



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00738/2017

THE IMMIGRATION ACTS

Heard at Glasgow
Promulgated
On 2nd November 2018

Decision & Reasons
On 23rd November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MR. AIVARS [A]
(NO ANONYMITY DIRECTION MADE)

Appella

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And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Bradley of Peter G Farrell, Solicitors, Glasgow

For the respondent: Mr Govan, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Latvia, born on [~] 1984. On 28 November 2017 an order for his deportation was made further to regulation 23 (6)B of the Immigration (European Economic Area) Regulations 2016.

2. On 6 November 2017 he was convicted of possessing a controlled drug and admonished at Glasgow Court. The respondent became aware of earlier convictions in his home country. On 4 June 2004 he was convicted of grievous bodily harm and sentenced to 3 months imprisonment. On 9 May 2005 he was convicted of theft and sentenced to one year and 10 days imprisonment, suspended for 2 years. On 27 April 2006 the suspended aspect was revoked. On 21 December 2010 he was convicted of theft and damage to property and sentenced to one year and 6 months imprisonment. This was followed by a conviction on 15 February 2013 of robbery for which he received a sentence of 3 years imprisonment.
3. The respondent took the view he was entitled to the lowest level of protection available to a person exercising Treaty rights. By regulation 27(5) of the 2016 Regulations the decision must be proportionate and based on personal conduct. This must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct. Matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision to deport. Previous criminal convictions do not in themselves justify the decision. The conclusion was that his deportation was justified.

The First tier Tribunal

4. His appeal was heard by Designated Immigration Judge Murray at Glasgow on 1 May 2018. In a decision promulgated on 14 June 2008 his appeal was dismissed.
5. The judge referred to the threat he posed to the public and his article 8 rights. The judge heard evidence from a British national, Mr Trebor Anderson, who 1st met the appellant in 2003 and had been in a relationship with him. They did not have contact from 2006 until the end of 2010. The appellant had returned to Latvia and then moved to Lithuania. He returned to the United Kingdom and renewed his acquaintance in 2016 after release from prison. Mr Anderson said he relied upon him as his care giver as he suffered from poor health.
6. The judge found Mr Anderson to be a credible witness. The judge found the appellant was addicted to drugs and on a methadone programme. His explanation for his conviction in Glasgow, namely, that he was given class B drugs by a shopkeeper which he reported to the police was accepted. The judge referred to a 'blip' in his progress when he tested positive and an absence of evidence about the methadone program and how he was progressing.
7. The judge did not find the appellant entirely credible and questioned his sincerity towards Mr Anderson. The judge did not find they were

in a genuine and subsisting relationship and did not find the existence of family life within the meaning of article 8. The judge also did not find evidence of a private life beyond the time spent was Mr Anderson. The judge also found that the appellant had not been exercising Treaty rights in the United Kingdom.

8. The judge concluded that if the appellant abstained from illegal drugs he may present as a low risk of reoffending. However, there was a lack of evidence about his progress in the methadone programme. Consequently, the judge was unable to conclude he would not resume taking drugs and if this happened, he would be a genuine, present and sufficiently serious threat. The Judge found a real risk he would reoffend in the future and concluded that deportation was proportionate.

The Upper Tribunal

9. Permission to appeal was granted on the basis it was arguable the judge failed to engage properly with regulation 27 of the 2016 regulations. The Judge's conclusion at paragraph 57 that he would represent a threat if he went back to taking drugs was arguably speculation.
10. A second-ground advanced was that the judge failed to engage with regulation 8(5) of the 2016 regulations and the possibility of him being an extended family member of Mr Anderson. It was arguable the judge conflated the notion of a genuine and subsisting relationship as used in the immigration rules with a durable relationship in the regulations. Finally, it was argued that the article 8 assessment was flawed because the proportionality assessment was inadequate.
11. In ground 7 of the application it was argued that the judge in referring to a real risk the appellant will reoffend at paragraph 58 of the decision conflated the standard of proof in an asylum hearing with that in an EEA deportation case.
12. At hearing, reference was made to paragraph 42 where the judge said the burden of proof is upon the appellant. Both representatives are in agreement that this was incorrect (see Arranz (EEA Regulations - deportation - test) [2017] UKUT 00294 (IAC)) and it was then submitted on behalf of the appellant that this tainted the decision. The presenting officer faced difficulties arguing this was a simple slip. I note at paragraph 45 the judge stated that it is for the appellant to show he is entitled to remain in the United Kingdom and he has to show he should not be deported.
13. At hearing I was given a copy of the decision of the Inner House in SA -v- SSHD [2018] CSH 28.A First-tier Tribunal had incorrectly

said, as here, that in a deportation appeal the burden of proof was upon the appellant. The Upper Tribunal concluded that when read as a whole the reference was a standard recital and not part of the decisive passages and was considered to be an immaterial slip. However the Inner House accepted that this misstatement influenced the First-tier Tribunal's whole approach to decision-making process.

14. I do not find the Inner House decision cited establishes any general principle but has parallels with the present. I agree with the presenting officer that when taken with comments elsewhere, particularly paragraph 45, this cannot be explained away as a simple immaterial slip. The misstatement of the burden of proof does taint the essential findings made by the judge including the benefits of the methadone programme and the associated likelihood of the appellant reoffending and the evaluation of his relationship with Mr Anderson. In the circumstance I find it would be unsafe to allow the decision to stand. Consequently, I would set the decision aside and remit the appeal to the First-tier Tribunal for a complete rehearing de novo.

Decision

A material error of law has been demonstrated. The decision is set aside and the appeal is remitted for determination de novo in the First-tier Tribunal

Francis J Farrelly

Deputy Upper Tribunal Judge
November 2018

Date 15th