore poses a significant and unacceptable risk of harm to the public or a section of the public and it was also held against him that in July of 2015 he displayed complete disregard for our laws by attempting to enter the United Kingdom in breach of the order made in May of last year that he should be deported.

7. Then in paragraph 13 which is the important paragraph this is said:

> "Further we have considered whether in spite of the fact your client may cause serious troubles to public policy or public security, it would be proportionate to refuse his entry."

"Proportionality" is not the test, the test is whether it can be said properly that there is the necessary basis for refusing leave pursuant to paragraph 29AA(3), that is to say that the Secretary of State can establish that his appearance may cause serious troubles to public policy or public security.

8. Going on in paragraph 13 the author continues:

> "In particular, we have balanced your client's interest in providing his submissions in person against his threat to public policy or public security. While your client may wish to provide submissions in person, we see no reason why your client's position could not be adequately presented without oral submissions and we do not consider that any benefit your client might gain from being present outweighs the violent and sexual threat he poses to other members of society."

Again, that is not the correct test because, I repeat, the Regulation is mandatory and there must be admission for oral representations unless the basis for refusal is established.

9. It goes on:

> "This threat could, in theory, be mitigated by detaining Mr Gabor during the period of temporary admission. However, given the violent and sexual nature of his offences it is considered that he poses the same risk of harm to staff and detainees as he does to the general public. Moreover, his previous attempt at entering the UK in breach of the deportation order indicates that he may fail to comply with removal directions after the appeal hearing."

Frankly that seems to me to be a totally irrational decision. The suggestion that he falls within sub-paragraph 3 because he may cause serious troubles to public policy or public security by assaulting or committing offences against prison staff is frankly not to be regarded as a sensible approach. Furthermore, the suggestion that he might fail to comply with the rules or directions is equally not sensible because if he is kept in custody he will be removed still in custody and he will have no basis whatever to enable him to stay unless of course his appeal is allowed. One suspects the likelihood may be that would be deferred and of course he will have to leave pending the decision.

10. It goes on:

> "In addition, there would be significant costs involved in detaining Mr Gabor, which in light of the circumstances, would not be proportionate for the government to incur."

That has got absolutely nothing to do with the case. It is not a proper basis within the Regulations. It may be that in two years' time the situation could change but as the law now stands costs is not a relevant consideration.

11. Finally, it is said that refusing permission to temporarily re-enter the United Kingdom to attend the hearing is disproportionate simply mis-applies the Regulation. As I have said it is not a question of proportionality. It follows that this decision cannot stand.

12. To be allowed to enter to appear seems to me to mean that it must be right that the admission takes place within a reasonable time to enable the applicant properly to instruct his solicitors. True it is of course that when the applicant is abroad one would expect that he is able to make some submissions but in any case it is necessary for solicitors to take proper instructions, maybe to find witnesses who could assist him in the given case and it seems to me that the requirement to give leave to enter to appear carries with it that the applicant should be enabled to make appearance which is one which is based on proper advice and proper instructions to those representing him. This does not mean that there need be a lengthy period before the hearing. Quite the contrary: I note that the solicitors asked for a matter of weeks; that is not reasonable but it does seem to me that normally some two possibly three days before the hearing date is required. In this case the hearing date is fixed for 8 November which happens to be a Tuesday and one has to bear in mind the intervening weekend. In those circumstances what I propose to direct is that the admission be permitted to take place on the Thursday, that is Thursday 3 November. He will then no doubt be taken to immigration detention which should be Harmondsworth and the solicitors should then visit him for the purpose of taking instructions on Friday, the 4th and the Home Office must ensure that access on the 4th is allowed even if that does mean perhaps jumping the queue because one knows that there are pressures on attending at the immigration centres for legal visits.

13. Thus what I propose to do is to allow this application and to make a mandatory order in the terms I have indicated.