Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00405/2013

THE IMMIGRATION ACTS

Heard at Nottingham Magistrates	**Determination Promulgated**
on 18th November 2013	**On 28th November 2013**

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARTURS VISOCKIS
(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr Mills – Senior Home Office Presenting Officer.
For the Respondent: Ms White instructed by Rashid & Co Solicitors.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel of First-tier Tribunal composed of First-tier Tribunal Judge Frankish and Mr HG Jones (hereinafter referred to as "the Panel") who in a determination promulgated on 26th June 2013 allowed Mr Visockis's appeal against the decision to deport him from the United Kingdom, made pursuant to the provisions of the Immigration (European Economic Area) Regulations.

Background

2. Mr Visockis is a citizen of Latvia born on 31 December 1983. He arrived in the United Kingdom on 9th December 2009 with four of his five children in exercise of his right of free movement under European law.

3. On 17th February 2011 he was convicted at Derby Magistrates Court of shoplifting for which he received a twelve month conditional discharge plus costs followed by four convictions for theft and breach of a conditional discharge between 17th February 2011 and 14th May 2012.

4. Mr Visockis has been made the subject of the decision to deport him from the United Kingdom as a result of a conviction on 20th April 2012 at Derby Crown Court of escape from lawful custody and burglary for which he was sentenced, on 14th May 2012, to thirty seven months imprisonment in total.

5. The Panel noted that Mr Visockis was in a relationship akin to marriage which has lasted for some fourteen years with the mother of their five children, four of whom were born in Latvia between 25th February 2001 and 18th December 2010 and the youngest who was born in the United Kingdom. Mr Visockis's partner joined him and the children in the UK in March 2010.

6. Mr Visockis also has other members of his own family in the United Kingdom such as his parents and an uncle.

7. The Panel considered the sentencing remarks and a NOMS Report prepared following a request from UKBA on 30th October 2012. The author of the report assesses the risk of serious harm as being 'medium' on the basis that due to the nature of the offence there is the possibility for Mr Visockis to cause physical and emotional harm to members of the public based upon the fact it was not clear who caused harm to the victim of the burglary.

8. In relation to the likelihood of reconviction it is noted that Mr Visockis has mainly been convicted of acquisition crimes for financial gain which he claims has been to support his family although it is also noted that concerns exist regarding the fact that the offences were committed to fund his drug and alcohol usage. Mr Visockis is said to have admitted that he injected heroin in the past and that since remand in custody he had been prescribed methadone although did not engage with the Recovery Team in custody as he did not feel that his drug use was an issue.

9. The OASys assessment, referred to in the NOMS Report, was completed on the 18th December 2011 which assessed the likelihood of reconviction as 'medium' and risk of serious harm as 'medium'. As

a result of the nature of the offence Mr Visockis will also be subject to Multiagency Public Protection Arrangements (MAPPA) on release.

10. The Panel set out their findings from paragraph 15 of the determination. In relation to the risk of reoffending they note Mr Visockis' offending history and the reasons for the same but accept his evidence that he has been drug-free for the past fifteen months [20]. As a consequence the Panel find that given his drug dependency was so substantially the cause of the index offensive, the removal of that dependency has greatly reduced the risk of reoffending [20]. They find as a consequence that a substantial part of the public policy or public security consideration for removal is also greatly reduced [20].

Discussion

11. Mr Visockis' immigration history and family composition is not disputed. He came to the United Kingdom to exercise treaty rights of free movement as an EEA national but it is accepted he has not acquired a right of permanent residence in the United Kingdom and so it is the lower test namely whether his removal is justified on grounds of public policy, public security, or public health, which is applicable to this appeal.

12. At the outset of the hearing, we provided a preliminary indication of the concerns we have regarding the determination, based upon the Secretary of State's grounds, and invited submissions from the advocates. Our first concern was that the use of the term "greatly reduced" in paragraph 20 may give rise to concern based upon lack of clarity/reasoning regarding the question "from what to what" regarding the level of risk. This is particularly important for one of the factors that has to be proved is that Mr Visockis' personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society - Regulation 21 (5) (c).

13. Another concern we had is that the finding by the Panel in paragraph 21 that the Secretary of State accepted that Mr Visockis has family life with his parents and a named uncle in the United Kingdom is factually incorrect, if this is a reference to family life recognised by Article 8 ECHR. In paragraph 39 of the reasons for refusal letter such family life was rejected.

14. We are also concerned that the proportionality exercise has not been properly conducted as it should be an assessment of the proportionality of the decision in relation to the free movement provisions of EU law, not just Article 8 ECHR, and that inadequate reasons have been given for why Mr Visockis' partner and the children cannot return to Latvia with him as they are all Latvian citizens who have grown up in that country.

15. Having heard submissions in response we retired to consider the matter further and upon returning to court advised the advocates and Mr Visockis that our primary finding is that the Secretary of State has not proved that the Panel have made a legal error(s) material to the decision to allow the appeal. We now give our reasons.

16. As made clear to Mr Visockis in court it is not a question of whether we ourselves would have made this decision but whether the Panel's conclusions as to risk are within the range of those the Panel were permitted to make on the evidence. We have come to the conclusion on the basis of the findings made by the Panel in paragraph 20 of the determination that they are.

17. Ground 1 of the Secretary of State's challenge to the Panel's findings alleges they failed to provide adequate reasons for their conclusions regarding the risk of harm and reoffending posed by Mr Visockis. It is alleged the Panel failed to provide adequate reasons for why the probation report should not be relied upon despite being eight months old or why it was accepted that Mr Visockis will gain employment and why his family's financial circumstances are sufficient to prevent him from reoffending in the future given that financial circumstances are considered to be a risk factor.

18. There is reference in the grounds to alleged fraudulent activity but the key challenge is based upon a submission the Panel failed to provide adequate reasons as to why it accepted that Mr Visockis has been drug-free for the past fifteen months.

19. In relation to the claim Mr Visockis has been involved in other fraudulent activities there is reference in the NOMS report, under the heading 'Lifestyle and Associates' that Mr Visockis has previously reported that several different women were the mothers of the children. The Panel were clearly aware of the allegation and record in paragraph 21 of the determination this information which, as Miss White submitted on her client's behalf before the First-tier Tribunal, was contained in a report heavily reliant upon repetition of previous material with no particulars of the assertion given, which was denied by Mr Visockis. If the Secretary of State believed there was merit in such an allegation it would have been open to her to provide corroborative evidence before the Panel. She did not and therefore cannot criticise the Panel for attaching the weight they did to what is no more than an uncorroborated allegation.

20. In relation to the risk of reoffending, the Panel clearly considered all the available evidence with the degree of care required in an appeal of this nature and gave adequate reasons for their findings. The weight they gave to the evidence is a matter for them and they note in paragraph 20 of the determination that both the Sentencing Judge's remarks and the NOMS report make it clear that the index offence was

strongly motivated by Mr Visockis' drug addiction. The Panel had before them Mr Visockis' evidence that he had been completely drug-free since his final five day course of diazepam fifteen months ago. They placed weight upon a certificate confirming a negative drug test dated 25th April 2012 and evidence that Mr Visockis has attempted to corroborate his assertion by a letter dated 28th May 2013 from the Lifeline Drug Service who were unable to assist as testing is not a service they provide. The Panel accepted that Mr Visockis has continued to cooperate with his designated worker and considered reports from the prison education service. It is the weight placed upon the evidence considered cumulatively that is the basis for the Panel's acceptance of the credibility of Mr Visockis' statement that he has remained drug-free which is the basis for their finding that at the date of the hearing he remained drug-free for the past fifteen months. It was not proved before us that this finding is perverse, irrational, or contrary to the evidence.

21. On the basis that addiction was found to be a key component in his offending it was found that the risk of reoffending had been "greatly reduced" as a result of his lack of drug use. That is based on an assessment of the evidence that the Panel were able to consider since the date of the publication of the NOMS report, which is itself based upon evidence from late 2011.

22. If the risk has been "greatly reduced" it must be reduced from the medium risk of reoffending and as a result of the removal of the key cause of such offending. As stated above if the personal conduct does not represent a genuine, present, and sufficiently serious threat the removal of the EEA national will be a breach of the United Kingdom's Treaty obligations.

23. It may be argued that the Panel have committed legal error by failing to specifically define what they mean when they say that risk of reoffending has been greatly reduced and whether this means that a genuine, present, and sufficiently serious threat has not been proved. We find having considered the evidence and the determination as a whole that this can be inferred from paragraph 20. This case highlights the fundamental difference between the deportation of non-EEA nationals where their conduct and the commission of the index offence may be sufficient to warrant their removal from the United Kingdom alone and EEA nationals where the criminal convictions do not in themselves justify a decision to deport. What is required in an EEA case is an assessment whether there is a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society, based upon an assessment of the likely future conduct, which is the relevant test. As we do not find that it was proved before the Panel that Regulation 21 (5) (c) could be satisfied the other concerns we noted need not be considered any further as without such a future risk removal will be contrary to European law.

Decision

24. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

25. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We make no such order.

Signed…….
Upper Tribunal Judge Hanson

Dated the 19th November 2013