



IAC-FH-NL-V1

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

Appeal Number: DA/00389/2014

THE IMMIGRATION ACTS

Heard at Field House

On 4 December 2014

**Determination
Promulgated**

On 10 December 2014

Before

**THE HON. MRS JUSTICE CARR DBE
UPPER TRIBUNAL JUDGE MOULDEN**

Between

MR RAIMODAS BUDRAITIS

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Jarvis, HOPO

For Mr Budraitis: No representation

For the Respondent: No representation

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department ("the Secretary of State"). Mr Budraitis' appeal was allowed in a determination of the First-tier Tribunal (Judge Malone and Mrs Hewitt), promulgated on 8 July 2014. We have been assisted by Mr Jarvis who appears for the Secretary of State. Mr Budraitis has appeared in person and had the benefit of assistance from a Lithuanian interpreter throughout the course of these proceedings.

2. The facts can be shortly stated for present purposes. Mr Budraitis is a citizen of Lithuania, born on 23 November 1982 and so now some 32 years old. He is not a permanent resident of the United Kingdom but he is a citizen of the European Economic Area. He first entered the United Kingdom in about 2005 and has returned since then to Lithuania from time to time. He stayed for some six months before returning for a holiday. On re-entering the United Kingdom he remained for another four years at the end of which he again returned to Lithuania. He appears to have found it difficult to settle there and he returned back to the United Kingdom after about another six months.
3. He has been the subject of a number of convictions both in this country and in Lithuania. He was first convicted in the United Kingdom on 14 August 2008 for the offence of burglary for which he received a suspended sentence of four months with conditions. He committed a second offence for which he was convicted in 2009, again for burglary, this time receiving a sentence of twelve months' custody. Thereafter he went on to commit further offences most of which related to shoplifting. In total he has some eleven convictions for some 23 offences. His last and most recent conviction was on 29 November 2013 when he received a sentence of twelve weeks' custody. As already indicated he has also been convicted abroad, in particular convicted of theft in Vilnius on 25 January 2011, 22 February 2011 and 28 May 2012. The sentence on his last conviction here was completed in February 2014. All his offences in the United Kingdom have been dealt with in the Magistrates' Court apart from one burglary offence which was the only offence to which he pleaded not guilty, and which was dealt with in the Crown Court.
4. In the meantime, on 31 December 2013, the Secretary of State wrote to Mr Budraitis requiring him to set out reasons why he should not be deported. To that request he did not reply. He was in custody at the time.
5. On 18 January 2014 the Secretary of State wrote giving reasons for deportation. In summary, his presence in this country would not be conducive to the public good.
6. On 25 January 2014 the Secretary of State notified Mr Budraitis of her decision to remove him in accordance with the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") and signed a deportation order pursuant to Section 5(1) of the Immigration Act 1971 on 17 February 2014. As a result, on the day of Mr Budraitis' release from custody for the conviction on 29 November 2013 he was taken immediately into immigration detention.
7. On 5 March 2014 Mr Budraitis lodged Notice of Appeal resulting on 19 March 2014 in the Secretary of State revoking her deportation order.
8. We turn to consider the hearing and the ruling below.

9. Mr Budraitis gave evidence before the Tribunal below. He was married in Lithuania but later divorced. He had two children with his ex-wife. They now live in Peterborough, but he has recently ceased contact with his children there. He is now with a new partner, also a Lithuanian citizen, living in Stratford in London. She has two sons of her own, aged 14 and 7. In addition to that his blood brother, sisters and mother all live in London and have done so for some years, ten or eleven years in the case of his brother and sisters, two years in the case of his mother. His mother is about 61 and has recently suffered a stroke.
10. Mr Budraitis told the Tribunal below that his offences were committed as a result of his alcohol habit. He had never taken drugs. Since being in custody in November 2003 he had been off alcohol. He had also, whilst in prison, completed an alcohol abuse course lasting some three weeks. He told the Tribunal that before his drinking he had been a painter and a decorator for which purpose he had relevant qualifications. A back injury a year ago or so meant that he was unable to work. He told the Tribunal that if he were to be deported he would in essence lose all his family. He firmly believed that his brother would keep him on the straight and narrow. He wanted to re-engage in painting and decorating.
11. He had the support of his partner who appeared before the Tribunal below and who has also attended the hearing today. She works as a nurse in the NHS and speaks fluent English. In short, he told the Tribunal there was nothing for him in Lithuania and everything for him here. Not only did his partner attend the hearing below before the First-tier Tribunal, so did his brother. There were letters of support to the Tribunal indicating for example the closeness between his current partner and Mr Budraitis, his partner visiting him with her children once a week or so whilst he was in custody. He expressed great remorse for his criminal conduct.
12. The Tribunal found amongst other things that Mr Budraitis's criminal conduct was caused by his alcohol dependence. They noted that he had been off alcohol whilst in custody. They were unable to say whether he would be able to stay off alcohol but they accepted as a matter of fact his declared intention to do so. They found that he had the full support of his brother and partner and recorded the fact in evidence that Mr Budraitis had been advised that his chances of survival, were he to resume drinking were only 50:50. The Tribunal said in terms that they were unable to accept Mr Budraitis as a hardened criminal. The two offences of burglary of dwelling houses were of course serious. Thereafter, Mr Budraitis had been convicted of mainly shoplifting offences which the Tribunal accepted were the result of alcohol consumption. They accepted as a matter of fact that Mr Budraitis had previously worked as a painter and decorator.
13. This appeal brought by the Secretary of State is essentially based on Mr Budraitis's profile. It is said that his persistent offending does reach the level of serious threat. It is said that the Tribunal made an error of law in failing to find him to have persistent criminality that constituted the necessary serious threat justifying deportation. Mr Budraitis was a

convicted criminal in his homeland and had continued to be a persistent offender for the whole time of his existence and residence in the United Kingdom. There was no evidence to show that his pattern of behaviour was likely to change and it was wrong in law not to equate persistent and unremitting offending with a serious threat to the fundamentals of society, namely the right of a person to live in a crime-free and peaceable society that is not persistently interrupted by alcohol-induced criminality.

14. Mr Jarvis in oral submissions has ably expanded on those grounds of appeal. He submits that it is unclear in terms precisely what the Tribunal found so far as the threat posed by Mr Budraitis was concerned. It is said that the Tribunal addressed itself to the wrong test in law, namely did not assess and apply itself to the particular question of genuine, real and sufficient threat to a fundamental interest of society. It is submitted that Mr Budraitis had produced no independent evidence of his engagement in prison and reference is made to two cases in particular.
15. Firstly the case of **AR (Pakistan) v Secretary of State for the Home Department [2010] EWCA Civ 816**. There, at paragraph 21, the Court of Appeal emphasised the cost of providing resources by way of prosecution costs for the conviction of offenders, their punishment and their rehabilitation. That paragraph also refers to the importance of taking into account, for example, behaviour ignoring warnings. Mr Jarvis points to the fact that Mr Budraitis has a history of ignoring warnings in the past, a factor of which he submits the Tribunal did not sufficiently take account.
16. He also referred to the case of **Nerijus Jarusevicius v Secretary of State for the Home Department [2012] UKUT 00120 (IAC)** at paragraph 63 and 63(2) in particular. Mr Jarvis relies on the fact that the Upper Tribunal indicated that previous convictions of a completely different nature might nevertheless be relied on as evidence of unwillingness to abide by the criminal laws. So he says the fact that Mr Budraitis has been guilty of different types of offending should be taken into account and should have been taken into account as demonstrating unwillingness on his part to abide by the criminal laws. Reliance was also placed on paragraph 63(4). The Upper Tribunal Judge there relied on the fact that the appellant in that case had not produced any positive evidence of insight.
17. Before turning to give our substantive ruling we pause to identify factual errors in the submissions made so far on behalf of the Secretary of State. First of all, as a matter of fact there was evidence to show a likely change in pattern of behaviour on the part of Mr Budraitis by reference to his conduct in prison since November 2003. (We are not persuaded that the absence of any independent evidence in that regard is of any significance in circumstances where the Secretary of State would herself have had access to any relevant information and where Mr Budraitis was acting in person below.)

18. The second area of factual error is that there was evidence before the Tribunal in relation to the question of insight. As we have already recorded, he expressed great remorse for his criminal conduct in the past.
19. For his part, Mr Budraitis has rehearsed his background and sought to emphasise to us his commitment to not offend in the future and to attempts to start his life again with a clean slate. He has been on immigration bail pending appeal and he tells us that he has not been arrested or charged for any offence since September 2014.
20. We turn then to a substantive consideration of the considerations of the relevant law. The EEA Regulations provide so far as material as follows:

“19(3) subject to subparagraphs 4 and 5 an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if...

(b) the Secretary of State has decided that the person’s removal is justified on grounds of public policy, public security or public health in accordance with Regulation 21.”

Regulation 21 then goes on to provide so far as material:

“(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.”

Regulation 21(5) goes on to provide:

“(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."*

Finally, Regulation 21(6) provides :

"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."

21. An appeal to this Tribunal only lies on the basis of an error of law – see Section 11 of the Tribunals, Courts and Enforcement Act 2007. In **R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982** the Court of Appeal gave general guidance on the most frequently encountered errors of law which it categorised as including “making perverse or irrational findings on a matter or matters that were material to the outcome”.
22. In our judgment there was no material error of law in the Tribunal's ruling. This is in reality a challenge to the First-tier Tribunal's findings of fact which cannot be said to be perverse or irrational.
23. The Tribunal correctly identified the law and the standard of proof, in particular at paragraphs 11 and 12 and paragraphs 35 to 37 of its ruling. Having correctly identified the law the Tribunal found in terms that although Mr Budraitis had been a persistent offender he fell into a category that could not be said to be that of a hardened criminal. The fact that he had support available justified them in having some hope that he would mend his ways. They came to the “clear” conclusion that he did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of our society. His criminal convictions did not justify the Secretary of State's decision to deport him.
24. For the avoidance of doubt, we reject in terms the submission made on behalf of the Secretary of State that the Tribunal did not carry out the necessary assessment by reference to the relevant test. It seems to us that in paragraph 42 of their judgment that it carried out precisely the right exercise.
25. The Tribunal bore in mind Mr Budraitis' evidence which it accepted. It considered his age, the support of his partner who attended court and her correspondence. That correspondence reflected her commitment to Mr

Budraitis whom she praised as a wonderful stepfather. She was visibly upset in court. It had regard to Mr Budraitis' past alcohol dependence and it had regard to the lack of family links in Lithuania.

26. We are satisfied that the Tribunal below was fully aware of Mr Budraitis' criminal record including, for example, the warning letters. It reiterated that, being fully aware of that record, it nevertheless found Mr Budraitis to be a persistent but not hardened criminal. Thus, the clear conclusion of the Tribunal on the totality of the evidence was that the Secretary of State's decision to deport was disproportionate and Mr Budraitis did not pose a threat affecting one of the fundamental interests of society let alone a genuine, present and sufficiently serious threat. It bore in mind his contrition and past punishment.
27. We remind ourselves that the test is one of perversity or irrationality. The Tribunal had the benefit of a full oral hearing at which Mr Budraitis gave evidence. As we have indicated the Tribunal was aware of his criminal record. Its finding that he was not a hardened criminal was one open to it as was its conclusion that there was every prospect that he would not re-offend, that conclusion being reached in the light of the evidence, his time in prison and the support of his family and partner. It was a clear conclusion. It was not the result of an error of law but of the findings of fact made after a full hearing, which we have not been able to find perverse or irrational. It was not a decision with which we can interfere.
28. For all these reasons we dismiss the appeal and uphold the decision of the First-Tier Tribunal. We do not do so without reminding Mr Budraitis of the closing remarks of the First Tier Tribunal relating to the consequences that any future offending would have on his position in this country and more generally.

Signed:

Dated: **9 December 2014**

Mrs Justice Carr