IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21772/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
Judgment given orally at hearing On 29 October 2015	**On 27 November 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALEKSANDR VLADIMIROVIC TURKIN

Respondent

Representation:
For the Appellant: Ms A Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: Mr A Eaton, Counsel instructed by Asylum Aid

DETERMINATION AND REASONS

1. The appellant in the proceeding before the Upper Tribunal is the Secretary of State. However, for the sake of clarity I continue to refer to the parties as they were before the First-tier Tribunal.

2. The appellant was born on 11 April 1978. He is said to be stateless but was born in Lithuania. He is understood to have arrived in the United Kingdom on 19 November 2005 as a visitor. He must have left because he re-entered on 19 May 2006 on an EEA family permit, this information being taken from the decision of the First-tier Tribunal. On 17 January

2012 a decision was made to deport him. That is an important feature of the background circumstances because it feeds in to what follows.

3. The appellant appealed to the First-tier Tribunal against that decision and his appeal was allowed on the basis that the decision was not in accordance with the law because there appeared to be a conflict in the policy of the respondent with regard to the conditions in which deportation proceedings could be instituted under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). I take this from [2] of the First-tier judge's determination as an accurate summary, but it is in any event reflected in the other documents before me. Mr Eaton reminds me that there was in fact no further deportation decision by the respondent.

4. On 10 January 2014 the appellant made an application for a residence card. That application was refused. The application was on the basis that he was a dependent relative under regulation 7 of the EEA Regulations. The decision was refused on 28 April 2014 because the respondent, amongst other things, invoked reg 20. It was concluded that the applicant's presence in the UK posed a genuine, present and sufficiently serious threat to the fundamental interests of society. Thus, the application was refused with reference to reg 20; a decision that at least in principle the Secretary of State was entitled to make.

5. The appellant's appeal against that decision, which is the subject of these proceedings, came before First-tier Tribunal Judge Afako at a hearing on 14 May 2015, whereby he allowed the appeal. It was part of the decision to refuse the application that the appellant had not demonstrated that he was the family member of an EEA national and had not adduced sufficient evidence to support his claim for dependency under reg 7. That regulation defines family members and includes direct descendants of an EEA national who are that EEA national's dependants.

6. The grounds of appeal before the Upper Tribunal, at 1a-d, assert firstly that the judge fell into error in the application of reg 8. In fact, on behalf of the respondent before me it was accepted that reg 8 had no part to play in the judge's decision, or indeed in the respondent's decision to refuse the application, as I think is obvious from a reading of both. That aspect of the grounds is not relied on.

7. It is further argued in the grounds, in summary, that the judge's assessment of the risk of the appellant re-offending is flawed in that the judge decided that the burden was on the Secretary of State to demonstrate such a risk. It is also said that the seriousness of the offences for which he was convicted were not taken into account in whatever assessment the judge made. Furthermore, it is said that a relevant factor on the question of risk is the appellant's apparent unwillingness to provide details of his conviction or convictions in Lithuania. It is argued that the judge was wrong to conclude that the appellant did not make any attempt to deceive in relation to his criminal

convictions. It was incumbent on the appellant to provide all relevant and accurate particulars.

8. Additionally, the grounds assert that the judge wrongly took into account the apparent relationship between the appellant and his EEA national partner who is a Lithuanian citizen. It is argued that there are relevant provisions for the appellant to be issued with a residence card on the basis of such a relationship, that is to say reg 8, as an extended family member (presumably) in a durable relationship.

9. The grounds also contend that the judge failed to have regard to the possibility of Ms Trosina, the appellant's partner, returning with him to Lithuania. Insofar as the judge took into account any medical conditions that the appellant may have, as set out at [35] of the determination, there was a failure to explore whether the appellant could receive treatment for those conditions in Lithuania.

10. The appellant's 'rule 24' response seeks to rebut, point by point, the arguments advanced in the grounds. In submissions on behalf of the Secretary of State, Ms Brocklesby-Weller relied on the grounds and with reference to the determination sought to demonstrate the areas in which the First-tier Judge had erred in law. I was reminded that the latest offence, described as the index offence, was one in which the appellant received a sentence of fifteen months' imprisonment for an offence of having an offensive weapon. The judge, it is argued, did not look into the particular circumstances of the appellant's offending and his convictions in order to determine what the risk is. The other grounds in relation to proportionality, it was said, are in a sense parasitic on the first argument about risk.

11. On behalf of the appellant Mr Eaton, initially responding to issues that I raised with him, argued in line with the rule 24 response that there was no error of law on the part of the First-tier Judge in any of the respects advanced.

12. Judge Afako's determination at [17] starts by recapping the background to the case, namely that in May 2012 the respondent made a decision to deport the appellant but that decision was overturned (for the reasons already explained above). He noted that the First-tier Tribunal apparently in that decision left open the possibility that a deportation decision would be remade, but in the event the respondent elected not to make such a decision but instead made the decision under reg 20. The fact that there has not been a further deportation decision is a matter relied on on behalf of the appellant.

13. In considering reg 7 Judge Afako concluded that he was satisfied that the appellant is the son of Elina Turkina, a national of Lithuania exercising Treaty rights as a worker. Details of her employment are set out in the determination, and are reflected in the documents before the First-tier Tribunal. The judge was satisfied that the appellant was living with his

mother at the same address, citing the ample documentary evidence to that effect and giving examples of it.

14. He gave legally sustainable reasons for finding that the appellant is not economically active or otherwise self-sufficient. His partner's part-time employment was not sufficient to remove his dependency on his mother, on whom it was concluded he was also emotionally dependent. There is reference in [21] to her helping him overcome his drug dependency and "other challenges" that he faced.

15. At [22] it was concluded that the appellant was a direct descendent of his mother who is exercising Treaty rights and that he is her dependant, she providing financial, practical and emotional support, as well as accommodation. The conclusion in [23] is that the appellant is a family member of an EEA national within the meaning of reg 7.

16. The judge then conducted a detailed assessment of the application of reg 20. He referred in general terms to the appellant's convictions. He said that the respondent must establish the necessity of the restrictive measure by demonstrating that the circumstances which gave rise to the convictions are evidence of personal conduct constituting a present threat to particular interests. Thus he concluded that a credible assessment of future risk must inform the first step of the decision before conclusions as to proportionality.

17. At [26] there is reference to the respondent's reliance on the remarks of the sentencing judge who referred to the potential danger that the appellant posed. There is reference in that same paragraph to the allegation by the respondent of deception.

18. At [27] there is an assessment of the issue of deception. I am satisfied that the judge was entitled to conclude that the respondent had not established that the appellant had attempted to conceal in his application his criminal convictions. He noted that the appellant was legally represented and apparently it had not been denied that his representative did send a list of convictions to the Secretary of State. I pause there to mention that this was an issue that I asked Mr Eaton about. It is still not entirely clear, to me at least, where the list of his convictions that was apparently provided to the Secretary of State by his representatives is to found. Nevertheless, it is abundantly clear that the Secretary of State was fully apprised of the appellant's criminal history, and for my part, having looked at the application form at section 10.2 and 10.10, it is apparent that the appellant referred to "an attached list" of convictions and also asked that a covering letter be considered. The covering letter was a letter of representations in support of the application by his legal representatives.

19. To return to Judge Afako's determination, at [27] he noted that in any event these offences had previously been the subject of discussion with the Secretary of State. He concluded that from the way the respondent put

her case, the issue of deception seems to have arisen from missing particulars (of offences) rather than the fact of the existence of the offences. He concluded that he was unable to make a positive finding that dishonesty had been employed in making the application.

20. He then turned to the question of the risk of reoffending which was a necessary feature of his assessment of the reg 20 issue (because of reg 21). He concluded at [28] that the respondent needed to make an assessment of the risk that the appellant posed to the UK's "relevant interests". That required the conduct of the appellant since he left custody to be taken into account. He noted that there does not appear to have been a professional assessment of the risk that the appellant poses, or the nature of his engagement with rehabilitative processes in the country.

21. I move on, omitting for the moment [29], to [30]. There the judge said that there was no dispute but that the offences in Lithuania were very serious as indeed they were. One of them was an offence of rape. The respondent, the judge said, was now in possession of all the facts relevant to the offences which she had obtained from the national authorities. He then said as follows:

> "The respondent is thus best placed (indeed bears the burden) to present cogent evidence about how those offences impact upon the contemporary assessment of the future risk this appellant represents. This has not been forthcoming, and in the absence of an objective risk assessment, it seems to me that there is no sound basis for drawing adverse inferences about his future conduct from the existence of his past offences in themselves."

22. Judge Afako did conclude at that point that the burden was on the respondent to provide evidence about the future risk that the appellant represented. I am inclined to think that if that was his view it was probably an error of law if he meant to say that there needed to be a formal risk assessment. On the other hand even if the judge did err in law in that respect I am not satisfied that the error is material to the outcome of the appeal. Returning to [29], the judge concluded that there was evidence that the appellant complied with bail conditions and had been engaging positively in drug and alcohol rehabilitation programmes to which he had signed up. He concluded there was thus more than the word of his mother to look to for evidence of the steps that the appellant had taken in rehabilitation. He noted that the last criminal offence by the appellant was about five years ago and he had spent almost three years out of detention since that time, a matter which he concluded must weigh in the evaluation of the risk he poses.

23. Returning to [30], the judge was correct to conclude that a presumption of risk cannot arise solely from the existence of past offending. He went on to state such would not be the case in particular where an individual had engaged successfully with rehabilitation efforts. Earlier on in that paragraph he correctly stated that past convictions in themselves are not sufficient.

24. Although there is an issue about whether the judge had erred in law in terms of there being a burden of proof on the respondent to establish that there was the relevant risk, it is important to remember also that at [31], under the sub-heading “proportionality”, the judge stated that even if the respondent could by legitimate inference derive an assessment of risk capable of justifying the decision from his previous offending, it would have to be shown that the decision was proportionate taking into account all the circumstances. Again in that the judge was correct.

25. He went on to state that he found it “difficult” to carry out a proportionality assessment without a credible evaluation of the degree of risk as it is not clear what any factors in the appellant's favour are being balanced against. Nevertheless, in his proportionality assessment the judge expressly stated that he would assume for the purposes of the exercise that the appellant did pose a risk sufficient to “trigger” a reg 20 decision.

26. In the proportionality assessment there is consideration of the appellant’s relationship with his partner with whom he concluded the appellant was in a durable relationship. He also noted again the important role that the appellant’s mother plays in his life.

27. At [33], although noting that his partner is not his spouse, he concluded that the couple had decided to build their lives together and had hoped to start a family life. He noted the particular circumstances relevant to their relationship recorded at [33], namely the fact of the appellant's partner having suffered a miscarriage and the considerable impact it had had on them both.

28. The respondent asserts that there were relevant avenues (under the EEA Regulations) whereby the appellant could establish his entitlement to a residence card as a durable partner. It is argued that it was illegitimate for the judge to take the relationship into account in assessing proportionality.

29. I do not agree with that suggestion. The judge was entitled, indeed bound, in the proportionality assessment to take into account all relevant circumstances. It seems to me that it must surely be relevant that he has been found to be in a relationship with an EEA national exercising Treaty rights.

30. The judge went on at [34] to consider that matter further, including in terms of the exercise of Treaty rights of the appellant’s partner. At [36] he returned to the issue of the appellant’s offences, noting that he had committed a string of offences in the UK and that any risk of re-offending would harm the interests of the UK society which the respondent has a duty to protect. He noted that the decision under the EEA Regulations required an assessment made on a correct footing, which should not be based on past conduct alone.

31. In his final conclusions he stated that in the light of the adverse impact of the decision, the undoubted progress the appellant has made, his domestic circumstances and health problems, the refusal to issue him with a residence card is a disproportionate response even if a credible risk assessment had been made. Importantly, at [38] he concluded that he would have reached the same conclusions had the decision entailed the expulsion of the appellant.

32. On the question of whether the judge had failed to have regard to the possibility of the appellant's partner returning to Lithuania with him, even if the judge was in error in that regard, and I do not consider that he was, he was bound to take into account the appellant's relationship with his partner. So far as medical issues are concerned, although the judge did not go on to make an assessment of the extent to which the appellant could receive treatment in Lithuania, in reality the references to the appellant's health were more concerned with his circumstances in the UK and the proportionality assessment in terms of the progress that he has been making and the dependency on his mother.

33. In all these circumstances I am not satisfied that there is any error of law in the decision of the First-tier Tribunal, whose assessment of all the facts was informed by a correct appreciation of the law. Insofar as my decision identifies any possible error of law, such does not require the decision to be set aside.

Upper Tribunal Judge Kopieczek 26/11/15