Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00369/2014

THE IMMIGRATION ACTS

Heard at Columbus House, Newport

On 7 October 2014

Determination Promulgated
On 27 October 2014

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLEGAS LVOVAS

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr E Tububu of Ty Arian Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals against a decision of the First-tier Tribunal (Judge Holder and Ms V S Street JP) allowing the appeal of Mr Lvovas, a citizen of Lithuania, against a decision of the Secretary of State taken on 8 February 2014 to make a deportation order against him by virtue of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003 as amended) and s.3(5)(a) of the Immigration Act 1971.

2. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

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Introduction

3. The appellant is a citizen of Lithuania who was born on 5 September 1990. The appellant came to the UK in early 2010. Between 14 March 2011 and 22 November 2013, the appellant was convicted on four occasions of a total of fourteen offences including driving a motor vehicle with excess alcohol, driving otherwise than in accordance with a licence, using a vehicle whilst uninsured, aggravated vehicle taking, failing to stop after an accident and using threatening, abusive and insulting words or behaviour with intent to cause fear or provocation of violence and battery. In relation to the latter offences, the appellant was subject to a suspended sentence order.

4. On 18 October 2013, the appellant was convicted at the Swansea Crown Court of threatening to kill, breach of a restraining order; two counts of assault by beating; and using threatening, abusive or insulting words or behaviour with intent to cause fear of/to provoke violence. The circumstances of those offences were that the appellant met his ex-partner at a party and, realising that someone else must be looking after their child, he became aggressive whilst drunk. He threatened his ex-partner, demanded that she go home with him and then attacked her. On 22 November 2013, the appellant was sentenced to twelve months' imprisonment for those sentences and a further four months concurrently for breach of the suspended order, making a total sentence of sixteen months' imprisonment.

5. As a consequence of that conviction, on 8 February 2014 the Secretary of State made a decision to make a deportation order against the appellant under the 2006 EEA Regulations.

6. The Secretary of State's reasons are set out in her decision letter of 8 February 2014. First, the Secretary of State did not accept that the appellant had a permanent right of residence based upon five years' continuous residence in the UK and so concluded that his deportation could be justified on the grounds of "public policy or public security". The Secretary of State concluded, in the absence of a NOMS Assessment but based upon the appellant's criminal record, that he had a propensity to reoffend and that he posed a risk to the public or a section of the public and so represented a "genuine, present and sufficiently serious threat to the public" to justify his deportation on grounds of public policy. Secondly, the Secretary of State concluded that the appellant's deportation would be proportionate applying reg 21(5) of the 2006 EEA Regulations. Finally, any interference with the appellant's family life with his 3 year old son was proportionate and not a breach of Art 8 of the ECHR.

7. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 22 April 2014, the First-tier Tribunal concluded that the appellant's deportation was not in accordance with the 2006 EEA Regulations and would be a disproportionate interference with his family life with his son and so a breach of Art 8 of the ECHR.

8. The Secretary of State sought permission to appeal to the Upper Tribunal on a number of grounds. On 24 June 2014 the First-tier Tribunal (Judge J M Holmes) granted the Secretary of State permission to appeal on the basis that the First-tier Tribunal assessment of proportionality was arguably legally flawed.

9. Thus, the appeal came before me.

Submissions

10. At the outset, Mr Richards on behalf of the Secretary of State, accepted that the grounds' reliance upon OH (Serbia) v SSHD [2008] EWCA Civ 694 to support an argument that the Tribunal had failed to take into account the public interest in deterring other EEA nationals from committing offences and to demonstrate society's revulsion to such criminal offences could not be relied on in the context of an appeal under the 2006 EEA Regulations. The sole issue as regards the public interest was, Mr Richards accepted, the risk, if any, of an individual reoffending and so presenting a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". That concession was, in my judgment, entirely correct. It is beyond doubt that an individual's previous criminal convictions "do not in themselves justify" a decision (see reg 21(5)(e)). Past convictions are, however, relevant in assessing whether an individual is at risk of committing an offence or offences in the future which is the proper scope of enquiry for "public policy" in a deportation case based upon an EEA national's criminal convictions.

11. Putting that matter to the side, Mr Richards submitted that the Tribunal had failed properly to consider the issue of proportionality both under the 2006 EEA Regulations and under Art 8 of the ECHR. He submitted that the Tribunal had failed to make clear findings in relation to the 2006 EEA Regulations and had, in effect, conflated the two in para 36 of its determination. Further, Mr Richards submitted that the Tribunal had failed to properly carry out the proportionality assessment and, in particular, to have regard to the appellant's risk of reoffending which the NOMS Report dated 18 March 2014 stated was a "low" risk to the public and a "medium" risk to his ex-partner of causing serious harm. Mr Richards submitted that the Tribunal's reasoning was inadequate both in respect of its decision to allow the appeal under the 2006 EEA Regulations and also under Art 8.

12. On behalf of the appellant, Mr Tububu submitted that the Tribunal had made a finding in relation to proportionality both in respect of the 2006 EEA Regulations and Art 8. The Tribunal had considered the appellant's propensity to reoffend at paras 28 to 29 and had noted the appellant's expressed remorse and that he had gone some way to addressing his offending (through alcohol problems) by completing courses whilst in prison. Mr Tububu submitted that the First-tier Tribunal had carried out the balancing exercise and had properly considered the impact upon the appellant's son if the appellant were deported from the UK.

Discussion

13. The appellant is an EEA national and consequently his deportation must comply with the requirements of the 2006 EEA Regulations, in particular reg 21. No challenge is made to the Tribunal's finding that the appellant could not establish a right of permanent residence in the UK and that, therefore, the heightened level of protection in reg 21(3) – requiring proof of "serious grounds of public policy or public security" – did not apply. The decision must, instead, be taken on "the grounds of public policy, public security or public health." (reg 21(1)).

14. For the purposes of this appeal, regs 21(5) and (6) are relevant and are as follows:

> "(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
>
> (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.
>
> (6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."

15. There is no doubt that the Tribunal had these provisions well in mind which are quoted at paras 23 and 24 of its determination.

16. The Tribunal's findings begin at para 25 and set out the appellant's circumstances, including those of his family as follows:

> "25. Mr. Lvovas is twenty-three years of age. We find that he has spent the vast majority of his life in Lithuania.
>
> His close family and his son aged two years are in the United Kingdom. They are all Lithuanian nationals.

The Appellant has a close relationship with his parents and brother. We find, as such, that it is likely that they would help him financially should he be deported to Lithuania."

17. Then at paras 26-29 the Tribunal dealt with the appellant's offending as follows:

"26. The Appellant's personal conduct is reflected in his criminal record. He has accumulated a criminal record in the relatively short period of time that he has been in the United Kingdom. This is set out in the Respondent's letter of 8th February, 2014 at page 4.

In short, the appellant has been convicted four times for 14 offences between 14th March, 2011 and 22nd November, 2013. These included driving a motor vehicle with excess alcohol, driving otherwise in accordance with the licence, using a vehicle whilst uninsured, aggravated vehicle taking, failing to stop after an accident, using threatening abusive and insulting words or behaviour with intent to cause fear or provocation of violence and battery.

27. The Appellant was made the subject of a Suspended Sentence Order and a Restraining Order for some of those offences.

However, not long after those orders were imposed, the Appellant met his ex-partner at a party. He realised that someone else must be looking after their child and he became aggressive whilst in drink. He threatened his ex-partner, demanded that she goes home with him, dragged her into the street by the hair, hit her twice to the head and left her. He also threatened her with a butterfly knife. She did not receive any significant injuries.

As a consequence, he received the 16 months imprisonment sentence as indicated at paragraph 2 above.

They are serious offences and are described as such by the Sentencing Judge. We take into account the fact that he pleaded guilty.

28. We find from the nature of the offences for which he received his sentence of imprisonment, the domestic situation and the Assessment of the Probation Service dated 18th March, 2014 that Mr Lvovas poses a low risk to the public and a medium risk to his ex-partner of causing serious harm. He will be the subject of a multiagency risk assessment conference on release from prison. He has previously complied fully with sessions regarding Respectful Relationships and Alcohol Awareness. Alcohol was deemed a factor in his offending.

29. There is a lack of evidence as to any proposed rehabilitation process save it is said at page 7 of the Probation Service Assessment that 'Mr. Lvovas has reflected upon his behaviour whilst in custody and is very aware that his relationship with his partner is now over. That he must continue to self-monitor his alcohol use and address his consequential thinking deficits. I am of the opinion that Mr Lvovas would, as previously demonstrated, work to apply himself to comply with his period of licence and engage with offender focused intervention given both my experience as his offender manager and his responses to his offender supervisor whilst in custody.'

> Given the above, we find that the Appellant has expressed remorse for his offending and has gone some way to addressing his offending by way of completing courses and impressing his offender manager."

18. Then at para 31 the Tribunal dealt with the appellant's links with Lithuania and his potential for reintegration if he returned there:

> "31. We do not find that he has any particular significant links to Lithuania now that his close family are in the United Kingdom. We accept that he may well experience difficulties in finding accommodation and work in that country.
>
> We find that it is likely that he came to the United Kingdom in order to find work and a better standard of living (as did his family members). That said, we do not find that he has been away from Lithuania for such a time that his social and cultural integration there cannot reasonably take place if deported."

19. At para 34 the Tribunal dealt with the appellant's relationship with his 3 year old son and the evidence concerning that relationship, not least from his mother who was, of course, the victim of his most recent offence. The Tribunal said this:

> "34. We are mindful that the Appellant has a son almost aged 3 years. In that regard, we find the following:
>
> a) the Appellant is no longer in a close relationship with the mother of the child. Indeed, he is formally restrained from contact with her,
>
> b) the child's mother still maintains a good relationship with the Appellant's family. This was evident at the hearing and from her evidence;
>
> c) the child's mother wishes that the Appellant remains in the United Kingdom in order that their son can have a reasonable relationship with his father. She wishes for the Appellant to play a part in his upbringing. That is also the Appellant's wish;
>
> d) the Appellant has had regular visits from his son whilst in custody;
>
> e) we are mindful of case law such as considered ZH (Tanzania) v SSHD (2011) UKSC 4 and LD (Article 8 – Best Interests of the Child) Zimbabwe (2010) UKUT 278 (IAC). Furthermore, we have considered Section 55 of the Borders, Citizenship and Immigration Act 2009 regarding the best interests of the child."

20. At para 35, the Tribunal set out the well-known five stage test in Razgar [2004] UKHL 27 and at para 36 concluded that the appellant's deportation engaged Art 8.1 on the basis of an interference with his family life, was in accordance with the law and for the legitimate aim of the prevention of disorder or crime.

21. Then at para 36(e) the Tribunal turned to the issue of proportionality as follows:

> "(e) It would be a disproportionate interference with the Appellant's and his child's family life should he be deported.
>
> We say this having taken into account all matters and in the knowledge that the Appellant has committed serious offences. The relevant ones are in relation to his ex-partner. However, his perceived risk to the general public is low in terms of reoffending. His offender manager's findings give optimism that the medium risk to his ex-partner can reduce.
>
> His own family's involvement with the child and the family's good relationship with his ex-partner bodes well for the appellant to be able to maintain a positive and contributing relationship with his son.
>
> Additionally, his continued involvement with their son has the endorsement of his ex-partner.
>
> We find that the best interests of the child are served by him having close relationships with both his parents. We do not find that this can be achieved by the Appellant being deported. It may be that he could visit his father in Lithuania on occasions but we do not find that family life can be reasonably expected to be enjoyed in that way."

22. The Tribunal expressed its conclusions as follows at para 37:

> "37. We find that the interference is not in accordance with the law given our findings that the Appellant's deportation is not in accordance with Regulation 21(5)(a) of the 2006 Regulations and is a disproportionate interference with his Article 8 rights."

23. Whilst the Tribunal could, perhaps, have structured its determination more closely following the rubric of first the 2006 EEA Regulations and then of Art 8 of the ECHR, I am unable to accept Mr Richards' submissions that the Tribunal erred in law in reaching its decisions in favour of the appellant under both those heads.

24. Taking first the EEA Regulations, as I have already noted, the Tribunal set out the relevant provision in regs 21(5) and (6). At paras 26-29, the Tribunal clearly considered, indeed in some detail, the evidence concerning the appellant's offending and that the NOMS Report stated that he was a low risk to the public and a medium risk to his ex-partner of causing serious harm. However, at para 29 the Tribunal noted the NOMS Report at page 7 and concluded that it demonstrated that the appellant had expressed remorse and had "gone some way to addressing" his offending behaviour which was associated with excessive alcohol use. In particular, the NOMS Report states:

> "Mr Lvovas has reflected upon his behaviour whilst in custody and is very aware that his relationship with his partner is now over. That he must continue to self-monitor his alcohol use and address his consequent thinking deficits.
>
> I am of the opinion that Mr Lvovas would, as previously demonstrated, work to apply himself to comply with his period of licence and engage with offender focused intervention given both my experience as his offender manager and his responses to his offender supervisor whilst in custody."

25. It is clear that the appellant had engaged with the services provided in prison to deal with his offending difficulties and had made progress. The Tribunal was entitled to take that into account and that he had no continuing relationship with his ex-partner. The risk to the general public was low.

26. Secondly, the Tribunal accepted that the appellant could socially and culturally reintegrate into Lithuania but also noted that his close family was all in the UK. Those findings are set out in para 25 as well, including that he is financially dependent upon his parents and brother in the UK. The fact that all his close family are in the UK is undoubtedly a factor relevant to his future risk and rehabilitation which is relevant in assessing proportionality in an EEA case (see, e.g. Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC)).

27. Thirdly, the Tribunal set out the nature of the relationship between the appellant and his 3 year old son at para 34. It is noticeable that the appellant's ex-partner gave oral evidence at the hearing indicating that she wished the appellant to have a reasonable relationship with his son and that she wished the appellant to play a part in their son's upbringing. The evidence was that the appellant had had regular visits from his son whilst he was in custody. At para 36(e) the Tribunal concluded that it was in the best interests of the appellant's son to have a close relationship with both parents which could not be achieved if the appellant were deported. The Tribunal did not accept that his family life with his son could reasonably be enjoyed simply by visits to him in Lithuania.

28. I did not understand Mr Richards to challenge those factual findings as such. Indeed, in my judgment they were properly open to the Tribunal on the evidence.

29. The Tribunal had before it evidence that the Secretary of State did not, namely the NOMS Report and that of the appellant's ex-partner concerning her views as to the need for the appellant's continued relationship with their son. There is no doubt that the Tribunal's findings that it was in the best interests of their child for the appellant to remain in the UK and to continue to have a positive relationship with his son which had continued whilst he was in custody were findings which were not irrational and were properly open to the Tribunal.

30. It is clear that in relation to the 2006 EEA Regulations the Tribunal had well in mind the risk the appellant posed and which it stated at para 36(e) as a "low risk" to the general public and also that "his offender manager's findings give optimism that the medium risk to his ex-partner can reduce."

31. It is clear that in reaching the Tribunal's ultimate finding that the appellant's deportation was not proportionate under reg 21(5)(a) of the 2006 EEA Regulations was, reading the determination as a whole, reached after a consideration of the public policy grounds relied upon by the Secretary of State based on the appellant's offending and took into

account all the circumstances of the appellant including that his close family were all in the UK, that he could return to Lithuania but the effect of that would run counter to the best interests of his son with whom he would, in effect, cease to enjoy the family life and which the appellant, and even his ex-partner, wished to continue with their son.

32. In my judgment, it was open to the Tribunal to conclude, applying the terms of reg 21(5), that the risk of the appellant reoffending was outweighed by his circumstances considered in detail by the Tribunal. Despite the clarity of Mr Richards' submissions, the Tribunal did, in fact, take into account all relevant factors in reaching their ultimate finding which, despite the structure of the determination, clearly led them to their conclusion in favour of the appellant under the 2006 EEA Regulations.

33. That, in my judgment, is equally true of the Tribunal's finding in relation to Art 8. Although there, the concept of the public interest is wider than under the EEA Regulations (see, e.g. OH (Serbia)), it was open to the Tribunal to conclude that the public interest was outweighed by the effect upon the appellant and his son's family life. The reasoning in para 36(e) has to be read in the light of the Tribunal's determination as a whole. That finding was not, in my judgment, irrational. It may well be that not every Tribunal would have reached that conclusion under Art 8. However, that does not, in itself, establish that the conclusion was not open to the Tribunal in the sense that it was irrational and therefore unlawful. As Carnwath LJ (as he then was) observed in Mukarkar v SSHD [2006] EWCA Civ 1045 at [40]:

> "[t]he mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law ..."

34. In any event, the favourable finding under Art 8 does not detract from the primary finding in favour of the appellant as an EEA national that he cannot be deported by virtue of the 2006 EEA Regulations.

Decision

35. For these reasons, the First-tier Tribunal's decision to allow the appellant's appeal under the 2006 EEA Regulations and Art 8 of the ECHR did not involve the making of an error of law. Its decision stands.

36. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Dated

8 October 2014