



**Upper Tribunal
(Immigration and Asylum Chamber)
DA/00357/2018**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 18 June 2019

Promulgated

On 25 June 2019

Before

**THE HONOURABLE MRS JUSTICE THORNTON DBE (SITTING AS A JUDGE
OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE McWILLIAM**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARTURAS VASILJEVAS

Respondent

Representation:

For the Appellant/ Secretary of State for the Home Department: Mr N Bramble,
Home Office Presenting Officer

For the Respondent: Mr M Bradshaw, Counsel instructed by Tilson Solicitors

DECISION AND REASONS

1. For ease of reference we shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal throughout this decision. This is an appeal by the Secretary of State against the decision of the First-Tier Tribunal promulgated on 08 March 2019 allowing the Appellant's appeal against the decision of the Secretary of State to issue a deportation order pursuant to Regulation 23(6)(b) Immigration (European Economic Area) Regulations 2016, following a lengthy history of criminal convictions.
2. The Appellant is a Lithuanian citizen. His date of birth is 19 March 1988.

3. We need only summarise the Appellant's immigration history for the purposes of this decision. His parents arrived in the UK in 2002 and he was granted leave to remain in the UK as a dependent until December 2006. In 2004, Lithuania acceded to EU membership.
4. The Appellant's criminal history, very much distilled, is that between 2006 and 2017, he accumulated 11 convictions for motoring offences and violent crime. Letters were twice sent on behalf of the Secretary of State to the Appellant on 01 June 2007 and 24 March 2014 referring to his criminality and warning him about the risk of deportation.
5. On 06 October 2017, the Appellant was convicted of making false representations to obtain a driving licence and sentenced to 15 months imprisonment. In her sentencing remarks, the Sentencing Judge stated as follows:

"I am afraid the time has come, when your actions have tipped over the balance. This was a very clever fraudulent set of documents and I nurse the virtual certainty, that the driving licence was so that you could get behind the wheel of a car again and not be caught for driving whilst disqualified..."

6. The Secretary of State subsequently served the deportation order dated 12 May 2018, which the Appellant successfully challenged before the First-Tier Tribunal. Permission was granted by DUTJ Mandalia on 2 May 2019 on a narrow issue only; that it was arguable that the Judge did not have sufficient regard to the OASys assessment. The matter comes before us to decide whether the FTT decision contains a material error of law.

The legal framework

7. The deportation of EEA nationals is subject to the regime set out in the Immigration (European Economic Area) Regulations 2016 ('The EEA Regulations') which were made under section 2 of the European Communities Act 1972 by way of implementation of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States. The Directive sets conditions that must be satisfied before a Member State can restrict the rights of free movement and residence provided for by EU law.
8. Pursuant to Regulation 23(6)(b) the Secretary of State may deport an EEA national from the UK where it is decided that the person's removal is justified on the grounds of public policy. The relevant section of Regulation 23 is as follows:

"(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if -

- (a) *that person does not have or ceases to have a right to reside under these Regulations;*
- (b) *the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with Regulation 27; or*
- (c) *the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under Regulation 26(3)."*

9. Any such deportation is required to be in accordance with Regulation 27 which provides that an EEA National who has a right of permanent residence in the UK may only be deported on 'serious grounds' of public policy and an EEA national who has resided in the UK for a continuous period of at least 10 years prior to the deportation decision may only be deported on 'imperative grounds' of public security. In this case, the Secretary of State took the view that neither of these provisions for enhanced protection applied because of the spells of imprisonment and this has not been challenged.

10. Accordingly, Regulation 27(5) is the applicable provision. It provides:

"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.*

11. Regulation 27(6) provides:

“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.”

12. The deportation regime for EEA nationals is separate from that for non-EEA nationals. The following cases consider the regime with respect to the predecessor 2006 Regulations. However Mr Bradshaw, on behalf of the Appellant, submitted that the same approach should apply under the 2016 Regulations and this was not disputed by Mr Bramble:

“in an EEA case, governed by the 2006 Regulations and reflecting the requirements of EU law, a decision to remove had to be based exclusively on the personal conduct of the person concerned; that conduct had to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society; and in the case of a person resident in the United Kingdom, a range of individual considerations had to be taken into account before the decision was taken” (R)(Connell) v Secretary of State for the Home Department [2018] EWCA Civ 1329

13. In Arranz (EEA Regulations - deportation - test) [2017] UKUT 00294 (IAC), it was confirmed that the burden of proving that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society under Regulation 21(5)(c) of the Immigration (European Economic Area) Regulations 2006 rests on the Secretary of State, on the balance of probabilities.

14. In MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC), the Tribunal confirmed that:

“It is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (Regulation 21(5)(c)) that it becomes relevant to consider whether the

decision is proportionate, taking into account all the considerations identified in Regulation 21(5)-(6)."

The decision of the FTT

15. The Judge set out the Appellant's immigration and offending history and the Secretary of State's decision to deport before turning to the Appellant's evidence. He heard evidence from the Appellant, his partner, his mother, his cousin and his aunt. The witnesses were questioned on behalf of the Secretary of State. The Judge began his reasoning as follows:

"After considering all the evidence before me I have been troubled with the issue as to whether the appellant posed a present risk. I would have to be satisfied on the balance of probabilities that the respondent had established that the appellant by reason of the various elements of his past conduct identified above, considered individually or as a whole, represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the United Kingdom society. If I were satisfied on the balance of probabilities that the appellant represented a present threat I would have no hesitation dismissing this appeal because the appellant's criminal record is appalling" [85].

16. The Judge recounted the Appellant's convictions before continuing:

"85 The question I have to ask is whether the appellant is sincere in his intention never to reoffend and has overcome his problems with alcohol following his release from detention, the time when he did not have access to alcohol.

86 I was impressed with the evidence of his partner his mother and in particular his aunt who obviously thinks highly of the appellant who has treated her kindly, giving up his time to decorate her flat in circumstances where she had no money to pay for decorators. There is obviously a good side to the appellant that could come to the fore if he was allowed to rehabilitate in the United Kingdom.

87 I remind myself that under the EEA regulations 2016 the decisions of the court must not be solely based on the appellant's previous convictions. These are to be taken into account in assessing future risk. On the face of the appellant's criminal record the record itself does not augur well for the

future: but against that I have the evidence that the appellant is a changed man. This is finely balanced. I find I can just tip this the appellant's way to enable the appellant to rehabilitate in the United Kingdom to keep his family together. However, I emphasise that this decision should not be taken as an insurance policy to prevent the appellant from being deported if he reoffended again. If his offending behaviour continued I cannot see that the appellant would have any argument against a further deportation decision made under the EEA regulations 2016, regardless of the appellant's family circumstances."

Conclusions

17. The Secretary of State submitted that the Judge's reasons did not refer to the OASys assessment which concluded that the likelihood of reoffending was assessed at 47% in year 1, increasing to 65% and that the Appellant posed a medium risk of harm to the public. The Tribunal's failure to have regard to the assessment in determining whether the Appellant posed a present risk in an appeal that was finely balanced was such that the Judge failed to have sufficient regard to material evidence that was capable of affecting the outcome of the appeal.
18. In his oral submissions before us, Mr Bramble, on behalf of the Secretary of State also contended that the Judge failed to have regard to Schedule I of the Regulations, contrary to the requirement of Regulation 27(8).
19. We are not persuaded that the Judge fell into error. His reasons are succinct but not unlawful. The Judge begins his reasoning by asking himself the key question, given the legal framework and the facts before him, of whether the Appellant presents a genuine, present and sufficiently serious threat (Reg 27 (5) (c)). His analysis acknowledges the history of criminality and he gives careful and cogent reasons as to why he considered that the threat posed by the Appellant was not present. The Judge heard evidence from the witnesses, including the Appellant, his partner, his mother and particularly his aunt (paragraph 86). He was impressed with their evidence.
20. We are not persuaded that the Judge failed to consider the OASys assessment. In detailing the evidence before him and submissions he refers to the OASys assessment at paragraphs 45, 73, 74, 78 and 81 of his judgment. At paragraph 80 he refers to the skeleton argument produced by Mr Bradshaw on behalf of the Appellant, which considers the OASys assessment. Both representatives made submissions on the OASys assessment. Moreover, whilst the Judge did not expressly refer to OASys assessment in his reasons, on a proper reading of the decision as a whole, we find that the question whether the Appellant would reoffend was clearly at the centre of the Judge's analysis.

21. We note that the Secretary of State does not challenge the Judge's direction at paragraph 87 that under the EEA Regulations his decision must not be based solely on the criminal convictions. A different approach to that taken by the Judge would, in any event, be contrary to the EEA Regulations.
22. The Judge was aware of the extent of the Appellant's criminality and the OASys assessment. The effect of the Judge's reasoning is that he departed from the assessment of the probation officer in the OASys report. The weight to be attached to the assessment was a matter for the Judge. The appeal took place almost a year after the OASys assessment. The Judge had the benefit of oral evidence from the Appellant and family members. She found the witnesses to be credible. What weight to attach to that evidence was a matter for the Judge. It was wholly open to the Judge to conclude that the Appellant had turned a corner. The finding is grounded in the evidence and adequately reasoned.
23. There is no legal authority before us to support a proposition that an OASys assessment is binding on a Judge. The case of MA (Pakistan) [2014] EWCA Civ 163 is relied on by the Secretary of State, in particular the comment by Elias LJ that:

"..... what may be an assessment of low risk for the purposes of criminal sentencing is not necessarily to be considered a low risk when looking at the future behaviour of this applicant. A risk of 17% re-offending over a 2-year period is not, in my judgment, in the context of a deportation case a matter which can be treated as insignificant. It is a good reason for supporting a decision to deport" [19]

24. This was said in the context of the Upper Tribunal departing, in that case, from the assessment and concluding that there was a serious risk of the commission of further offences.
25. It seems to us that if any proposition can be said emerge from the MA decision as to the approach to an OASys report, the case may be said to establish that a Tribunal can depart from the conclusions in an OASys assessment providing there is a proper analysis of the evidence and adequate reasons are given. The Judge in this case did both.
26. Furthermore, we are not persuaded that the absence of reference to Schedule I of the Regulations amounts to an error. Paragraph 3 of Schedule I provides that:

"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 interest of society.”

27. This issue was not raised in the Secretary of State’s grounds. In any event, we are not satisfied that the judge failed to take into account paragraph 3 of Schedule 1, the content of which is, in our view, axiomatic. The Judge was wholly aware of the Appellant’s history of offending. The task before the Judge was to assess risk at the time of the appeal taking into account any changes since the expulsion decision. The Judge evaluated risk after proper consideration of the evidence. The question whether the Appellant presented a genuine, present and sufficiently serious threat was at the heart of the Judge’s reasoning. In our view the grounds of challenge amount to a disagreement with the sustainable findings of the Tribunal. The Judge properly directed herself and applied the law. In the absence of irrationality, which is not raised by the Secretary of State as a ground of appeal, the appeal falls to be dismissed.

Notice of decision

28. The Secretary of State’s appeal before the Upper Tribunal is dismissed. The First-Tier decision allowing the Appellant’s appeal is to stand.

Signed

The Hon. Mrs Justice Thornton DBE

Date 20 June 2019