



**Upper Tribunal
(Immigration and Asylum Chamber)**

APPEAL Nos: IA/48510/2013
IA/48513/2013

THE IMMIGRATION ACTS

Heard at Field House on
6 October 2014

Determination promulgated on
5 November 2014

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL DIGNEY

**DARIUS MARTINAITIS (MR)
JULIA MARTINAITIENE (MRS)**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the respondent: Ms Isherwood, Home Office Presenting Officer

For the appellants: Mr Collins

DECISION AND REASONS

1. The first appellant is a citizen of Lithuania and the second appellant is his Ukrainian wife. On 28 September 2013 they applied for a registration certificate and a residence card respectively on the basis that the first appellant was an EEA national exercising treaty rights. The applications were refused under regulation 20(1) of the Immigration (European Economic Area) Regulations 2006 ("the regulations"). That reads:

The Secretary of State may refuse to issue, revoke or refuse to renew a registration certificate [or] a residence card... if the refusal or revocation is justified on grounds of public policy, public security or public health.

2. The Secretary of State justified the decision in the light of the first appellant's criminal activity between 2005 and 2012. The trial judge concluded that the first appellant did represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It is not disputed that the second appellant's appeal stands or falls with that of her husband.
3. Permission to appeal was granted by Upper Tribunal Judge Clive Lane who said the First-tier Tribunal had arguably failed to demonstrate a proper understanding of the regulations. I conclude that the Tribunal did so fail. This is a case where the first appellant, because of his residence in this country (over five years) is entitled to the second grade of protection, "serious grounds" and arguably the highest level of protection "imperative grounds". It follows that the Tribunal fell into legal error and I propose to remake the decision.
4. I turn to the facts which are not substantially in dispute; the case was heard on the papers and at neither hearing was there live evidence. The first appellant came to this country on 28 October 2001 and has been residing here since then. It has not been disputed that, apart from when in prison, he was exercising treaty rights. His mother and sister are settled here and have lived here since 2002. His sister is married and has two children who are British citizens. He married his wife in November 2012 and she came to this country in September 2013. They have a daughter who was born on 2 March 2014. The appellant works as a carpenter and has recently bought a house in which he lives with his family. His gross profits for the year 2012/13 were £27,510 and his net profits were £15,750.
5. I turn to the appellant's criminal record. I cannot find any document on the file dealing with this so I take the record from the First-tier Tribunal which has not been doubted. In February 2005 the first appellant was convicted of assaulting a constable, driving over the limit and driving uninsured. He received a community punishment order. In March 2006 he was again convicted of an excess alcohol offence and fined and disqualified. In April of the same year he was convicted of driving whilst disqualified and given a five months' suspended sentence.
6. In May 2008 at the Crown Court he pleaded guilty to a number of offences. He obtained a false passport, in order to obtain a driving licence which he needed in order to work. He was sentenced to twelve months imprisonment for that. The passport was then used in connection with a fraud which involved (as far as one can see, the sentencing remarks assume a knowledge of what had gone on) an e-bay internet fraud. For this the first appellant received a fourteen month prison sentence consecutive to the twelve months. It appears from the sentencing remarks that the judge considered that the appellant had been very cooperative. It appears that the serious part of this offending took place in December 2007. Finally he was convicted of criminal damage and failure to surrender in April 2012. He was fined. Apart from the

matter referred to earlier in this paragraph all the other matters were dealt with in the Magistrates Court.

7. The appellant can only be removed on serious grounds of public policy because he has resided here in accordance with the regulations for five years and that privilege is not lost because of subsequent imprisonment. In any event it would appear that he has resided here for a further five years since he was released from prison.
8. The principles that I must apply are to be found in paragraphs 21 (5) and (6) of the regulations. In particular I must be satisfied that the first appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
9. I would make one general remark. The first appellant is now married with a child and a mortgage; while such matters do not rule out offending they do lessen the risk. With regard to the motoring offences, I do consider these serious matters. Driving whilst over the limit, without insurance and whilst disqualified (and it would appear without having passed a driving test) puts members of the public at a serious risk. One of the fundamental interests of society is not to have drunken uninsured drivers loose on the road. However, the first appellant has not committed any offences of this sort for over eight years and I do not think that there is now a real risk that he might commit further such offences.
10. I turn to the offences for which the first appellant was sentenced to twenty-six months' imprisonment. These were committed about seven years ago, and from reading the sentencing remarks, it is clear that a much more sophisticated person was the brains behind the offences. Whilst, again, the offences affect one of the fundamental interests of society, I do not think that there is now, a real risk that the first appellant will commit such offences. I would add that had I so thought, I would have concluded that there were serious grounds of public policy involved.
11. Assessment of risk is always difficult and there can never be a certainty that there will be no further offending. However, on any basis here risk is at the lower end of the scale and the first appellant is highly integrated in this society, As Blake J says in Essa (EEA rehabilitation/integration) [2013] UKUT 00316 (IAC) such factors are likely to be a relevant positive factor in the proportionality balance as to whether removal is justified. The balance of all the factors here points to removal not being justified.
12. I turn to the situation if the first appellant is entitled to the privileges of someone who has resided here for ten years in accordance with the regulations; such a person can be removed only on "imperative grounds" and I am in no doubt that what we have here do not amount to such grounds. Here the appellant has resided here in accordance with the regulations but that period was interrupted by the time he spent in prison. The matter is dealt with in MG (prison-Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 003393 (IAC). The head note reads:

- (1) Article 28(3)(a) of Directive 2004/38/EC contains the requirement that for those who have resided in the host member state for the previous ten years, an

expulsion decision made against them must be based on imperative grounds of public security.

- (2) There is a tension in the judgment of the Court of Justice of the European Communities in the case C-400/12 Secretary of State v MG in respect of the meaning of the “enhanced protection” provision.
- (3) The judgment should be read as meaning that a period of imprisonment during those 10 years does not necessarily prevent a person from qualifying for enhanced protection if that person is sufficiently integrated. However, according to the same judgment, a period of imprisonment must have a negative impact insofar as establishing integration is concerned.

13. (3) in the previous paragraph must be taken as meaning that integration is a question of fact, but imprisonment will be a matter that may well mitigate against the establishment of integration. Here the first appellant has been in this country for thirteen years and has been in prison for thirteen months. He has always worked and has purchased a house. He has relatives in this country. There is nothing to suggest that the period of imprisonment has had a negative effect on his integration. I conclude that he is entitled to the enhanced protection that comes with ten years residence in accordance with the regulations.

14. It follows that the original determination did contain an error of law and I substitute a decision allowing the appeal.

The appeal is accordingly allowed

Designated Judge Digney
Judge of the Upper Tribunal

31 October 2014