Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00086/2020

THE IMMIGRATION ACTS

Heard in the Royal Courts of Justice in Belfast	**Decision & Reasons Promulgated**
On 9 December 2021	**On 28 January 2022**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR KESTUTIS DEMINSKAS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Ms R Kavanagh BL, instructed by Phoenix Law

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Grimes, promulgated on 20 May 2021, allowing Mr Deminskas' appeal against the decision of the Secretary of State to make a deportation order against him. That appeal was brought under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

Background

2. The respondent entered the United Kingdom on 22 April 2016 and remained here since. On 29 October 2019, he was convicted at Armagh Magistrates' Court of assault on police, theft and disorderly behaviour and was fined £225.

3. It is not in dispute that he has a number of convictions from other jurisdictions which are set out in the decision of the First-tier Tribunal at paragraph 8.

4. The respondent's case is that his abuse of alcohol has been the cause of his offending and that he is currently in a relationship with GZ, a Lithuanian national living in Northern Ireland. They were married from between 1994 and 1997, lost contact and regained contact through Facebook in 2016. They did not live together and the respondent has sought support for alcoholism and drug abuse. He has been employed since his release from immigration detention in January 2020 restoring an old farmhouse. The Secretary of State's case is set out in the refusal letter. It is stated that the respondent's deportation is not being sought solely on his conviction for murder in 1993 but is instead a reflection of his extensive offending between 1993 and 2019, the Secretary of State considering that the assertion that there were extenuating circumstances in relation to the murder in 1993 showed that he was still trying to minimise his criminality, an indication of the risk of reoffending.

5. The Secretary of State considered that the deportation was proportionate following Regulation 27(5)(a) of the Immigration (European Economic Area) Regulations 2016 noting that there was no evidence that removing him from the United Kingdom would be harmful to his health; that treatment for alcohol addition could continue in Lithuania where he had spent most of his formative years and where he would be able to survive economically. The Secretary of State did not accept that he was in a genuine and subsisting relationship in the UK as claimed with GZ.

6. The Secretary of State also considered that deporting the appellant would not be in breach of Article 8 of the Human Rights Convention concluding that he did not meet the exceptions set out in Section 117C of the Nationality, Immigration and Asylum Act 2002. although accepting that these did not apply to him they would be used as a guide for consideration of the article claimed. The Secretary of State concluded the appellant did not demonstrate he had established a family or private life in the United Kingdom.

7. The judge heard evidence from the appellant and his partner, GZ. She also heard submissions from Ms Kavanagh who also appeared below and Ms Tasnim, a Home Office Presenting Officer, who attended by video link.

8. The judge found that:-

(i) the respondent had not acquired permanent residence;

(ii) she was required to assess whether the deportation was justified on grounds of public policy, public security or public health, which required considerations of principles contained in Regulation 27 and Schedule 1 of the 2016 Regulations;

(iii) in doing so she took into account his criminal convictions including those outside the United Kingdom [17] and his convictions in the United Kingdom [18], the latter being at the lower end of offending and that significant weight was to be attached to the fact he had not accrued any other convictions over the past five years;

(iv) the longer the sentence or the more numerous the conviction the greater the likelihood that his continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society, I take into account in particular the conviction for murder and other offences;

(v) the respondent had some support for his alcohol and drug addiction but has not engaged consistently and is not yet in recovery [21];

(vi) consumption of alcohol is a risk factor in his risk of offending but that he had continued to consume alcohol and drugs throughout his stay in the United Kingdom, yet he had only been convicted on one occasion;

(vii) the respondent does not live with his partner because of the alcohol problems; that their evidence was largely consistent and credible and that the respondent and his partner were in a relationship [23] and that the respondent also has an ongoing relationship with his brother [26];

(viii) but the evidence did not show that the respondent currently represents a real risk of reoffending [27]; and

(ix) that the respondent did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society [28] and it was not proportionate to deport him [29] to [31];

(x) weighting into account all the evidence [33].

9. The judge considered that it was unnecessary to undertake a separate Article 8 assessment but allowed the appeal on human rights grounds as well as under the EEA Regulations.

10. The Secretary of State sought permission to appeal the grounds that the judge had erred:-

(i) in failing to consider the fundamental interests of society and excluding or removing the respondent, in particular failing to have regard to paragraph 7(f) with regard to the need to maintain public confidence;

(ii) erred in considering the present risk, in that she wrongly discounted the clear risk due to continued alcohol abuse by applying an overly restrictive approach to "present risk" given that the respondent had committed offences while in the United Kingdom and that the stabilising influence of family members that was not relevant to whether the risk was present but as to whether it was sufficiently serious; and, in the alternative that the conclusion that the risk was no longer present was irrational;

(iii) in allowing the appeal on Article 8 grounds, as that was based on the findings of proportionality under the EEA Regulations.

The Secretary of State's Decision

11. In the refusal letter, in assessing the threat that the appellant poses, the Secretary of State set out at paragraph [31] to [39] the risk of harm or reoffending this is concerned primarily at [31] to [35] how the victims of the offences would have felt and the impact on society. The assault on the police officer is dealt with in detail at [36] to [37] where it is stated "It is not the case that the applicant's deportation is being sought solely on account of his conviction for murder but instead as a reflection of his extensive reoffending between 1993 and 2019".

12. It is noted also that the respondent's plea of extenuating circumstances must have been tested by the Court of Lithuania and rejected because he was convicted and sentenced to nine years' imprisonment and that even after 27 years after conviction was still trying to minimalise his criminality [38]. This is said to be a clear indication of the risk of reoffending. There is no expressed reference to public confidence in the letter save for it being recorded as a bullet point within paragraph [30].

Submissions

13. Ms Cunha sought to rely on the grounds, although accepting that the judge was aware of Schedule 1. Whilst she noted that UTJ Grubb had queried when granting leave whether paragraph 7 (1)(f) of Schedule 1 was compatible with EU law, she submitted that it was compatible with the generalised principles. She submitted further that in any event, whilst previous conduct is not on its own a demonstration of a threat, the court and must and can take into account public policy and current risk in the member state. She submitted, relying on the grounds at [4] that exclusion was plainly in the public interest; that there was a fundamental interest in that past offending needs to be considered when considering public confidence. She did, however, accept that that intersected to an extent with the risk of reoffending. But it is necessary to take into account how

previous offending can have an impact and that where there has been offending there is a misuse of a right, in this case the right of free movement, and that an analogy was to be made with the exclusion from protection under the Refugee Convention of those convicted of particularly serious crime.

14. Ms Cunha submitted that there had been no risk assessment in respect of continued alcohol abuse and no proper explanation of why the judge had concluded there was no risk of reoffending. She submitted further the judge had not made findings on how the family could reduce the risk of offending, thus there was a present threat.

15. Ms Kavanagh submitted the judge had properly applied the test and conducted a proper balancing exercise. She submitted it would be open to the judge to conclude that. given there was only offence in three and a half years, that the likelihood of reoffending had not risen and the threat had been mitigated.

16. In reply, Ms Cunha submitted that the judge had inadequately reasoned her decision given the appellant had not consistently engaged in recovery, nor was there mention of how the support he gets from friends or family who assisted him in integrating.

The Law

17. It is for the respondent to demonstrate that deportation is justified.

18. The EEA Regs provided as follows, so far as they are relevant.

> 27. (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.
>
> (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security
>
> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—
>
> (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
>
> (b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(17).
>
> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

(7) ...

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

19. The First-tier Tribunal was also duty-bound to take into account Schedule 1 of the 2016 Regulations which provided as follows, so far as is relevant:

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as—

(a) the commission of a criminal offence;

(b) an act otherwise affecting the fundamental interests of society;

(c) the EEA national or family member of an EEA national was in custody.

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

…

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);

…

(j) protecting the public;

20. Although the EEA Regulations were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, many of its

provisions are preserved for the purpose of appeals pending as at 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309), ("the EEA Transitional Regulations").

21. The effect of the amendments is that the sole ground of appeal is now, in effect, whether the decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.

22. It is unclear from the grounds what submissions were made to the judge in respect of public confidence, or paragraph 7(f) if any. There is no specific submission made on that issue within the refusal letter, nor does the Secretary of State point to such, or to any particular submission on the issue made. It is unclear what part of the Secretary of State's case that played given the lack of any specific reference under that heading and which is submitted in the grounds at [4].

23. It cannot be argued that the judge erred in not giving express weight to a factor where, as here, it cannot be shown that specific reliance on it was made.

24. Further, and in the alternative, the submission that it is necessary to exclude someone in order to maintain public confidence does not fit easily into the jurisprudence regarding exclusion and in particular that the reasons must be personal to the individual in question.

25. In Straszewski v SSHD [2015] EWCA Civ 1245 the Moore-Bick LJ held:

> 13. Given the fundamental difference between the position of an alien and that of an EEA national, one would expect that interference with the permanent right of residence would be subject to more stringent restrictions than those which govern the deportation of nationals of other states. Moreover, since the right of free movement is regarded as a fundamental aspect of the Union, it is not surprising that the Court of Justice has held that exceptions to that right based on public policy are to be construed restrictively: see, for example *Van Duyn v Home Office* (Case 41/71) [1975] 1 C.M.L.R. 1 and *Bonsignore v Oberstadtdirektor der Stadt Köln* (Case 67/74) [1975] 1 C.M.L.R. 472.
>
> 14. Regulations 21(5)(b) and (d) provide that a decision to remove an EEA national who enjoys a permanent right of residence must be based exclusively on the personal conduct of the person concerned and that matters that do not directly relate to the particular case or which relate to considerations of general prevention do not justify a decision to remove him. On the face of it, therefore, deterrence, in the sense of measures designed to deter others from committing similar offences, has of itself no part to play in a decision to remove the individual offender. Similarly, it is difficult to see how a desire to reflect public revulsion at the particular offence can properly have any part to play, save, perhaps, in exceptionally serious cases. As far as

deterrence is concerned, the CJEU has held as much in *Bonsignore v Oberstadtdirektor der Stadt Köln*.

15. Nonetheless, there have been instances in which deterrence and public revulsion have played a part in the decision. In *R v Bouchereau* (Case 30/77) [1978] 1 Q.B. 732 the defendant, a French national working in England, was convicted for a second time of possessing dangerous drugs (small quantities of amphetamine, cannabis and LSD). The magistrate was minded to recommend him for deportation, but he argued that it would be unlawful to deport him as he was a migrant worker exercising Treaty rights. The magistrate referred a number of questions to the European Court, the second of which was whether the provision that previous convictions do not in themselves justify a decision to deport, now to be found in regulation 21(5)(e), meant that such convictions were relevant only as demonstrating a propensity to offend in the future.

16. In his Opinion Advocate-General J-P Warner agreed with a submission of the UK government that, in exceptional cases where the personal conduct of an alien has been such that, while not necessarily evincing a clear propensity on his part to re-offend, it has caused such deep public revulsion that public policy requires his removal. The court dealt with the question as follows:

> "28. The existence of a previous criminal conviction can, therefore, only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy.
>
> 29. Although, in general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy.
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> 30. It is for the authorities and, where appropriate, for the national courts, to consider that question in each individual case in the light of the particular legal position of persons subject to Community law and of the fundamental nature of the principle of the free movement of persons."

17. In my view the clear emphasis of that passage is on the fundamental nature of the principle of free movement and the need to identify a present threat to the requirements of public policy, while recognising that there may be cases in which past conduct alone may suffice. However, paragraph 29 must be read and understood in the context of the court's answer to the third question, namely, whether "public policy" includes reasons of state in circumstances where no breach of the peace or public order is threatened. The court recognised that public policy may vary from country to country and may differ under different circumstances and at different times. National authorities must be allowed a degree of discretion in how they apply it within the limits imposed by the Treaty. The court then concluded with an endorsement of the underlying principles in these terms:

> "35. In so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in

> any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society."
>
> 18. This seems to me to emphasise the need to look to the future rather than the past in all but the most exceptional cases and to emphasise the importance of the right of free movement. I agree with Mr. Drabble Q.C. that one can detect in the decision an understandable element of pragmatism in the recognition of the right to deport those who have committed the most heinous of crimes which is at odds with the principles of the Directive.

26. That decision relates to the previous EEA Regulations, but there has been no change in the underlying Directive. And, while the individual in Straszewski had acquired permanent residence, that does not alter the fact that the right of free movement is fundamental right, even for those EEA nationals who had not acquired permanent residence. Further, it was not argued in this case that the facts are such as to fall within category of the most heinous crimes.

27. It is important to bear in mind the context in which the EEA Regulations are to be interpreted and applied, which is that the right of free movement is a fundamental right and curtailment of that must be proportionate. That is the overriding consideration implicit in the phrase “sufficiently serious”. It follows from the jurisprudence that restrictions on the right of free movement are to be narrowly construed even though there are parameters within which a state can chose what his fundamental interests are.

28. Ms Cunha was unable to point me to any specific case law on the issue of maintaining public confidence. The fact that somebody has committed an offence is not in itself sufficient basis to justify removal as that is expressly excluded by the Directive and the Regulations. Nor does that appear to be the Secretary of State’s primary case. As Ms Cunha accepted, the maintenance of the public confidence is to an extent tied to the risk an individual pose in that it is the threat that the person poses which causes concern. While there are cases in which the mere presence of an individual may rightly cause concern (such as in Bouchereau**)** that is not what the Secretary of State pleads here. Cases where the offending was of that seriousness would clearly fall within paragraph 7(f).

29. Ms Cunha sought to argue that public confidence could be undermined because people would not want a convicted criminal living next to them or in their community. No doubt that is true. But that does not mean, in and of itself, that that person’s personal conduct constitutes a threat; it may do if that person presents a threat of reoffending but the damage to public confidence through the respondent being unable to remove an offender.

30. The Secretary of State seeks to rely on Orfanopoulos [2004] ECR 1-5257 where the CJEU observed [67]:

> While it is true that a Member State may consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, the public policy exception must, however, be interpreted restrictively, with the result that the existence of a previous criminal conviction can justify an expulsion only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy (see, in particular, Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 22 to 24).

31. That does not provide much support to the grounds as pleaded, given the emphasis on personal conduct.

32. Taking all of these factors into account, even were I persuaded that the judge had erred in not taking into account paragraph 7(f), it is not arguable that, on the facts of this case, and absent any claim that this is a Bouchereau case, and thus ground (i) is not made out.

33. Turning to ground (ii), at [6] to [10] the grounds focus on the issue of whether the risk was *present*. But the risk must be "genuine, present and sufficiently serious". It is clear that the judge did consider that the risk was present albeit at a low level. But, it is argued, that the judge did not consider the "sufficiently serious" issue.

34. As noted above, that is a consideration of proportionality in the sense that excluding somebody from the United Kingdom is an interference with their right to free movement. It is the interference with that fundamental right which has to be proportionate. It is clear from the judge's decision at [19] that she was aware of the need for sufficient seriousness and again at [29] shee considered proportionality. Accordingly, I am not satisfied that the decision involved the making of an error of law on that issue. It was open to the judge to note that the appellant's relationships have a positive and stabilising influence on the appellant whilst diminishing the risk and again this is something to be considered in terms of proportionality.

35. The alternative ground is in effect that the judge's conclusion that the risk was not present was perverse. Given the comments above regarding the nature of the test to be applied, which required a consideration of all three issues that is genuine in the sense that it has substance and present the judge clearly took into account, as she was entitled to do, other factors in considering the risk of offending. That falls within the understanding of "sufficiently serious" and it is clear from what the judge said at [21] that she considered that the risk was there. The judge considered the evidence overall and reached a conclusion at [28] which was open to her. Further, in any event, her findings on proportionality at [29] to [31] are also relevant and taking it into account, it cannot be said that this decision was perverse at this averred in the grounds.

36. Accordingly, for these reasons, I conclude that grounds are not made out. In the circumstances, having found that the judge was entitled to conclude that the appellant did not present a genuine, present and sufficiently

serious risk, any errors with respect to Article 8 are immaterial. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Notice of Decision

1. For these reasons I consider the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

2. No anonymity direction is made.

Signed Date 18 January 2022

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul