



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

Appeal Number: DA/00399/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 12 April 2019**

**Decision & Reasons Promulgated
On 29 April 2019**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

AT

[Anonymity direction made]

Claimant

Representation:

For the claimant: Not represented

For the appellant: Ms L Kenny, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), I make an anonymity direction. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant(s).*
2. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judges Sharma & Parkes promulgated 17.12.18, allowing the claimant's appeal against the decision of the Secretary of State, dated 4.6.18, to deport him from the UK pursuant to the Immigration (EEA)

Regulations 2016. With his consent, preserving his appeal rights, he was removed to Lithuania on 16.6.18.

3. First-tier Tribunal Judge Foudy refused permission to appeal on 15.1.19. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Smith granted permission to appeal on 8.3.19.
4. The appeal was listed before me on 12.4.19. I am satisfied from the correspondence file that the appellant was fully aware of the appeal date. He could not attend in person as he has been removed to Lithuania. However, in a phone call on 10.4.19 he confirmed awareness of the substantive hearing date and indicated that he would advise his mother and his representative to attend. There is no indication on the file that the appellant has a UK legal representative and his mother did not attend the appeal hearing.
5. In the circumstances, I considered that it was consistent with the tribunal's objectives to deal with cases fairly and justly to hear the appeal in the appellant's

Error of Law

6. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside.
7. It is common ground that the claimant had not acquired permanent residence status under the Regulations and therefore the primary issue for the panel was whether he represented a genuine, present and sufficiently serious threat, assessed at the lowest level of protection pursuant to Regulations 23(6)(b) and 27(c). The tribunal panel concluded that he did not pose such a threat.
8. In granting permission, Judge Smith considered it arguable that the risk assessment was flawed. In particular, the panel failed to explain why the previous offences of driving without a licence and whilst uninsured, whilst not as serious as the index offence, were not relevant to that index offence given the nature of it. It is arguable that there are conflicts between the findings at [26] and [30] of the decision in this regard. It was also arguable that there is a conflict between the finding as to the claimant's remorse at [33] and what is said about that evidence at [14] of the decision. Further, it is arguable that the panel failed to sufficiently take into account his reaction to the offence and the view of the sentencing judge recorded at [11] of the decision.
9. The Home Office decision to remove the claimant was on the basis of his criminal history evidencing his behaviour over a number of years. Between March 2015 and October 2017 he had amassed convictions for a total of 10 offences. The index offences were causing death by careless driving, and driving whilst unlicensed, disqualified, and uninsured. The brief facts

of the case are set out more fully between [6] and [10] of the decision. In summary, in May 2017 whilst intoxicated and tired he drove a vehicle he had acquired in April 2017, with his partner and mother of his child in the front passenger seat and two friends in the back seat. He fell asleep and drove head-on into an oncoming vehicle. Both friends were thrown from the vehicle to their deaths. His partner was very seriously injured but survived. He sustained fractures to his pubic bones and the occupants of the other vehicle were also injured. He immediately fled the scene and took steps to try and avoid the police. When finally arrested, he repeatedly told the police he was not the driver, and subsequently gave a no comment interview. Whilst he pleaded guilty, the Crown Court Judge rejected the explanation for his post-crash actions that that he was unable to recall the aftermath of the incident. The judge concluded that he was not genuinely remorseful.

10. The findings of the panel relevant to risk are set out between [29] to [33] of the decision and at [32] the panel accepted that, following the guidance in Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC), it is an exercise looking to the future to assess the risk that he presents and which necessarily includes rehabilitation considerations.
11. It was accepted that the index offences were aggravated by the fact that he had no licence, was uninsured, and that he had previous convictions for similar driving offences. The panel found it likely he had been driving uninsured and without a licence since 2015, perpetually breaking the law and putting others at risk. However, the panel considered the real gravamen of the offence was driving whilst drunk and that part of the offence was deliberate and the most culpable.
12. The panel also accepted that the imposition of a significant, not short, custodial sentence increased the likelihood that the claimant's continued presence in the UK represented a genuine, present and sufficiently serious threat. It was also noted at [29] that the Secretary of State pointed to the lack of any information about rehabilitative work.
13. As Ms Kenny explained in her submissions, the issue is whether or not the expulsion or removal of the claimant was justified, on the basis of the lowest level of protection under the Regulations. There has to be a genuine, present and sufficiently serious threat. She pointed to the repeating pattern of behaviour in relation to the claimant's driving, continuing up to the fateful night of the fatal crash. There is no suggestion that he would have stopped continuing to drive in the same unlawful way. He was disqualified before he could obtain a licence to drive. MS Kenny submitted that for the tribunal to suggest that the real gravamen was driving whilst drunk and to point out he has not done that before trivialises the seriousness of his conduct. She submitted that it was only a matter of time before a serious accident occurred.
14. It is difficult to follow the conclusion of the panel at [30] that because he had not previously been convicted of driving whilst intoxicated suggested

that the risk of repeating such actions is “not great.” The panel also went on at [31] to conclude that because of the serious consequences of the index offences, the loss of the lives of two of his friends and serious injuries to his partner, “it is unlikely that such offending would be repeated.” Having earlier pointed out that there was no formal risk assessment and no pre-sentence report, the panel then asked rhetorically, “what rehabilitative work in reality is there any need for?”

15. On its face, the decision fails to accord any or any sufficient weight to the fact that the claimant failed to take heed of the warning in previous non-custodial sentence of 2015, which is an aggravating factor. Causing death by bad driving is not the sole risk the claimant presents and, in particular, the risk assessment is not to be confined to the question of whether he would commit the same death by careless driving offence again but must take into account his overall behaviour, including his running away from the scene, leaving his friends dead or dying and his girlfriend seriously injured, failing to report the matter to the police, his deliberate evasion of the police, his denials to the police that he had been driving, his no-comment interview, and the conclusion of the sentencing judge that he had shown no genuine remorse for his actions but only self-pity at his own situation. In that context, the claimant’s letter purporting to express remorse can be viewed as entirely self-serving, particularly when it fails to offer any explanation for his conduct following the collision.
16. It is also difficult to understand why the panel considered at [32] that the claimant’s post-offending behaviour is not indicative of future risk. This harks back to the finding at [26] that “his conduct after the accident is less of a concern as he may well have acted in a way that he would not normally have done had it not been for the traumatic events of the night. His age in this regard is relevant also.” With respect, the conduct after the accident surely fits into a pattern of his previous behaviour, flouting the law and putting the public at risk by driving uninsured and without a valid licence.
17. Given the absence of any rehabilitative work to address his more general behaviour of acquiring a car when he had no right to drive, driving whilst intoxicated, driving without a licence and whilst disqualified and uninsured, and driving carelessly with serious and fatal consequences, and given his previous motoring offences demonstrating a total disregard for the law and public safety, it is questionable to what extent the tribunal could have concluded that the claimant had learnt the lesson from the fatal consequences of his actions. The extent of any genuine remorse is also questionable in the light of the judge’s sentencing remarks. On the evidence, there was nothing to suggest that he would not continue to flout the law with regard to his driving behaviour, putting public safety at real and serious risk. It is not equating the risk he presents to the seriousness of the consequences to take into account the overall pattern of behaviour leading up to and following the index offences.

18. In the circumstances, I am satisfied that the decision was made in error of law and is not sustainable so that it must be set aside and remade. Bearing in mind the absence of any submissions by or on behalf of the appellant, the appeal having been brought by the Secretary of State, I can only conclude that he has nothing to add or offer beyond that evidence and those submissions made to the First-tier Tribunal, of which I have taken full account.
19. However, I have to bear in mind that the appellant is entitled only to the lowest level of protection under the Regulations. I am satisfied on the evidence referenced above that the claimant presents a genuine, present and sufficiently serious threat. I am satisfied that the decision to remove him from the UK is one justified on grounds of public policy, public security, or public health, in accordance with regulation 23(6)(b) and was taken in order to protect the fundamental interests of society.
20. The decision must also be proportionate and based exclusively on the personal conduct of the person concerned, which I am satisfied represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and taking into account his past conduct as mentioned above. The threat does not need to be imminent and can be taken on preventative grounds. I am satisfied that there is no basis before the tribunal to conclude otherwise than that the claimant would continue to drive unlawfully, without a licence, without insurance, whilst disqualified and in a manner likely to put his own safety and that of others including the public at risk. This is a clear case where the preventative grounds specific to the claimant and the pattern of his behaviour are entirely appropriate and justified.
21. The appellant's personal circumstances have also been taken into account. In particular, I have taken into account his relative youth, a factor mentioned in the First-tier Tribunal. However, he is fit and healthy and able to work to support himself. There has been a degree of integration into life in the UK in the sense of a relatively short length of residence but one during his formative years, and that his immediate family members are also in the UK. Against that, the level of repeat motoring offending is cogent evidence that he has not integrated into the society of the UK. Further, pursuant to schedule 1 I have to bear in mind that merely because he has family or societal links with persons of the same nationality or language in the UK does not amount to integration in the UK; "a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the UK." Also, little weight is to be attached to integration in the UK if the alleged integrating links were formed at or around the same time as the commission of a criminal offence, or other acts otherwise affecting the fundamental interests of society. I also have to take account of the fact that the claimant has failed to adduce any substantive evidence to suggest that he does not pose a threat, such as evidence of reformation or rehabilitation.

22. In particular, I note that he lived in Lithuania until the age of 13 and speaks the language. He must have retained at the very least cultural ties and understanding of his country, despite his absence from the country for 7 years or more. It was claimed that there was no one in Lithuania who can help him, but the fact is that he was returned there and has been living there pending appeal, for some considerable period. Nothing has been put forward to suggest that he is living in desperate circumstances or is not able to support himself, with or without family assistance.
23. Perhaps the most significant factor in the claimant's favour is that he has a child in the UK and I have taken as a primary consideration the best interests of that child, pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009. Ideally, it would be in a child's best interests to have his father present and playing an active role in his life in the UK. However, the claimant's behaviour and actions had the consequences of separating himself from his child, first whilst he was serving a prison sentence, and latterly after he was removed to Lithuania. The claimant is able to maintain contact with his son through modern means of communication. In any event no cogent reason has been advanced as to why family life with his son could not in theory or practice continue in Lithuania, especially given the young age of the child and that his former partner is of Lithuanian heritage. Of course, it is up to the child's mother whether she wishes to facilitate the continuation of the previous degree of relationship by relocating there.
24. There are therefore factors both for and against the question of integration and ties to the UK, with the evidence, all of which I have taken into account. However, in my view the evidence falls largely against any significant integration.
25. I have taken account of the claimant's article 8 ECHR rights to respect for private and family life. Applying the R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27 stepped process, I am satisfied that the decision creates such interference as to engage article 8, the threshold for which is low. The decision is lawful and necessary to protect a fundamental public interest, the protection of the public from continued bad and illegal irresponsible if not reckless driving behaviour by the appellant, which at any time could have had and ultimately did have serious and fatal consequences. It was only a matter of time before such an accident happened, or to put it another way, the pattern of the claimant's behaviour was an accident waiting to happen. On balance, notwithstanding the separation from his child, I find that the balance falls clearly in favour of the decision to remove him from the UK being entirely proportionate and not disproportionate to the rights of the claimant or his child, or indeed his relationship with his mother and siblings residing in the UK.
26. Whilst Part 5A of the 2002 Act does not directly apply to an EEA national, paragraphs 398 to 399A and s117A-D reflect Parliament's view of the public interest in the deportation on the basis of criminal convictions. His

removal is conducive to the public good and in the public interest. In essence, under those provisions the claimant would have to show both that it was unduly harsh for his child to either leave the UK to join him in Lithuania and to remain in the UK without him. It is not clear that the child is a British citizen and given the young age he cannot have lived in the UK for the threshold requirement of seven years. Further, it is questionable on the evidence whether the claimant has a genuine and subsisting parental relationship with the child, which requires more than a biological relationship and more than mere presence. There is insufficient evidence before the tribunal to demonstrate that the appellant has any current meaningful relationship with his child or any involvement in the child's upbringing or well-being. On the limited information before the tribunal, I cannot be satisfied that the claimant's removal causes any unduly harsh consequence for his child. Neither am I satisfied that there are any very compelling circumstances over and above the unduly harsh threshold tests.

27. There is no ongoing family life with a partner to consider. However, applying the same principles and considerations, I find nothing to demonstrate that it would be unduly harsh for the former partner to join the claimant in Lithuania, where she was born and raised and speaks the language. Neither is there any evidence that it would unduly harsh to expect her to remain in the UK without the appellant. In reality, it appears that the child will continue to live with his mother and it will be up to the mother to determine the extent of any ongoing contact with the claimant.
28. I have also considered the claimant's private life claim, but I am not satisfied that he has been lawfully resident in the UK for most of his life, or that he is socially and culturally integrated in the UK, or that there would be very significant obstacles to his integration in Lithuania. In the circumstances, he cannot meet the requirements of paragraph 399A of the Immigration Rules.
29. In all the circumstances, I find that the claimant's removal would not breach either the requirements of the EEA Regulations or infringe his human rights under article 8 viewed through the perspective of paragraphs A398 to 399A of the Rules and section 117A-D of the 2002 Act.
30. It follows that the appeal must be dismissed on all grounds.

Decision

31. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it.

Signed

DMW Pickup

Deputy Upper Tribunal Judge Pickup

Dated 23 April 2019

Direction Regarding Anonymity

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Fee Award Note: this is not part of the determination.

I make no fee award as the appeal has been dismissed.

**Signed DMW Pickup
Deputy Upper Tribunal Judge Pickup**

Dated 23 April 2019