Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01688/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 February 2015	**On 6 February 2015**

Before

UPPER TRIBUNAL JUDGE PITT

Between

MR SAULIUS VITAS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Haywood, Counsel
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Horvath promulgated on 19 November 2014 which refused the appeal against deportation of the appellant, an EEA national.

2. It was common ground before me that the appellant is someone with permanent residence and therefore entitled to have his expulsion assessed against the "serious grounds of public policy or public security" protection provided by Regulation 21(3) of the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations).

3. Regulation 21 also provides other criteria that must be taken into account when the expulsion of an EEA national is proposed, stating also that:

"(2) A relevant decision may not be taken to serve economic ends.

…

(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."

4. It is also common ground that after he came to the UK in 2004, records show that the appellant first came to the attention of the police in 2009 when he was drunk while in charge of a child and cautioned. Between 31 August 2007 and 18 June 2014 he was convicted nineteen times for 28 offences. Those offences included driving a motor vehicle with excess alcohol, batteries, assault theft/shoplifting (fifteen offences), breach of a conditional discharge, commission of further offence during the operational period of suspended sentence order. Many of his offences arose in connection with the abuse of alcohol.

5. For those offences he received fines, conditional discharges, community orders, supervision requirements, victim surcharge, alcohol treatment and imprisonment. They also include at least three batteries or assaults.

6. On 18 June 2014 he was convicted of two counts of battery, one against his wife and one against his stepdaughter, both of whom he beat. On 2 July 2014 he was sentenced to twelve weeks' imprisonment for each offence to be served concurrently. It was these offences which led to the notice of an intention to make a deportation order on 18 August 2014.

7. Judge Horvath's decision was that the appellant represented a "serious", genuine and present threat to public policy or public security. She considered that the appellant's offence were very numerous, not at a high level but serious enough to attract a custodial sentence, that he had

shown a lack of remorse, sought to minimise his offences, had not addressed his alcohol problem and that reoffending was likely. She also found that she could not weigh the appellant's relationship with his wife, stepchild and adult son as highly as he put forward.

8. The grounds of appeal as set out in the written application upon which permission was granted can be summarised as follows:

   (a) Incorrect approach to the assessment of the evidence – there was no clear finding on the credibility of the appellant and his wife and their material evidence as to the appellant's relationships in the UK. There was little reference at all in the determination to the evidence of the wife. Further, at [52] and [59] the judge required corroboration of oral evidence which was not permissible approach. Further the judge took an irrational approach when she placed weight on the parents of the appellant and his wife not attending their wedding. Further, no allowance was made for the fact that the appellant was unrepresented.

   (b) Erroneous application of the correct EEA framework – the appellant's offences could not bring him within the "serious" grounds provisions. The judge further erred at [56] in considering incorrect factors as part of the public interest weighing against the appellant in an EEA deportation, stating:

> "I have to balance the public interest in particular regard to the prevention of crime, the protection of the public moral, the economic wellbeing of the country against the personal and other compassionate circumstances of this appellant's case."

   This offended the specific criterion of Regulation 21(2) which states that "a relevant decision may not be taken to serve economic ends" and Regulation 21(d) which states "matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision".

9. At the hearing Mr Haywood began with the ground concerning whether the appellant could possibly be said to represent a "serious" threat to public policy or security where his offences were of a relatively low level albeit they were numerous.

10. Mr Haywood relied on the reported case of **LG and CC (EEA Regs) [2009] UKAIT 00024,** referring first to Appendix B of that document which set out the UKBA Criminal Casework Directorate Case Owner Process Instructions concerning deportation of an EEA national. This document provided guidance on what might amount to "serious" grounds. The offences set out in the respondent's document were a conviction for murder, a terrorism offence, a drug trafficking offence, a serious immigration offence, or a serious sexual or violent offence carrying a maximum penalty of ten years or more. The guidance document states that these offences "might constitute serious grounds of public policy or public security."

11. At paragraph 106 of **LG and CC** the Tribunal comment on the respondent's guidance document thus:

> "The threat in the 'serious grounds' category (level 2) requires to be differentiated from that posed in a level 1 case, bearing in mind that a level 2 person has acquired a permanent right of residence in the United Kingdom. We can see from the section of the Instructions concerning level 2 that a conviction for any number of the listed offences might constitute 'serious grounds'. We see merit to the list of offences as a means of differentiating between level 1 and level 2, but it must be emphasised that it is the present risk arising from conviction for the offence in question that must be established. As the Instructions recognise, the list of offences represents guidance rather than prescription, but properly represents a higher level of seriousness. One can imagine, for example, a serial shoplifter being properly removable under level 1, but being unlikely to represent the level of risk that is required to be posed in the case of a person with a right of permanent residence."

12. As set out at [4] above this appellant can be considered as a "serial shoplifter", having committed fifteen such offences. Mr Haywood sought support from the final sentence of the Instruction cited above which suggests that a "serial shoplifter" is "unlikely" to come with the "serious" category so as to justify the expulsion of an EEA national with permanent residence. As was further pointed out, none of his offences were more serious than the most recent batteries which were summary offence with a maximum term of imprisonment of 6 months and for which the appellant had received a sentence of 12 weeks.

13. In response Mr Jarvis took me to the case of **Jarusevicius (EEA Reg 21) [2012] UKUT 00120 (IAC)** which at [65] states:

> "However, even if, contrary to our assessment, it were concluded that he had acquired a right of permanent residence, we do not regard the UKBA Criminal Casework Directorate Instructions (attached as Appendix B to **LG and CC**) to be exhaustive or conclusive of which convictions will lead to an assessment of serious grounds of public policy or public security. "

14. This, argued Mr Jarvis, showed that there was no "bright line" for deciding whether an individual's offending came within the "serious" category. The First-tier Tribunal had not erred in finding that this appellant did so given the extent of his offending, the risk of reoffending and that his convictions went beyond merely shoplifting, including as they did offences of violence including violence against a child.

15. In this appeal, it appears to me that a difficult decision lay before the First-tier Tribunal. The level of seriousness of each of the individual offences committed by the appellant is certainly not that of the crimes set out in the Instruction. But the appellant's offending history is so prolific and his propensity to reoffend inevitably a concern, his not having expressed credible remorse, his minimisation of his offences including the two batteries in 2014, his alcohol problem not having been addressed, that it is not readily apparent that he is someone who could easily be found not to pose a "serious" threat to public policy or security.

16. There is no question that Judge Horvath was aware of the need to address the "serious grounds" test. She sets out at [35] the hierarchy of levels that can apply to the expulsion of an EEA national. She concludes at [37] that he "has acquired permanent residence in the UK" and that the "serious grounds of public policy or public security provision applies to him".

17. She also refers at [37] and [38] to **LG (Italy)** v Secretary of State [2008] EWCA Civ 190, the remittal from which became **LG and CC** in the Tribunal. When considering how the Court of Appeal approached the hierarchy of levels of protection, Judge Horvath states at [38]:

> "I bear in mind that Carnwath LJ stated that he did not feel confident in attempting to lay down any definitive guidance until the Secretary of State had reached a more settled view both of the legal interpretation of the provision and of the policy considerations governing their application in practice."

18. That principle, essentially the same principle as that expressed by the Tribunal in **Jarusevicius**, considered at [13] and [14] above, was one she was entitled to take into account.

19. At [39], Judge Horvath correctly directed herself in terms to the other provisions of Regulation 21 that she had to apply to the facts of the appellant's case.

20. Over paragraphs [41] to [55], in a very detailed consideration, Judge Horvath assessed all of the material evidence before her including the nature of the appellant's offences, his continued alcohol abuse, the risk of reoffending and whether these matters could amount to a serious, genuine and present threat to public policy. At [47] she found that he minimised the true extent of his offences and consequences of his drinking. At [48] she found that "he has shown no real remorse in court for his past conduct". She notes also in [48] the prevalence of alcohol behind the appellant's offending behaviour and that:

> "whilst I note that orders have been made in the past for alcohol treatment, this did not appear to have made any real impact upon him to stop drinking. In addition, I note there is no evidence to show that he has completed alcohol treatment courses by way of rehabilitation. There is also no credible or cogent evidence from the partner to show what active steps she had taken to wean him off alcohol."

21. The judge further notes at [48] that the stepdaughter's father had not been informed about the battery on the child in June 2014. The judge concludes at [48] that:

> "the lack of remorse shown by the appellant in court damages his credibility to the extent that it increases, in my view, the propensity threshold for the appellant to involve himself further with unsociable, undesirable and/or violent criminal behaviour in the future associated with drink/alcohol consumption, sooner or later."

22. The determination goes on at [50] to state:

> "It does appear to me that he presents a real risk of reoffending, particularly in circumstances where there exists a real risk that he may well return to drinking, as he has done since he met the partner in January 2013."

and concludes that "he would reoffend sooner or later."

23. As above, this was a case which required the resolution of a difficult balancing exercise between the level of the appellant's offending and its nature, extent and the likelihood of reoffending in order to decide if his offending could justify expulsion where he had "serious grounds" protection provided by Regulation 21(3).

24. Judge Horvath, as set out above, addressed the relevant legal principles and material evidence. Having done so, was her conclusion open to her? What, in my view, sustains her conclusion, are her comments at [51]. She states there:

> "The type of offences is an important consideration. I consider the repeated shoplifting offences and various counts of battery and common assault to be serious and the gravity of the offences as well as the deleterious effect of that type of crimes on the wider community was reflected in the sentences imposed. There is a need to protect the public generally (including the child) from serious crimes and its effects such as these. I are [sic] also aware of the primary responsibility of the state for the public interest/policy and public security in that the consequence for non-citizens of committing serious crimes might be deportation. I have borne in mind that the crimes which have been committed were not heinous such as rape, murder, grievous bodily harm, acts of terrorism, or drug trafficking, however I am of the view that the appellant showed a propensity to continue with his drinking, that when under the influence of drink, he had a tendency to act violently. I take the view that his repeated offences of battery and common assault, taken cumulatively, were sufficiently grave and serious such as to justify the respondent's decision to make a deportation order against him."

25. Those comments acknowledge the level of seriousness of the offence is an "important consideration". The judge considers the appellant's offences to be "serious" whilst overtly acknowledging that they are not "heinous" or, to put it another way, individually the equivalent of the offences set out in the respondent's Instruction as the type of offence that might justify the deportation of an EEA national with permanent residence. As above, neither the respondent's Instructions nor any of the case law put before me indicates that the list offences set out a definitive list and **Jarusevicius** confirms that there is no "exhaustive or conclusive" list or type of conviction that must be present for the "serious grounds" test to be met.

26. Where that is so and where Judge Horvath took into account what would more usually constitute a "serious grounds" level of offending and acknowledged the low level of the offending here, it is my conclusion that even where it was not a decision that all judges would have come to, it was not irrational, perverse or unlawful but was reasonably open to her. I therefore did not find that the first ground of appeal was made out.

27. I turn now to the second ground put forward by Mr Haywood, that Judge Horvath relied on incorrect and impermissible factors as part of the public interest when making her decision on deportation of an EEA national.

28. As indicated above, Judge Horvath set out the correct legal matrix and the criteria from Regulation 21 that she had to apply to the facts before her.

The argument that she did not apply that framework and those criteria in practice arises from her comment at [56] that:

> "I have to balance the public interest in particular regard to the prevention of crime, the protection of the public moral, the economic wellbeing of the country against the personal and other compassionate circumstances of this appellant's case."

29. This comment is made in a concluding paragraph. As above, it comes after the judge directed herself in terms to the correct legal matrix and criteria and I was not taken to anything in the detailed substantive consideration at [36] to [55] that was not in line therewith.

30. I also note that at [57], immediately following the reference to the comments which the appellant maintains amount to an erroneous approach, Judge Horvath again invokes references Regulation 21 as the relevant provision when addressing the issue of rehabilitation in appellant's home country.

31. When the determination is read as a whole and fairly, it is not my view that Judge Horvath incorrectly assessed the public interest to be weighed against the appellant regarding his deportation as an EEA national. She set out the law correctly, considered relevant case law and the substance of her consideration is in line with the framework set down by Regulation 21. The wording of [56] and reference to "prevention of crime, the protection of the public moral, the economic wellbeing of the country" is infelicitous but it does not appear to me that, in substance, Judge Horvath materially went beyond the need for "serious grounds of public policy and security" and the provisions of Regulation 21 when deciding that the appellant could be deported.

32. There remains the third ground, challenging regarding the judge's assessment of the evidence. I did not find that this had merit, being really a disagreement rather than something capably of showing a material error of law.

33. It was argued for the appellant that a clear finding had to be made on the credibility of the appellant and his wife and that where it was not, the assessment of their relationship and the appellant's relationship with his stepdaughter and his adult son was not sound. But the judge set out a number of reasons why she did not find the evidence of the appellant and his wife to be reliable. At [48] she points out that the appellant and his partner gave conflicting evidence about the most recent offence, seeking to minimise it. Also set out at [48], the appellant claimed to have stopped drinking but this was not found to be reliable where he had continued to offend whilst abusing alcohol. There were further numerous inconsistencies identified at [52] as to whether the couple were living together as they claimed. The judge also found at [52] that the appellant had made unreliable statements to the respondent about his reasons for not being able to return to Lithuania. Those matters more than justified Judge Horvath weighing the relationships that the appellant claimed to have established in the UK at a lower level than put forward by the appellant and his wife.

34. Those findings also indicate that it was not merely a lack of corroborative evidence that led the First-tier Tribunal to find that the appellant had more limited relationships in the UK than he claimed. Where the appellant sought to place weight on his "strong" relationship with his stepdaughter, it was not unreasonable for the judge to seek some independent evidence of this beyond that of the appellant and his wife. The same is true for the relationship of the appellant and his adult son.

35. It is also my view that, in the context of all of the sustainable findings on the unreliable evidence provided by the appellant and his wife, even if it were an irrational point on which to place weight, the comment at [52] that it was of concern that no parents attended the wedding could not be material. It is also my view that putting weight on this point cannot be characterised as irrational so as to amount to an error, in any event. It was open to the judge to weigh this amongst many factors relevant to the seriousness of the relationship of the appellant and his wife.

36. I also saw nothing inconsistent in the judge finding a limited relationship between the appellant, his wife and the stepchild but indicating that it was, in any event, not unreasonable for the wife and to return with him to Lithuania. It is difficult to see how that could be so where the child is 11 and has lived in the UK only for the last four years of her life, the wife's period of residence here being similarly limited.

37. I did not find any weight in the argument in the written grounds that the judge failed to take account of the fact that the appellant was not represented before her. This does entitle him to a preferential burden or standard of proof. Quite properly, Mr Haywood did not seek to take that point much further at the hearing before me.

38. It is therefore my conclusion that Judge Horvath did not err in concluding that the appellant's deportation was justified even where he was an EEA national with permanent residence. Insofar as the grounds challenge the First-tier Judge's decision under Article 8 of the ECHR on the same grounds as those rejected above they must also fail.

39. For the reasons set out above I find no error in the decision of the First-tier Tribunal.

Decision

40. The decision of the First-tier Tribunal does not disclose a material error on a point of law and shall stand.

Signed:  Date: 4 February 2015

Upper Tribunal Judge Pitt