



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00073/2018

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice
On 4 June 2018

Decision & Reasons Promulgated
On 3 July 2018

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

DC
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S A Salam, Solicitor, Salam & Co Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant's children. Breach of this order can be punished as a contempt of court. I make this order because they are wholly innocent of the appellant's many failings but I am satisfied that public anger at the appellant might be directed towards them if their identities were known.

2. The appellant is a national of Lithuania. She was born in 1992. She appeals against the decision of the First-tier Tribunal on 27 February 2018 dismissing her appeal against the decision of the respondent to deport her to Lithuania.
3. For the purposes of introduction only and at the risk of over simplification, it is the appellant's case that the First-tier Tribunal applied the wrong test and reached an unlawful conclusion.
4. I begin by considering carefully the decision of the First-tier Tribunal.
5. This shows that the appellant was born in September 1982 and is a female citizen of Lithuania. She was made the subject of a deportation order on 8 April 2016 but that decision was subject to appeal and the appeal was allowed by the First-tier Tribunal. The Secretary of State appealed the decision to allow the appeal but the Secretary of State's appeal was dismissed and the deportation order was revoked on 3 July 2017. However on 12 January 2018 there was a further decision to make her subject to a deportation order and it is that decision that was challenged unsuccessfully before the First-tier Tribunal.
6. The judge noted that when the appeal against the earlier decision was heard the appellant's offending comprised, in summary,
"eighteen convictions between October 2008 and March 2016, and includes two assaults on police officers, battery, damaging property, failing to comply with the requirements of court orders post-sentence, committing offences during the course of suspended sentences and theft."
7. Nevertheless, the First-tier Tribunal noted that the offences for which the appellant had been convicted were all at the "lower end of the scale" and had been punished with various restraining orders and only the "very briefest periods in prison".
8. By the time the appellant came before the First-tier Tribunal again she was in more serious trouble. She had committed offences on 20 March 2017 and on 13 September 2017 at the Crown Court sitting at Mold she was sentenced to eighteen months imprisonment for an offence of assault occasioning actual bodily harm and concurrent sentences of two months for theft and four months for breach of a Criminal Behaviour Order. She had pleaded guilty to these offences.
9. The judge set out the Crown Court judge's sentencing remarks which, with respect, are very revealing. The Crown Court judge said:
"The aggravating features of this case are as obvious as they are numerous. You were targeting an elderly man who lived alone, he was vulnerable, he did not want you in his home, you knew it and you pestered him, you forced your way into his home, you demanded and were given drink and cigarettes for one reason, he was scared of you. Having been given what you wanted, you insisted that you be given more cans and tobacco and when he refused he was punched to the face and as he walked away he was kicked and punched to the back. You picked up a weapon, you threw it at him, striking him in the face, you took his beer. You were later to return shouting and screaming and shouting abuse through his letterbox, banging repeatedly on his door. Your elderly victim had been left with swelling and discolouration on his face and bruising. You were both acting in breach of a Criminal Behaviour Order, either by being together or by behaving as you did, you both acted while heavily under the influence of alcohol".

10. Significantly the First-tier Tribunal Judge said at paragraph 7:

“The decision is dated 11 January 2018. It was accepted that the Appellant had established permanent residence in the UK under the EEA Regulations. However it was not accepted that the Appellant had established ten years’ continuous residence. She had not shown that she had been exercising her treaty rights continuously from 2011 – 2017. The only documents she had provided were payslips from January 2011 – November 2012, P45s dated 16/11/2011 and 14/10/2014, P60 for the tax year ending 05/04/2015 (£201.92) and a letter from the DWP dated 16/04/2015 stating that she had passed the right to reside at habitual residence test. Therefore consideration had not been given as to whether her deportation was justified on imperative grounds of public security. Consideration has been given to whether deportation was justified on serious grounds of public policy or public security.”

11. The judge then noted that the OASys manager found that the appellant had a “medium risk of harm to the public” and that the offence that brought her before the Crown Court represented an escalation in the seriousness of her offending. The judge also recorded that, in a letter dated 9 July 2016, she had claimed that she was remorseful and had shown exemplary behaviour in prison but her remorse was not evidenced by subsequent conduct.
12. In short, the First-tier Tribunal decided that the appellant had been “convicted of a serious offence and the risk of reoffending was high”.
13. The First-tier Tribunal further noted that it was the respondent’s case that the appellant “had been convicted of a serious offence and the risk of reoffending was high”. The respondent maintained there was no evidence of rehabilitation in any worthwhile way in the United Kingdom and no reason to think her prospects of rehabilitation would be any worse in Lithuania where she had relatives who might be expected to support her. Her children were the subject of Care Orders. Her father was still in Lithuania. She was being treated for depression but could access medication in Lithuania.
14. Under a heading “Established Facts” the First-tier Tribunal Judge acknowledged that the appellant had had a difficult childhood. She had been left in Lithuania at the age of 11 when her mother came to the United Kingdom. Although it was expected that her father would take proper care of her that did not happen. She did have contact with her grandmother in Lithuania and she does speak Lithuanian but is probably not literate in that language.
15. She arrived in the United Kingdom at the age of 12 in 2005 with her brother. She could not make much of the educational opportunities that she enjoyed in the United Kingdom but she did pass some GCSEs.
16. She had been involved in two abusive relationships and had children she could not manage and took to drinking alcohol as an inept means of coping. Much of her offending was alcohol related. Involvement with her children was limited to supervised access and little had happened while she had been in prison. Her children’s interests were managed elsewhere and it was not suggested that their best interests lay in being with their mother.
17. She does not accept full responsibility for the offence of which she was most recently convicted and sent to prison. She committed the offence with another and denied

punching or kicking the victim. I do not see that anything turns on that. The appellant has been convicted and on any version of events was present encouraging the offence.

18. The appellant has two children. One child was born in 2011 and lives with her paternal grandmother under a Special Guardianship and Supervision Order and contact is by way of letter and occasional supervised contact. The other child was born in 2015 and is the subject of a Care Order and is being looked after by foster parents. There is again sporadic supervised contact. Clearly their rights are an important consideration in any article 8 balancing exercise but the family courts have decided that their best interests do not lie in their living with the appellant. Clearly there can be no direct contact in the United Kingdom if she is removed but given the present arrangements this does not count for much.
19. There is no error in the finding that deporting the appellant does not violate the respondent's obligations under the European Convention on Human Rights.
20. The judge then considered the periods of residence. As indicated above it is accepted the appellant has established five years' lawful residence and has the degree of protection from removal that extends to a person with permanent right of residence in the United Kingdom. The judge then had to decide if the appellant had the greater rights that come with "ten years' residence". The judge noted that it was not argued energetically before her, although it was set out in the grounds, that the appellant was entitled to the protection that follow from ten years' residence exercising treaty rights. The judge concluded that the appellant qualified for the higher level of protection. The judge says at paragraph 32:

"The offence leading to the Appellant's imprisonment occurred on 20 March 2017. By that time she had already established 10 years residence in the UK and so she is entitled to the enhanced protection under Regulation 27(4)(a)."

21. The respondent disagrees. There was no proof in the mind of the respondent that residence had been in accordance with exercising treaty rights rather than mere presence in the United Kingdom. However, like the First-tier Tribunal Judge, I find that rather odd. The appellant had established a permanent right of residence and, prison sentence apart, it is not clear how her life in the United Kingdom had changed.
22. The First-tier Tribunal's reasoning becomes confusing when carrying out the "Assessment and Conclusions".
23. At paragraph 34 the Tribunal Judge said:

"I consider the personal conduct of this Appellant. She has committed a serious offence of assault as described in the sentencing remarks. The sentence was one reflecting the serious nature of this offence. I am satisfied that serious grounds of public policy or public security have been established. The appellant would I find have been liable to deportation and I would not have found that the decision to deport is disproportionate or unlawful, had she not acquired ten years' residence."

24. This is, I find, a clear finding by the judge that there are serious grounds justifying the appellant's removal. However, the judge then went on to say at paragraph 35 that the "test is higher for this appellant as she is entitled to enhanced protection".

25. The judge looked at the evidence of rehabilitation and said at paragraph 38:

"The appellant has completed an alcohol awareness course. She has not attended a course addressing the impact of her conduct on victims; [her representatives] said numerous such courses were reserved for more serious offenders. The appellant has shown a positive attitude in the Life Coaching Course she attended in December 2017. She has completed some educational courses. However the appellant has had the benefit of rehabilitation, input and support in the past and her offending has if anything deteriorated over the years. I am not persuaded that she is effectively engaged and attempts to rehabilitate her. She had returned to the home of her parents yet their influence did not have a positive effect on her. She has not demonstrated that she is willing to effectively engage in or benefit from attempts to rehabilitate her. My view is also supported by the OASys assessment."

26. The judge then continues and says at paragraphs 43 and 44:

"43. This appellant has been given numerous opportunities in the past to address her offending behaviour but continues to offend. I am mindful that the nature and seriousness of her offending seems to be escalating. That the appellant has now attended courses about alcohol abuse are noted, but her alcoholism does not explain why the Appellant sought to associate with the person with whom she was not permitted to engage by virtue of a court order. She has already had the support of her mother, her partner and her brother but they were not able to prevent her from offending. They do not exercise control over her behaviour and I am not persuaded about her commitment to keep out of trouble. I do not find that the appellant is in an advanced state of rehabilitation or that there is such a substantial degree of integration into society. On the contrary, I find that there is little chance for rehabilitation given all the input that the appellant has had in the past. There may be even less support in Lithuania but that has not been established by her.

44. The general members of the population of this country need to be protected from offending of the nature of the index offence in this case. The appellant has shown disregard for court orders, not just when she committed this offence but also in the past as evidenced by her criminal record. She has little respect for society and has not become genuinely integrated. There is a real risk of reoffending. The risk of harm to other individuals is assessed as medium by the OASys assessment. The escalation and the brutal nature of this appellant's last offence where the victim was an elderly man and was attacked in his home tells me that this appellant has not learnt her lesson and she will I fear continue to offend. There is a real risk of significant harm to general members of the public by her behaviour, which will, as her history has shown, continue to escalate into more serious offending. It is in the interests of maintaining public order, and combating the effect of repeated criminal offences. I find the deportation justified on imperative grounds of public security."

27. The judge then noted balancing factors including the appellant having come to the United Kingdom at the age of 11 and having few ties in Lithuania although there were relatives there and she had had some contact with the country.

28. Mr Kotas had prepared a "Rule 24 notice". He presented the case on an alternative basis. It was his first point that the First-tier Tribunal was entitled to conclude that there were imperative grounds justifying the appellant's removal and there was nothing wrong with the decision. Alternatively, he argued that the judge should not

have concluded that there were the ten years' lawful residence such that there was a right to the enhanced protection and that the appeal ought to have been dismissed on the basis that there were serious grounds of public policy or public security.

29. Although Mr Salam objected the points being taken at short notice he did not ask for an adjournment and I agree with Mr Kotas that, given our decision in **EG and NG (UT Rule 17: withdrawal; Rule 24; scope) Ethiopia [2013] UKUT 14 (IAC)** the Secretary of State, as the effective "winner" of the appeal was in no position to enter a cross appeal but wanted the decision upheld for reasons other than those given by the First-tier Tribunal and rightly did so by way of a Rule 24 notice although serving it a little earlier would not have been a bad thing.
30. I have the advantage of the decision of the European Court of Justice in the case of **Franco Vomero (C-424/16)** which was awaited when the First-tier Tribunal made its decision. Unremarkably, this recognises that the relevant period of residence must be established by counting backwards from the date of the decision complained of.
31. With respect, for the reasons given below, I find that the First-tier Tribunal was just wrong to suggest that as soon as ten years residence is established the appellant was, and remains, entitled to the higher degree of protection.
32. Mr Salam argued that whatever the meaning of the Directive (2004/8/EC) Citizens' Free Movement Directive, the EEA Regulations in statutory instruments were more generous. He drew to my attention paragraph 27(4)(a) of the Immigration (European Economic Area) Regulations 2016 which provides that a relevant decision may not be taken on imperative grounds for public security in respect of an EEA national who "has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision". He said, correctly, that the word "prior" is not qualified with a word such as "immediately" and so if, as is the case here, there has been ten years' residence not interrupted by prison then the higher level of protection is established.
33. He said, correctly, that there is no reason why Parliament cannot be more generous to an EEA national than the directive requires.
34. However I remind myself the purpose of the Regulations is to give effect to the Directive. Article 28(3)(a) gives protection to people who have "resided in the host Member State for the previous ten years". The word "previous" cannot be ignored. Further, the words "has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision" did not change the law but repeated the words used in regulation 21(4)(a) of the Immigration (European Economic Area) Regulations 2006 about which there is considerable jurisprudence. The interpretation suggested by Mr Salam is contrary, for example, to the decision of **LG and CC (EEA Regs: residence; imprisonment; removal) Italy [2009] UKAIT 00024** which itself followed Court of Appeal guidance.
35. Whilst I find it surprising that a qualifying word is not present in the Regulations it is so clear in the translation of the Directive and in jurisprudence that the period has to be calculated back immediately before the date that Mr Salam's superficially

attractive submissions are not based in reality. I respectfully disagree with him on that point.

36. I also find there is no simple test about to show what constitutes an interruption in a period of continuous residence. Clearly as a matter of common sense and authority a period of imprisonment at least could have that effect but European jurisprudence prevents a simple answer. What must be considered as is explained in Vomero, particularly at paragraph 2 at the end of the decision, the Directive:

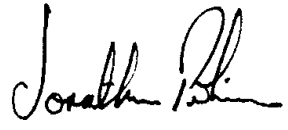
“... must be interpreted as meaning that, in the case of a Union citizen who is serving a custodial sentence and against whom an expulsion decision is adopted, the condition of having “resided” in the host Member State for the previous ten years laid down in that provision may be satisfied where an overall assessment of the person’s situation, taking into account all the relevant aspects, leads to the conclusion that, notwithstanding that detention, the integrative links between the person concerned and the host Member State have not been broken. Those aspects include, inter alia, the strength of the integrated links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which the offence was committed and the conduct of the person concerned throughout the period of detention.”

37. I do not find it immediately obvious to understand how each of those elements determines whether residence is described properly as continuous but that is the test that has been set.
38. I am quite satisfied that the First-tier Tribunal erred in law. The First-tier Tribunal did not count backwards and look for integrated links but decided that ten years had been established and that was sufficient. That is clearly erroneous. Had the “integrated links forged” test been applied the judge would have found, as I find, that the ten years had not been established. The appellant’s integrated links are weak. Her behaviour in the United Kingdom is characterised by repeated criminal offences and an inability to establish any meaningful family life or hold down any meaningful employment. It is a sad fact that I must describe her conduct in this way. As is so often the case for those whose early childhood has been difficult the appellant has found it very hard to establish helpful, meaningful, productive and wholesome relationships and in a sense, she is to be pitied but that does not change the fact that she has not established herself in the United Kingdom and the integrated links are not there and the judge should not have found otherwise.
39. The idea of “integration” is malleable and is sometimes easier to understand by considering its absence. A person who commits crime is engaged in conduct that society has determined is so unacceptable that it attracts punishment. A person who has committed offences including quite serious offences is clearly not “integrated” because she has shown a willingness to repeatedly engage in antisocial behaviour which is, almost by definition, the exact opposite of being integrated.
40. I am quite satisfied that this appeal should not have been approached on the basis that the appellant is a person who has established ten years’ lawful residence and could only be removed on imperative grounds.

41. However, I make it clear that, again with respect to the First-tier Tribunal Judge, I cannot agree that this appellant's behaviour establishes imperative grounds and the Judge erred in finding to the contrary.
42. I remind myself of the particularly unattractive nature of the most recent offence that led to the appellant's imprisonment. Invading the privacy of a person's home is always a serious matter and is particularly repugnant to public order. When the victim is an elderly person who has been selected by the criminal because of his frailty the public repugnance is even greater. Hitting an elderly person is utterly unacceptable.
43. Nevertheless, Mr Salam, rightly, reminded me to keep a sense of perspective and proportion. However disgusting the appellant's behaviour might have been it does not establish an imperative ground. This appellant is not a terrorist or an international criminal. She is not likely to kill anyone (although that is not something that can be ruled out completely) and she is not likely to inflict grave harm on a large number of people as for example might be done by a person with an obsession with firearms. The imperative test is not made out.
44. That said, I have no hesitation in saying all the repugnant factors identified above make out the serious grounds.
45. I now metaphorically sit back and consider the evidence and remind myself of it. The appellant is a woman who has spent a lot of her life in the United Kingdom and who does not have strong links with her country of nationality but she is a woman who is unable or disinclined to behave herself. Probably as a result of alcoholism which is probably itself a symptom of other problems rather than the real cause of her difficulties, she has shown herself unable to take advantage of opportunities for support that have been extended by the courts and whilst it would be attractive to find a way of helping her, well behaved members of society are entitled to protection from her. She has had chances and has squandered them more than once. There are serious grounds here and the appeal should have been dismissed on serious grounds.
46. It follows therefore I find the First-tier Tribunal erred in law. I set aside its decision to the extent that I rule that the appellant has not established the ten years' lawful residence prior to her decision to remove which is necessary to give her the enhanced protection. I am satisfied that she is not entitled to enhanced protection and I am satisfied that there are serious grounds justifying for her removal and I substitute a decision dismissing her appeal for that reason.

Notice of Decision

The appellant's appeal against the decision of the First-tier Tribunal is allowed because the Judge applied the wrong legal test. I set aside the decision of the First-tier Tribunal but substitute a decision dismissing the appellant's appeal against the decision of the Secretary of State.

A handwritten signature in black ink, appearing to read 'Jonathan Perkins', written in a cursive style. The signature is positioned above a horizontal line that extends to the right.

Signed

Jonathan Perkins, Upper Tribunal Judge

Dated: 29 June 2018