IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001473

First-tier Tribunal Nos: EA/50953/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12th of December 2023

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR GINTAUTUS KANCEVICIUS
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Moksud, instructed by AM International Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

Heard at Field House on 9 October 2023

DECISION AND REASONS

1. The appellant appeals against a decision of the Secretary of State to make a deportation order against him on 12 May 2022 and made a deportation order against him.

2. He is a citizen of Lithuania. He arrived in the United Kingdom in 2006 and, along with his wife and elder son. He had resided here first in 2000 but left voluntarily following a conviction for drink driving in 2001. He returned in 2002 for some three to four months but arrived in 2004 to live permanently. On 16 January 2007 he and his family were issued with EEA registration certificates. It is his case that he has remained here since then, living in accordance with the EEA Regulations.

3. In 2021 the appellant pleaded guilty to conspiracy to steal and to an offence under Section 327 of the Proceeds of Crime Act 2002 when he received concurrent sentences of three years and ten months' imprisonment.

4. The appellant's wife has been resident in the United Kingdom since 2007 and has, since 2009, been continuously employed.

5. On 26 July 2021, subsequent to the conviction, the Secretary of State invited representations from the appellant as to why he should not be deported. These were made on 24 August 2021 and on 21 September 2021 he made an application under Appendix EUSS of the Immigration Rules.

6. On 12 May 2022, the Secretary of State refused the appellant's application under the EU Settlement Scheme and made a deportation order against him. In doing so the Secretary of State took the view that the appellant was not entitled to the protection of the EEA Regulations as saved.

7. For the reasons set out in my decision of 26 July 2023 a decision of the First-tier Tribunal allowing his appeal was set aside. A copy of that decision is attached to this decision. This decision must be read in the light of that decision, given the findings that it preserves.

The Hearing on 9 October 2023

8. I heard evidence from the appellant and his wife. In addition, I had before me the bundle prepared for the First-tier Tribunal and new witness statements in respect of both the appellant and his wife.

9. The appellant adopted his witness statement stating that he is now working, as a driver, for a company owned by his wife, KDJ Ltd, which provided transport services. That he, his son and one or two others worked for the company but he was not sure which companies hire services from his wife's company.

10. The appellant did not know how much profit the company makes per month. He said that he owes £30,000 in debt as a result of his criminal offending. He currently receives £1,000 a month from driving for his wife's company. He is not sure if this is the money he had earned in the previous two months, explaining that the debt he owes - £30,000 – is as a result of confiscation proceedings.

11. It was put to him the respondent's concern that this was not enjoyment of genuine employment and he might be still committing crimes. He said that he was not and that the court had accepted that his involvement in the crimes was just for some three to four months. It was put to him this was not the case and he was still trying to minimise his offending to make it look less serious.

12. He said he did not have any evidence of repaying the money and that he was able to do so without committing further crime, that his son is helping him, he is now employed and his wife will take out a loan. He said they still owe £18,000 so a loan of about £8,000 to £10,000. He said he had paid £500 at a time to settle the debt. Asked whose account the money came out of he said that he would pay in cash, his son gives him the money, and a couple of times this money had come from his wife's account.

13. He denied that he would have continued offending had he not been caught, that he did not know how significant his role was in the offending and that he had had no active involvement. He did not know how it had been accepted that he only knew what was happening and had no other role. He denied trying to avoid answering the question. Asked why he had said in his first witness statement he had "turned a blind eye" to what was going on, he said that was correct and he had been paid rent. It was put to him that he had not just turned a blind eye. It was put to him that the Tribunal should not believe what he said.

14. The appellant denied that he would not commit further crimes if he needed the money and that he had no connections in the Lithuanian community with people who had committed crimes, they had all been deported; he was the only one still here. All the others were younger.

15. He said he had no reason why he would go back to and where to go back to in Lithuania. His parents are dead, his wife's mother is very old. He said that the drivers that he works with are English. He accepted that his wife had found some of the businesses for whom her company worked through Lithuanian connections.

16. In re-examination he said that he pays money to the court making the payment into an account with NatWest Bank. He said that his wife had not yet taken out a loan and that discussing how much she could take out so they knew what she could afford to repay.

17. I then heard evidence from the appellant's wife who adopted her first and second witness statements. She said that approximately £12,000 or £13,000 had been repaid but there was also interest and so she did not know exactly how much was owing. She said they had tried to negotiate each month but this was not approved and they pay as much as they can and they will shortly be going back to court to seek different terms. They had paid £1,000 and then she was told to pay at least £10,000 at which point they agreed to bring it back to court and create a new payment plan. She had raised £10,000 from friends and the rest would have to be borrowed or her husband would contribute. She confirmed that her husband was working as a lorry driver for the company KDJ Ltd which she had created. She could not recall exactly how long he had been working but it was only since he had been permitted to work again. At first he had not earned very much money.

18. It was put to her that there was a concern that as they are in debt the appellant might commit more crimes to pay the debt back. This was denied, his wife saying that he is remorseful and the fact they are supportive, that all their life is here and they have nothing to go back to, their children and grandchildren are in the United Kingdom, they have a plan to pay back the money owed. She said that she has a permanent job and that there was not the chance that they would be told to pay the remainder immediately.

19. In re-examination the appellant's wife said that she employed two women to deal with paperwork for KDJ Ltd.

Submissions

20. Mr Lindsay accepted that it had been established the appellant had permanent right of residence and that the Secretary of State had shown that the appellant did present a genuine, present and sufficiently serious threat given his conviction for 30 months for conspiracy to steal. He submitted that the appellant was seeking to diminish his involvement which undermined his credibility, the dishonesty being a factor in that assessment. He submitted that the evidence before me had been evasive and unclear and it was of concern that the appellant minimises his role as he had done in the OASys Report. It was also of concern that in the OASys Report (2.14) he had claimed to have no knowledge of the co-accused which was not correct and that on any view his involvement in the offending was significant.

21. Mr Lindsay submitted that there was a real risk of the appellant reoffending, the risk being 7% and then 13% and that although two years had now elapsed, it could not be overlooked that he faced financial difficulties about which he had been evasive. It was unclear how much of the £30,000 debt remained and it was likely that more money would have to be borrowed, his financial circumstances being a factor in encouraging further offending. It was also unclear how much he earns.

22. Accordingly, it was submitted deportation was proportionate and that it was open to the appellant's wife to go to live in Lithuania, there being limited evidence of her or his integration into the United Kingdom.

23. Mr Moksud submitted that the respondent had not shown that the appellant was a genuine, present and sufficiently serious risk and that he had been compliant with his licence during his probation period. There had been no warnings or breaches. Turning to his mental health he submitted that the appellant had been trying to sort out issues and that weight should be attached to the letters from his wife and others stating that he is honest. The appellant is working and had made a significant attempt to repay the debt owed, he and his wife had been here a long time, had two adult children and grandchildren here, and deportation would be disproportionate.

The Law

24. The United Kingdom has left the EU. The transition period during which EU law had continued to apply came to an end at 11pm on 31 December 2020. At that point, EU Free Movement rights ceased to be effective or enforceable – see section 1 and schedule 1 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020. Two discrete bodies of law, however, remained – retained EU law which is not relevant to this appeal, and the WA which has direct effect by operation of section 7A of EUWA 2018.

25. The rights of EU nationals under EU law to enter and reside in the United Kingdom are described in detail in Celik v SSHD [2023] EWCA Civ 921 at [10]-[18]. Prior to the UK's exit from the EU, by operation of section 7 of the Immigration Act 1988 Act, those having a right to enter or reside under European Law did not (absent any exclusion or deportation order) require leave to enter or remain that would otherwise have been imposed by section 3 of the 1971 Act. Those rights to enter and reside were primarily set out, for domestic purposes, in the EEA Regulations, although those relied on the machinery of the 1971 Act to effect deportation.

26. This is not an appeal to which Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 apply. That is because to qualify as an applicant as defined in reg 4 of those regulations, the appellant would have had to applied under Appendix EU ("EUSS") prior to 30 June 2021 which he did not.

27. There are two decisions giving rise to appeals in this matter. First, a decision made on 12 May 2022 that he is not entitled to leave under the EUSS as there was a deportation order against him. That is a decision which comes within reg 3 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. The permissible grounds of appeal under those regulations at that the decision:-

    (i) was not in accordance with Appendix EU (reg 8 (3)(b)) or

    (ii) breaches any rights he may have under the Withdrawal Agreement (reg 8(3)(a))

28. Reg 9 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 requires me to take into account any matters the appellant may have raised in a statement made under section 120 of the 2002 Act.

29. In addition, there is a decision made on 12 May 2022 to refuse his human rights claim against which an appeal lies under section 82 of the 2002 Act.

The EUSS

30. Broadly, in order to obtain indefinite leave, an applicant must make a valid application and must also meet the eligibility criteria and the suitability criteria. It is only the latter which is relevant in this appeal, all the more so, given the preserved finding that the appellant had been

exercising Treaty rights for over 5 years and had acquired permanent residence prior to 31 December 2020.

31. Rule EU 15 of the EUSS provides:

EU15. (1) An application made under this Appendix will be refused on grounds of suitability where any of the following apply at the date of decision:

(a) The applicant is subject to a **deportation order** or to a decision to make a deportation order; or

(b) The applicant is subject to an exclusion order or exclusion decision

32. In turn, a deportation order is defined as:

as the case may be:

(a) an order made under section 5(1) of the Immigration Act 1971 by virtue of regulation 32(3) of the EEA Regulations; or

(b) an order made under section 5(1) of the Immigration Act 1971 by virtue of section 3(5) or section 3(6) of that Act in respect of:

(i) conduct committed after the specified date; or

(ii) **conduct committed** by the person **before the specified date, where** the Secretary of State has decided that **the deportation order is justified on the grounds of public policy, public security or public health in accordance with regulation 27 of the EEA Regulations**, irrespective of whether the EEA Regulations apply to the person (except that in regulation 27 for "with a right of permanent residence under regulation 15" and "has a right of permanent residence under regulation 15" read "who, but for the making of the deportation order, meets the requirements of paragraph EU11, EU11A or EU12 of Appendix EU to the Immigration Rules"; and for "an EEA decision" read "a deportation decision"); or

(c) an order made under section 5(1) of the Immigration Act 1971 by virtue of regulation 15(1)(b) of the Citizens' rights (Frontier Workers) (EU Exit) Regulations 2020 [emphasis added]

33. It follows from the definition, and the grounds of appeal, that it will be necessary to consider reg. 27 of the EEA Regulations in assessing whether the decision under EUSS is correct. Reg 27 provides, so far as is 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) …

(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.).

34. Schedule 1 of the EEA Regulations 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;

…

(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;

…

(j) protecting the public;

35. It is relevant to note that in Dumliauskas [2015] EWCA Civ 145 at Sir Stanley Burnton held [40]:

> I have to say that I have considerable difficulty with what was said by the Advocate General in relation to rehabilitation. In the first place, it had no, or very little, relevance to the questions referred to the Court, which concerned the meaning of "imperative grounds of public security". **Secondly, it is only if there is a risk of reoffending that the power to expel arises**

> [emphasis added] It is illogical, therefore, to require the competent authority "to take account of factors showing that the decision adopted (i.e., to expel) is such as *to prevent* the risk of re-offending", when it is that very risk that gives rise to the power to make that decision. Secondly, in general "the conditions of [a criminal's] release" will be applicable and enforceable only in the Member State in which he has been convicted and doubtless imprisoned. …

36. The sentence highlighted is confirmed at paragraph [55].

37. I bear in mind also In Straszewski v SSHD [2015] EWCA Civ 1245 per Moore-Bick LJ at [16] to [18] that given the fundamental difference between the position of an alien and that of an EEA national, interference with the permanent right of residence would is subject to more stringent restrictions than those which govern the deportation of nationals of other states. There is a 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.

The Withdrawal Agreement

38. On the basis of the findings preserved, the appellant had acquired a permanent right of residence under European Law prior to 31 December 2020. On that basis he came within the scope of the Withdrawal Agreement (see Article 10(1)(a) and Article 15). He is also entitled to the benefit of Articles 20 and 21.

39. In order to achieve compliance with the Withdrawal Agreement, the Secretary of State's policy is that she will undertake an examination of whether an individual should be deported by applying the criteria set out in the EEA Regulations although they have in effect been revoked, this being in order to comply with the requirement to apply the provisions of the Citizenship Directive, Directive 2004/38/EC.

40. In the light of the above, it is essential to start this appeal with an analysis that would have been undertaken in light of the EEA Regulations before then going on to consider human rights.

Reg. 27 of the EEA Regulations

41. Bearing in mind the observations above, it is appropriate to begin the evaluation of this appeal with the question of propensity to offend.

42. It is appropriate to start in the analysis with the judge's sentencing remarks which explains the circumstances of the appellant's offending. The judge said:-

> "This was a sophisticated conspiracy in which you all played a part. High-value vehicles were targeted. There was reconnoitring, largely by you Juozas Paulauskas. This operation extended to many counties; see paragraph 6 of the sentencing note. But everything flowed to a mechanical workshop in Boston which you ran, Kancevicius, where vehicles were cut up

> alarmingly quickly and moved on for sale probably as vehicle parts, largely being shipped to Lithuania.
>
> ...
>
> You, Kancevicius, should have known better. You are 51, far too old to be getting involved in crime. You had no convictions before this. I know you fell on hard times. I know life economically was tough. But the way to deal with it was not the way you chose. You allowed an engineering workshop in Boston, of which you were the tenant, to be used as what is known as a chop shop. You had a very clear warning when it was raided in February 2019. This enterprise should never have started but it should certainly have stopped then. But it carried on; vehicles arrived and, on one occasion, one provably was stripped down in no more than six hours.
>
> It is suggested that it somehow assists you that you were not physically involved in the stripping down; I am not sure that does assist you. It shows you had reached a position where you did not have to get your hands dirty anymore. The encrypted traffic between Paulauskas and Bajorinas shows you were keen to be involved and sometimes frustrated when the volume of stolen vehicles was below what you would have liked.
>
> ..."

Having considered the relevant sentencing guidelines and that the value of the conspiracy is £2.4 million and having dealt with the other co-conspirators the judge said:-

> "Gintautas Kancevicius, it is very sad that things should come to this. I have hovered, following the guidelines, around the five-year mark; that is by reference to the starting point for Balcinas, and I think there are some comparisons there. I think you have a significant role within this. Ultimately, I have come to the figure of four and a half years before I apply credit for your plea. That is fifty-four months; 15 per cent comes out slightly below eight months, if my arithmetic is correct".

The judge then imposed a sentence of three years and ten months' imprisonment, with a concurrent sentence of three years on count 1 as opposed to count 4.

43. The OASys Report records that the appellant conspired between 1 January 2018 and 1 August 2019 with others to steal cars and in concealing criminal property. At 2.6 it is recorded that the appellant did not recognise the impact and consequences of offending on the victims, community or wider society and that a consideration for the offending was financial greed (2.8). It is stated also in response to the question "Does the offender accept responsibility for the current offence(s)?" "No. He minimises his role in the offence stating that he did not know anything of the operation to steal the vehicles, does not know or have any knowledge or subsequent dealings/contact with the others involved". It is observed also (2.14) that "Although he was convicted of the serious offence of conspire to steal with others, this was for a lesser period of time of his co accused. He states that he does not have any knowledge of his co

defendants, or contact with them neither does he intend to have any contact with them".

44. It is also observed that the fact that he is not entitled to work is causing him difficulties and financial hardship but equally that his partner and two grown up sons are a stabilising factor. Lifestyle issues contributing to the risks of offending and harm are listed (7.5) as an apparent motivation to seek additional finance. It is also observed (11.7, 11.9) that he did not consider the consequences of his actions on the victims of the gangs' offences and there was no thought for the victims. It is also observed that there is no evidence of risk to harm to others, his maturity, family support network and risk of a custodial sentence acting as a deterrent to further offending. However given his lack of income as not permitted to work this will be monitored (12.9). The OVP risk of offending, that is violence, is low as is the GRS3 probability of proven reoffending at 7 and 13 respectively at one and two years.

45. This assessment took place on 17 October 2021, sometime after the sentencing on 9 July 2021.

46. In assessing the appellant's propensity to reoffend I have taken into account also his evidence and that of his wife.

47. The appellant was not an impressive witness. He did not know much about the basis on which he was employed by his wife's company as a driver, and was unable properly to explain the situation regarding the compensation order made by the court as a result of his offending. His explanation about how much was outstanding and how it was intended to repay it was unclear and I consider there is merit in Mr Lindsay's submission.

48. With respect to the appellant's lack of knowledge about the repayments, I find that his wife's evidence was considerably better and more detailed. Her account of the business that she runs in addition to being employed was also clearer and I formed a distinct impression that it is she rather than the appellant who has taken control in order to get the family finances back on track. That does not mean that the appellant is not committed to paying back the money. He clearly has difficulty communicating in English and has, I consider, left things to his wife who speaks English better, and has assumed responsibility. That I find is not an indicator of propensity to reoffend, but one of passivity, and, possibly, guilt at the situation he has placed his family in.

49. There is a pattern in seeking to diminish his involvement as can be seen from the OASys Report, and to a limited extent from the answer in oral evidence. That said, the main thrust of the respondent's submission were to the effect that the appellant's financial difficulties are likely to increase any propensity to reoffend. This is not a case in which the appellant denies the offences committed: rather, he has decided to minimise his

role, and part of what he said about the length of his role appears to be a misunderstanding of the sentencing remarks.

50. As Mr Lindsay submitted, it is unclear how much the appellant is working or earning. His evidence on both was vague and lacked detail but, as noted above, it is very much his wife who is in charge and I find her evidence that the appellant is working is reliable and supported by the documentary evidence.

51. I accept that it was the appellant's financial circumstances which drove him to commit crime in the first place. There is, however, no evidence of him reoffending in the last two years when, if anything, the circumstances are worse given the large debt that has to be paid. And, that pressure has been there the whole of that period.

52. Further, the appellant is in a stable environment, he is surrounded by his children and grandchildren. There are proper plans in place to pay off the debt. I am not satisfied that there is, as Mr Lindsay submitted, a "very substantial risk of further offending of the same or similar nature". There is insufficient reliable evidence that the appellant is in a position to carry out similar offences, nor, viewing the evidence am I satisfied that he is likely to do so. It is of note also that the appellant has been compliant during probation with no warnings or breaches.

53. In addition to these factors, I have considered carefully the matters set in Schedule 1 in assessing regulation 27. There is clearly a public interest in maintaining public order and preventing harm, as well as other factors set out in the refusal letter, including protecting the public and the maintenance of confidence in the system. I bear in mind also that the longer the sentence, the greater the likelihood of reoffending. In this case, I bear in mind also that the offences were carried out over a prolonged period.

54. Taking all of these factors into account, and bearing in mind the matters set out in Schedule 1, I am not satisfied that the respondent has shown that the appellant presents a genuine, present and sufficiently serious threat, given that it must be shown that there are serious reasons of public security or policy why the appellant should be removed from the United Kingdom

55. I bear in mind also the other factors set out in reg.27. The appellant has lived in the United Kingdom lawfully for a considerable period prior to 31 December 2020. I accept that all of his immediate family members live in the United Kingdom, including his wife , children and grandchildren. I accept that he now has few ties to Lithuania, and that he is still economically active here. I accept that at his age it would now be difficult for him to relocate to Lithuania, given also the length of time he has been absent.

56. Accordingly, I am satisfied that that the deportation order was not justified, and that accordingly, the appeal under the Immigration (Citizens'

Rights Appeals) (EU Exit) Regulations 2020 should be allowed on the grounds that (a) the decision is not in accordance with the EUSS, and (b) is in contravention of the appellant's rights under the Withdrawal Agreement.

57. In terms of the human rights appeal, I find that deportation would be disproportionate as it follows from the conclusion above that the appellant meets the requirements of the Immigration Rules, and that his deportation would be contrary to the Withdrawal Agreement that it would not be proportionate.

58. Accordingly, for these reasons, I allow the appeals on all grounds.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the appeal by allowing it on all grounds.

Signed Date: 11 December 2023

Jeremy K H Rintoul
Upper Tribunal Judge
Immigration and Asylum Chamber

ANNEX – ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

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First-tier Tribunal Nos:
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THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr GINTAUTUS KANCEVICIUS
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr A Basra, Senior Home Office Presenting Officer
For the Respondent: Mr M Moksud, instructed by AM International Solicitors

Heard at Field House on 26 June 2023

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge J Lebasci promulgated on 21 March 2023, allowing his appeal against a decision of the Secretary of State to make a deportation order against him.

2. We refer to Mr Kancevicius as the appellant for avoidance of confusion. He is of course the respondent to this appeal. He is a citizen of Lithuania. He arrived in the United Kingdom in 2006 and, along with his wife and elder son. He had resided here first in 2000 but left voluntarily following a conviction for drink driving in 2001. He returned in 2002 for some three to four months but arrived in 2004 to live permanently. On 16 January 2007 he and his family were issued with EEA registration certificates and it is his case that he has remained here since then, living in accordance with the EEA Regulations.

3. In 2021 the appellant pleaded guilty to conspiracy to steal and to an offence under Section 327 of the Proceeds of Crime Act 2002 when he received a concurrent sentence of three years and ten months' imprisonment.

4. The appellant's wife has been resident in the United Kingdom since 2007 and has, since 2009, been continuously employed.

5. On 26 July 2021, subsequent to the conviction, the Secretary of State invited representations from the appellant as to why he should not be deported. These were made on 24 August 2021 and on 21 September 2021 he made an application under Appendix EUSS of the Immigration Rules.

6. On 12 May 2022, the Secretary of State refused the appellant's application under the EU Settlement Scheme and made a deportation order against him.

7. In doing so the Secretary of State took the view that the appellant was not entitled to the protection of the EEA Regulations as saved.

8. At the appeal before the First-tier Tribunal the agreed issues were as follows:-

   1 Whether the Appellant falls to be considered under the "conducive deportation" provisions and/or UK Borders Act as a "foreign criminal" or should instead be considered under the EEA Regulations 2016 (as saved); and

   2 Whether the Appellant had acquired 10 years' exercise of treaty rights before 31st December 2020 ("imperative" protection); or

   3 Whether the Appellant had acquired permanent residence after arriving in the UK in 2007 before 31st December 2020 (the 5 years heightened protection); or

   4 Whether the Appellant falls within the EEA Regulations 2016 as saved because he had acquired such a right of residence before the cut-off date of 31st December 2020;

   5 Whether the Secretary of State has met the burden to demonstrate that the Appellant should be deported because of imperative / serious grounds of public policy or public security;

   6 In the alternative whether the Secretary of State has demonstrated that the deportation is required under the threshold of the public policy or public security test;

7 Whether his in-time EUSS application should have been refused on suitability grounds (which only applies if the deportation order is upheld).

8 Whether the deportation of the Appellant should be considered under the EEA Regulations or domestic legislation.

9 Whether deportation would result in a breach of Article 8.

9. The judge heard evidence from the appellant and his wife. He also had a bundle from the appellant which included a marriage certificate for the appellant and a letter from his wife's employer.

10. The judge concluded that:

(i) by operation of Article 20(1) of the Withdrawal Agreement, Regulation 27 of the 2016 Regulations applied to anyone granted settled status or pre-settled status or to anybody eligible for that even if they had not applied for it [16];

(ii) the appellant was not entitled to the highest level of protection whereby he could be removed only on imperative grounds of public security because, although he had acquired permanent residence either through employment, self-employment or because his wife had been continuously employed from 2009 to 2023 [21] and had lived in the United Kingdom for more than ten years prior to deportation, the appellant had not shown that he had done enough to demonstrate that his integrative links were sufficiently solid not to have been broken by his period of imprisonment and thus he was not entitled to the highest level of protection [28];

(iii) because the appellant was at low risk of reoffending he was not a present and sufficiently serious threat [37];

(iv) removal was not proportionate given the factors set out at [39] to [40];

(v) with regard to Article 8 of the Human Rights Convention it would not be unduly harsh for his wife to return to live with him in Lithuania and he did not meet Exception 1 set out in Section 117C(4) of the 2002 Act;

(vi) he had not provided persuasive evidence of his social and cultural integration given the index offence and the attitude towards his role in the events which resulted in his convictions [56], having found a low risk of reoffending such that the decision was not consistent with the EEA Regulations, deportation would be in breach of the United Kingdom's obligations under Article 8.

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

(i) in concluding that the appellant was not a present and sufficiently serious threat, as the low percentile risk of reoffending was not an indicator that risk did not exist, given the nature of the offence which was a sophisticated conspiracy;

(ii) in failing to have regard to have regard to MA (Pakistan) v SSHD [2014] EWCA Civ 163;

(iii) in failing to consider proportionality with regard to Schedule 1 paras 7(c) and (j) to the EEA Regulations, given the reference to social harm caused by the index office and low risk of re-offending should not be a determinative factor in the proportionality assessment;

(iv) in failing to give adequate reasons, with respect to the article 8 assessment, why removal to Lithuania would be unduly harsh, given also the appellants lack of remorse for his behaviour, and lack of evidence of rehabilitation or integrative links; and/or

(v) in failing to consider the appellant's application for settlement under the EUSS which had been refused on grounds of suitability.

12. The Appellant filed a rule 24 response, which we have considered.

Discussion

13. We bear in mind the guidance given in HA (Iraq) [2022] UKSC 22 at [72] that it is for the Secretary of State to show that it is quite clear that the judge misdirected himself in law. Nor should we assume that the Tribunal misdirected itself simply because it does not set out every step in its reasoning.

14. We consider that Mr Basra's submission that paragraph 2 of the grounds constituted an arguable ground of appeal was lacking in merit. The paragraph provided:

(i) At [29], the FTTJ found that the appellant had completed 5 years continuous, unbroken residence in the UK and was entitled to permanent residence and therefore benefits consideration under the EEA Regulations 2016 with reference to Regulation 23(6) and Regulation 27.

15. This is simply narrative. The most obvious point is that it does not say the conclusion was wrong, nor does it explain why it was wrong. There was in any event sufficient evidence before the judge to have concluded that at some point prior to 2020, the appellant had acquired permanent residence through five years' continuous residence in accordance with the EEA Regulations, either through his employment or self- employment. Further, and in any event, the appellant was at all times married to his wife who, as the judge found, by reference to a letter from her employer, had been employed since 2009. The appellant was clearly, on that basis, the family member of an EEA national exercising Treaty Rights and entitled to permanent residence. Mr Basra's submission that the judge erred in not

assessing the acquisition of permanent residence counting back from the date of conviction is misplaced; that approach applies only to the assessment of whether an individual is entitled to benefit from regulation 27(4) - the "imperative grounds test". His submission that the appellant could not be treated as the dependant of his wife was equally misplaced; simply residing in the UK as the spouse of an EEA citizen exercising Treaty Rights is sufficient.

16. We turn next to consider whether the judge erred in his assessment of the risk of re-offending. Before turning to what is averred at [3] and [5] of the grounds we turn to what is averred at [4], that is, the judge failed to have regard to "MA (Pakistan) v Secretary of State for the Home Department [2014]".

17. That case is improperly cited. First, it is a decision refusing permission to appeal and such decisions are prohibited from being cited save in the very limited circumstances set out in para. 6.1 of the Practice Direction on the Citation of Authorities [2001] 1 WLR 1001 (which applies to "all courts", which in our judgment includes this Tribunal). Second, a full neutral citation (or a law report) should have been provided. Third, the quote relied on is removed from its context. The reference to a 17% risk of re-offending not being insignificant in the context of deportation was made in relation to whether deportation breached the appellant's Article 8 rights. The assessment of whether someone can resist deportation on Article 8 grounds and under EU law involve a wholly different analysis taking account of and weighing different factors: see Straszewski v SSHD [2015] EWCA Civ 1245 [11]-[14]. Comments about risk of offending in one context cannot obviously be transposed directly into the other.

18. The judge's assessment of the danger the appellant poses is set out primarily from [33] to [34], having noted [27] the judge's sentencing remarks:

> You, Kancevicius, should have known better. You are 51, far too old to be getting involved in crime. You had no convictions before this. I know you fell on hard times. I know life economically was tough. But the way to deal with it was not the way you chose. You allowed an engineering workshop in Boston, of which you were the tenant, to be used as what is known as a chop shop. You had a very clear warning when it was raided in February 2019. This enterprise should never have started but it should certainly have stopped then. But it carried on; vehicles arrived and, on one occasion, one probably was stripped down in no more than six hours. It is suggested that it somehow assists you that you were not physically involved in the stripping down; I am not sure that does assist you. It shows you had reached a position where you did not have to get your hands dirty anymore. The encrypted traffic between Paulauskas and Bajorinas shows you were keen to be involved and sometimes frustrated when the volume of stolen vehicles was below what you would have liked."

19. These were made in the context of the appellant being found guilty of a conspiracy conducted over a significant period.

20. The judge then set out at [33.1] to [33.3] that the conclusions in the OASys report include that the appellant:

> 33.1 does not recognise the impact and consequences of his offending on any victim.
>
> 33.2 does not accept responsibility for the offence.
>
> 33.3 minimises his role in the offence stating that he did not know anything of the operation to steal the vehicles, does not know or have any knowledge or subsequent dealings/contact with others involved.

21. He notes that the likelihood of serious reoffending over the next two years was low at 0.15 % and notes also [36] the respondent's submissions on the risks of reoffending.

22. The judge found [37]:

> The Appellant had convictions prior to the index offence, but for less serious and historic offences. When he was sentenced in July 2021 the Judge treated him, for the purposes of his sentence, as having no previous convictions. I find the Appellant's attitude towards his offending is a factor which counts against him. However, I consider it appropriate to place weight on the OASys report and find that because the Appellant is considered to be at low risk of reoffending, he is not a present and sufficiently serious threat. His past record is not in itself sufficient to make a different finding.

23. The OASys report sets out a number of predictor scores, only one of which – Risk of Serious Recidivism – is at 0.15%. The probability of proven reoffending is 7 % in year 1 and 13 % in year two. There is an obvious and significant difference between 0.15% - the only figure the judge quotes – and 7% or 13%. The scores for violent reoffending are low but that is to be expected given the nature of the appellant's crimes; the section on Risk of Serious Harm Screening at R1.2 is instructive on that. It is also of note that the offences were not linked to "serious harm" (see section 2.14).

24. We are satisfied that the judge has also confused Risk of Serious Recidivism with risk of serious offending at [33]. Risk of Serious Recidivism, as set out in the relevant guidance, means the likelihood of someone committing a "seriously harmful offence", that is one which causes serious harm which in the context of OASys assessments is "an event which is life threatening and/or traumatic and from which recovery, whether physical or psychological, can be expected to be 'difficult or impossible'" (see HMPPS' Risk of Serious Harm Guidance 2020, v.2 (March 2022)). A risk of serious offending (which may include serious financial or non-violent offending) and a risk of Serious Recidivism are not the same thing.

25. A further confusion arises in the judge's assessment at [36] where the judge refers to a risk of reoffending per se.

26. To summarise, the judge has taken as a key factor a risk of the appellant carrying out a serious violent crime, and has focussed on that but not considered properly the risk of the appellant reoffending in the way he had before. In the context of a clear misunderstanding of the risk figure cited, and the concerns that the judge had noted at [33] indicating a risk of future offending, we find that his assessment of the risk of reoffending was legally flawed.

27. In that context, and in the context of the factors set out at [33], we are satisfied that the judge's findings as to assessment of risk cannot be sustained. We are therefore satisfied that the decision did involve the making of an error of law which may have affected the outcome.

Article 8

28. With respect to the judge's finding that deportation would not be proportionate, given that he had found [54] that the appellant did not meet the exceptions set out in section 117C (mis-cited as Regulations 117), and given that his conclusion that the appellant's deportation would not be proportionate under the EEA Regulations is vitiated by an error of law, we are satisfied that the conclusion that his deportation would be disproportionate is unsustainable.

29. We note also that the judge failed to make a finding with respect to the EUSS decision. That is a matter which will need to be addressed in remaking the appeal.

30. We are satisfied for these reasons that the decision of the First-tier Tribunal did involve the making of an error of law such that the decision must be set aside.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

(2) We direct that the appeal be re-made in the Upper Tribunal on a date to be fixed with a time estimate of 3 hours

(3) If either party wishes to adduce any further evidence, this must be served in electronic format on the other party and the Upper Tribunal at least 10 working days before the next hearing, accompanied by an application made pursuant to rule 15 (2A) of the Tribunals Procedure (Upper Tribunal) Rules 2008.

(4) If the appellant wishes to give oral evidence, he must provide a witness statement capable of standing as evidence in chief, to be served in accordance with direction [2] above, and must state if an interpreter is required, if so in which language.

Signed Date: 26 July 2023

Jeremy K H Rintoul
Judge of the Upper Tribunal