



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-005105  
First-tier number: DA-00587-2018

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 9<sup>th</sup> of November 2023**

**Before**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Dainius Krotka**  
**(no anonymity order made)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Lee, Counsel instructed by BID (remote)  
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

**Heard at Phoenix House (Bradford) on 3 November 2023**

**DECISION AND REASONS**

1. The Appellant is a national of Lithuania born on the 1<sup>st</sup> October 1986. He appeals with permission against the decision of the First-tier Tribunal (Judge Monaghan) to dismiss his appeal under the Immigration (European Economic Area) Regulations 2016 ('the Regs').
2. The parties have been arguing about whether or not the Appellant should be deported since the 5<sup>th</sup> September 2018. On that date the Respondent served the Appellant with notification of her intention to remove him from the United

Kingdom under the powers in Regulation 27 of the Regs. The reason for her decision was the undisputed fact that the Appellant had received two convictions for battery, perpetrated against his partner, the mother of his children. Although neither of those convictions was deemed serious enough to warrant a custodial sentence, he had also failed to comply with the terms of a community sentence, resulting in him being committed to custody for 12 weeks.

3. The first battery conviction was in 2015, the second in 2017. The sentence of imprisonment was in March 2018. The Appellant entered the United Kingdom in 2013 and it is not in dispute that he had not accrued a right of permanent residence by the date of the Respondent's decision to deport. The appeal against the decision has therefore always proceeded on the basis that the Appellant does not have any 'enhanced protection' from deportation under the Regs.

4. These are the relevant parts of Regulation 27:

*Decisions taken on grounds of public policy, public security and public health*

**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) ....

(4) ...

(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.

...

5. The questions arising from this legal framework are therefore primarily these:
- i) Has the Respondent shown that the Appellant’s conduct represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society;
  - ii) Even if she has would it be proportionate to remove the Appellant having regard to all of the relevant circumstances?
6. Given the straightforward nature of that enquiry it is somewhat surprising that I am the 10<sup>th</sup> judge of the IAC to be asked to make a decision on it. The Appellant’s appeal was initially allowed by First-tier Tribunal Judge Myers on the 20<sup>th</sup> November 2019; that decision was challenged by the Respondent who obtained permission to appeal to the Upper Tribunal; a judge of the Upper Tribunal overturned Judge Myers decision on the papers and remitted to the First-tier Tribunal; on the 8<sup>th</sup> February 2021 it came before Judge Moxon who dismissed it; the Appellant obtained permission to appeal to the Upper Tribunal; on the 5<sup>th</sup> January 2022 Upper Tribunal Judge Reeds set the decision of Judge Moxon aside and once again remitted the matter to the First-tier Tribunal; there it came before Judge Monaghan, who by her decision of the 2<sup>nd</sup> August 2022 dismissed the appeal; the Appellant was refused permission to appeal by First-tier Tribunal Judge Moon but then renewed that application; Upper Tribunal Judge Owens granted him permission to appeal on the 18<sup>th</sup> November 2022 and that is how the case has come before me.
7. The first ground of challenge to Judge Monaghan’s findings is simple. At paragraph 120 of her decision Judge Monaghan says this:
- ‘Whilst I am told that the Appellant has completed Anger Management Courses and that he did very well in engaging with his Probation Officer for over a year whilst under supervision, *I have no substantiating evidence from Probation, nor of the courses he says he has completed. As I have general credibility concerns about the Appellant, there is no real reason for me to accept his evidence on these points either.*’ (emphasis added)
8. The point is reiterated at paragraph 125 of the decision:
- ‘Given that he has returned to the family home without informing Social Services and given their concerns about the children were he to do so in the light of his offending, together with *the lack of an substantiating evidence that he has completed rehabilitative*

*work*, the decision to remove him is proportionate.’ (emphasis added).

9. And at 122 the Tribunal underlines its view that it is the lack of evidence of rehabilitation that has been a deciding factor in this case:

“122. I next go on to consider the issue of rehabilitation given that the existence of a present threat affecting the fundamental interests of society would diminish substantially if the Appellant does not relapse into violence and any programme of rehabilitation which he has either undertaken or which is available to him is an important factor in deciding whether it is proportionate to remove him....”

10. Mr Lee says that as a matter of fact, the Tribunal is quite wrong to say that there is no independent evidence of the Appellant’s efforts at rehabilitation. He submits that in particular, there certainly was substantiating evidence from the probation service that the Appellant had undertaken rehabilitative work. This could be found in the OASys report dated the 15<sup>th</sup> October 2019 which includes the following statements from his probation officer:

“At termination stage in August 2019, Mr Krotka has completed offence focused work in supervision sessions and demonstrates a better understanding of the offence and his emotions and thinking leading up to it. Mr Krotka was able to discuss the forms domestic abuse might take saying "bad mood, financial problems and impulsive thinking. He noted that he had "pushed" and sworn at Justina before which were forms of domestic abuse. He was able to consider his expectations in a relationship, stating that he required reciprocal understanding and "emotional help". Mr Krotka noted that he felt both parties were more "open" now and spoke about issues more”.

“He completed offence focused work around triggers, both external and internal. He was able to provide examples in general life where he had managed triggers with self talk such as "it’s not worth arguing about", however this has yet to be proven in an environment where conflict arises with his partner. Mr Krotka recognized that ultimately we have control over our thoughts and actions, and that we are responsible for our behaviour when we press our internal trigger. . .”

“He has attended all required appointments which appears to show progression given the number of breaches on his past community order/ suspended sentence order....”

“I would suggest that Mr Krotka has complied with probation requirements and social services requirements and has engaged in offence focused work, demonstrating a motivation to address offending behaviour”

11. So while the decision elsewhere references the OASys report, it would seem from the Judge’s conclusions at her paragraphs 120 and 125 that she overlooked

this material evidence from the probation service. This was highly material given that this alleged 'omission' formed such a central plank of her reasoning.

12. For the Respondent Mr Diwnycz accepted that this error was made out and I am quite satisfied that this was a concession properly made. The Tribunal plainly attached very significant, indeed determinative, weight to what it understood, wrongly, to be the failure of the Appellant to undertake rehabilitative work. That in itself is sufficient basis upon which to set the decision aside.
13. I need therefore only to address Ground 2 briefly. It concerns the Tribunal's treatment of the expert evidence of an independent social worker, Ms Ann Buckley.
14. Ms Buckley had conducted a number of assessments of this family between August 2019 and May 2022. She had observed the family together, and interviewed the Appellant and his partner separately. She had also spoken to other family members, to the probation services and had made repeated and prolonged efforts to liaise with Doncaster Children's Services Trust (DCST), who had been involved in the family between 2015 and 2020. Her evidence, broadly speaking, was that the instances of domestic violence perpetrated by the Appellant were serious and that they must have had a profound negative impact on the children. She was however of the view that the couple had "turned a corner" in their relationship. The Appellant had undertaken anger management work, and had reached a good level of insight into how his offending had caused harm to his family. He had developed new strategies in dealing with his emotions and this was confirmed by his partner. There had been no further instances of violence since February 2017. Ms Buckley also spoke to her frustrations with the behaviour of DCST who had had only intermittent contact with the family whilst their file was open, who had given (in her view) confusing and unhelpful instructions to the couple, and who had failed to respond to her repeated requests for progress. They had closed their file in June 2020 and the last information they had provided was an email which they concluded "DCST would be concerned for the safety and wellbeing of these children if Mr Krotka was to resume his relationship with the mother". Since that date they had refused to conduct any further assessment, stating that they were waiting for the deportation proceedings to be resolved before they would do so.
15. The Tribunal recognises that Ms Buckley is an expert but then at its paragraph 117 effectively rejects her conclusions on the basis that she had not addressed the single line in the June 2020 email from DCST that they would continue to have concerns. Mr Lee submits that this was a wholly irrational approach to take. I agree. DCST had illustrated the depth of their ongoing concerns about these children by closing the file in June 2020. They had singularly failed to offer any ongoing support or assessment, and the judge herself had acknowledged (at her paragraph 110) that their refusal to do so was not in the children's best interests. Ms Buckley plainly knew about the email, and indeed the entire history of the contact with the service and the family, because she references it in her reports: this is recorded by the Tribunal at its paragraph 85. Furthermore the concerns expressed in that DCST email were based on nothing more than the convictions themselves: they *can only* have been because they had not conducted an assessment themselves. There was no other evidence before them when they wrote it.

16. This brings me to the third ground, which is in effect that the First-tier Tribunal appears to have lost sight of where the burden of proof lay in this case. It of course primarily lay on the *Respondent* to prove that the Appellant's conduct represented a genuine, present and sufficiently serious threat to one of the fundamental interests of society.
17. In order to discharge that burden the Respondent could point to three things. There were the convictions themselves, there was the involvement of DCST, and there was the OASys assessment conducted in 2019.
18. First the convictions. The only conviction which resulted in the Appellant being sent to prison was that arising from his failure to complete a community sentence. It has not at any stage been suggested that this conviction could possibly justify deportation, or establish any kind of ongoing risk. The convictions for battery were however undoubtedly more serious. The Appellant's partner was subjected to domestic violence that caused her to fear for her safety in her own home, and that was rightly judged to be unacceptable by the criminal courts who handed down two convictions, one in 2015, one in 2017. That violence was strongly contrary to the best interests of the couple's children. The weight to be attached to those convictions were therefore significant. We know however that deportation under the Immigration (European Economic Area) Regulations 2016 cannot be justified on the basis of convictions alone. It must be established that there is an ongoing threat posed by the Appellant remaining in the UK.
19. In order to establish that ongoing threat the Respondent points to the involvement of social services in the family. As I have set out above, however, they ceased involvement in June 2020 and have to date declined to undertake an assessment. Their opinion was, the First-tier Tribunal finds, wholly based on the violence which led to the Appellant's convictions.
20. Then there is the OASys report. Whilst the author of that report has some very positive things to say about the Appellant's recognition of the harm he has caused, his adoption of strategies to change his behaviour and his good level of insight, it does conclude that he poses a medium risk of harm to his children and partner. It is also right to acknowledge that on every metric (OGRS3, OGP and OVP) his risk of reoffending is classed as 'low'.
21. That was the Secretary of State's case. To that the Tribunal added, in its analysis, a negative credibility finding on the evidence of the Appellant and family.
22. The First-tier Tribunal heard testimony from the Appellant, his partner and her mother, that he had substantially changed as a person and that the couple had together developed their communication and conflict resolution skills. The Tribunal rejected that evidence as "not credible" on the ground that there had been a "long history of failing to inform social services" on the part of the Appellant and his partner about what was happening in the family. Their evidence had been that despite numerous attempts to contact social services and be 'signed off' they had, in effect, given up and just got on with their lives: upon his release from prison in late 2018 the Appellant had immediately resumed regular contact with his partner and children, and by the beginning of 2022 had moved back into the family home. It was admitted that he had done so without the permission of social services. The Tribunal concludes that "these series of events undermines the general credibility of both the Appellant and his partner", but it

is not clear in respect of *what*. The Tribunal does not find, and indeed the Respondent does not suggest, that in fact violence had persisted and that the family were all lying about his changed character. In the absence of such a finding it is very difficult to discern what the relevance of this negative finding on their “general credibility” might be.

23. This then is the total of the evidence that weighed against the Appellant. He was twice convicted of violent offences. As a result of those convictions social services expressed concerns. In 2019 the probation service classified him as continuing to pose a medium risk to his family. The Tribunal drew generally negative findings about the credibility of the Appellant and his partner but it is not clear what these findings related to.
24. Weighing against all of that is the fact that neither of the assaults perpetrated by the Appellant were deemed serious enough to warrant a custodial sentence. The last one was in 2017 and there is absolutely no evidence at all to suggest that he has committed any further offences of this nature. To that extent the OASys analysis conducted in 2019 has proven to be accurate: he was then classified as posing a low risk of reoffending. The concerns expressed by DCST were based on the convictions themselves and therefore add little to any contemporary analysis. The evidence of the probation service is that the Appellant took his convictions seriously and that in their aftermath he undertook offence focused work, including anger management skills, in order to improve his ability to resolve conflict safely. That he benefitted from that work is borne out by the contemporaneous evidence of his partner, his mother in law, the observations of the independent social worker, and – it is worth saying again – the undisputed fact that there have been no further instances of violence in this family for over six years.
25. I am quite satisfied, taking all of that into account, that it was simply not possible for the Respondent to discharge the burden of proof that lay upon her to show that the Appellant presents a genuine, present and sufficiently serious threat to one of the fundamental interests of society. This is a man who badly let his family down, and behaved appallingly, over six years ago. Since then all of the evidence has gone in one direction. This appeal must be allowed.

### **Decisions**

26. The decision of the First-tier Tribunal is set aside.
27. The decision in the appeal is remade as follows: the appeal is allowed.
28. There is no order for anonymity. Mr Krotka has been convicted of criminal offences and his identity would then have been made public: no reason has been advanced as to why it should be protected now. I have not identified his partner or children in the body of this decision.

Upper Tribunal Judge Bruce  
Immigration and Asylum Chamber  
3<sup>rd</sup> November 2023

