Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00630/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 October 2018	**On 14 November 2018**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AIVARAS MALISAVSKAS
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: The respondent did not appear and was not represented

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against the decision of the Secretary of State to deport him. The appeal to the First-tier Tribunal was brought on divers grounds including that removal would be "incompatible with the [claimant's] rights under the European Convention on Human Rights" and the "decision breaches rights which the [claimant] has as a member of an EEA National's family under Community Treaties".

2. The claimant is a national of Lithuania and is therefore an EEA national. The sole permitted ground of appeal was that the "decision breached the [claimant]'s rights under the EU treaties in respect of entry to or residence in the United Kingdom" (see Schedule 2 of the Immigration (European Economic Area) Regulations 2016). Additionally the claimant had been sent a notice under section 120 of the Nationality, Immigration and Asylum Act 2002 and so a ground alleging that the removal of the claimant would be unlawful under section 6 of the Human Rights Act 1998 was a matter to be considered (see Schedule 2).

3. In short the First-tier Tribunal was required to decide the appeal under the EEA Regulations and on human rights grounds.

4. At the end of the Decision and Reasons under the heading "Notice of Decision" the judge allowed the appeal "under Article 8 of the ECHR".

5. At paragraph 45 the judge found the decision to deport the Applicant to be "not proportionate or in accordance with the principles of Regulations 27(5) and (6)". I take this to be a decision to allow the appeal on "EEA grounds". The Secretary of State's grounds seem to be drawn on that assumption so I have decided the appeal on the assumption that is what was done.

6. The claimant had been represented by 786 Law Associates but on 24 October they sent by facsimile a letter to the Tribunal stating they were "writing to inform you that, we are no longer the representative of the abovenamed client (Aivaras Malisavskas)". The letter then identified the hearing on 25 October 2018 at Field House.

7. It is therefore plain beyond argument that the claimant's then representatives had received notice of the hearing and that meant that the claimant at least had constructive knowledge of the hearing. The papers show that notice had been sent to his address for service. There was no application for an adjournment and in the circumstances I decided to continue in the claimant's absence.

8. The decisions to allow the appeals with reference to Article 8 of the ECHR and under the 2016 Regulations must be looked at separately. They provoke different criticisms and different observations.

9. I have concluded that although I find the decision to allow the appeal on Article 8 grounds unsatisfactory for reasons that I will explain later, the decision to allow the appeal under the Regulations is lawful.

10. The Secretary of State's decision to make a deportation order is explained in a letter dated 16 October 2017.

11. The letter noted that the claimant was cautioned for possessing cannabis resin in June 2015. The letter then says that "between 8 February 2017 and 30 August 2017 you received three convictions in the UK for twelve offences". This is not accurate English. I deduce from context that the

Secretary of State meant that the claimant had been convicted of offences on three occasions in that period. I also note with surprise the reference to the claimant having been convicted "of two counts of handling stolen goods" when it is quite plain that there was no indictment here because the offences were dealt with in the Magistrates' Court. Without in any way seeking to excuse or trivialise the conduct complained of the claimant's misbehaviour is at the lower end of criminal offending.

12. Nevertheless the record shows that on 8 February 2017 he was convicted of driving a motor vehicle with excess alcohol for which offence he was fined and disqualified from driving. On 25 April 2017 he was convicted of two offences of handling stolen goods for which he was sentenced to sixteen weeks' imprisonment suspended for two years and subject to a curfew requirement for three months and ordered to pay surcharges and costs. On 30 August 2017 he was convicted of failing to stop a mechanically propelled vehicle when required, using a vehicle with a defective tyre and without a required test certificate, driving whilst disqualified, driving a vehicle with a defective registration plate, driving whilst uninsured and possessing a controlled drug of class B. He had cannabis or cannabis resin. He was also convicted of driving without due care and attention and committing an offence during the operational period of his suspended sentence.

13. According to the Secretary of State the claimant "received 26 weeks' imprisonment". The claimant was subject to a suspended sentence of imprisonment of sixteen weeks. I assume that it was activated and he was ordered to serve a further ten weeks for the instant offences making 26 weeks in all.

14. Additionally in March 2017 he was cautioned for "two counts" of possessing an offensive weapon in a public place.

15. The claimant had not established a permanent right to reside in the United Kingdom and so had a low level of protection as an EEA national. Nevertheless the judge reminded herself, correctly, that the claimant could not be deported unless he posed a "genuine, present and sufficiently serious threat to one of the fundamental interests of United Kingdom society".

16. The Secretary of State regarded him as a "persistent offender who has lack of respect for UK laws" (paragraph 21 of the Decision to make a Deportation Order) that "there remains a risk of you re-offending and continuing to pose a risk of harm to the public" (paragraph 27).

17. The judge was aware that it was the Secretary of State's view that the claimant had not given adequate attention to addressing his offending behaviour. The judge heard evidence that the claimant had learnt to abstain from alcohol and drugs and that he had undergone offending behaviour courses in prison. She also saw a certificate showing that the claimant has undergone a "blocking procedure". The translation was

provided after the hearing but the Secretary of State has not criticised the judge for admitting it. It appears to be from a well-qualified translator and says:

> "It is prohibited to use any substances (including medicinal) which contain alcohol/tobacco during the prescribed period.
>
> **Ignoring the regime may harm the health.**"

18. Clearly the treatment was expected (and may be intended) to give the claimant an additional reason to abstain from alcohol and the judge was entitled to give it some weight when reaching conclusions on the evidence of the claimant and of his wife that he had learned his lesson and had changed his ways.

19. At paragraph 38 of her Decision and Reasons the judge said:

> "The [claimant] stated in oral evidence that he has overcome his drug addiction and/or issues with alcohol. He is of the view that he is not likely to revert to using drugs and/alcohol upon his release from prison and he now realises how much he has to lose by reverting to his previous ways. He is adamant that he has successfully addressed the issues that prompted him to offend and he presents no risk of reoffending or harm to the public, or a section of the public."

20. The judge also reminded herself of the judgment of the Court of Appeal in the case known as **Essa [2012] EWCA Civ 1718** about the prospects of rehabilitation but I agree with the Secretary of State that that is not relevant in the case of someone who has not established a permanent right to remain in the United Kingdom. I do not accept that the judge has *materially* misdirected herself by considering **MC (Essa principles recast) Portugal [2015] UKUT 00520**. I am not sure why the judge referred to **Essa** at all except that it did feature in the refusal letter. It was not part of her reasoning in concluding that the claimant did not present a "genuine, present and sufficiently serious threat".

21. At paragraph 45 the judge said:

> "The [claimant] has committed criminal offences in the United Kingdom but there [is] no evidence to prove that it is a real risk and that he may reoffend in the future. The [claimant] has made representations and I have taken account of these. I find that the [claimant] does not pose a genuine, present and sufficiently serious threat to one of the fundamental interests of society. I find that the [claimant's] deportation is not justified on the grounds of public policy, public security or public health in accordance with Regulation 23(6)(b). I have carefully considered the [claimant's] personal circumstances and find that the decision to deport him is not proportionate or in accordance with the principles of Regulations 27(5) and (6)."

22. I remind myself that I am not deciding the appeal of the claimant. I am deciding if the First-tier Tribunal misdirected itself or otherwise reached an irrational or unlawful conclusion as asserted in the Secretary of State's grounds. The direction is adequate and I have to say after reflection that

the conclusion is permissible. The judge believed the evidence. She believed the claimant's own assurances about his future behaviour which were supported by the evidence of his wife and, she found, supported to some extent by the medical evidence. She accepted that the claimant had attended a course that had caused him to rethink his conduct.

23. The grounds complain that the Judge did not attempt to "scrutinise" the claimant's evidence but that is the point of an oral hearing. The Secretary of State was represented and, presumably, the claimant was cross-examined. The grounds do not aver that the judge ignored evidence.

24. I have reflected very carefully on this and on the grounds and on Mr Duffy's measured and realistic submissions.

25. He echoed the Secretary of State's grounds and argued that the finding that the claimant was not a "genuine, present and sufficiently serious threat to one of the fundamental interests of society" was perverse. It is not. It is reasoned and is based primarily but not exclusively on oral evidence that the respondent tested. At the distant vantage point of the Upper Tribunal the decision might seem generous but that may not have been my view if I had heard the evidence. That does not matter. The decision was open to the judge.

26. I cannot say that this decision is unlawful. It follows therefore that the appeal was allowed for a proper reason and the Secretary of State's appeal against that should be dismissed.

27. That said, I make it plain that the judge's approach to Article 8 was entirely wrong. Human rights were in issue because they were raised in response to a Section 120 notice. The judge was required to apply Part 5 of the Nationality, Immigration and Asylum Act 2002 because that is what section 117A requires but the judge's reason for finding that it helped the claimant are wrong.

28. The Secretary of State clearly decided that the claimant was a foreign criminal. He has not been sentenced to at least 12 months imprisonment and his offences have not caused "serious harm" so that status must depend on his being a "persistent offender". This phrase is not defined precisely but, following Chege ("is a persistent offender") [2016] UKUT 00187 (IAC) it could include a person with the three court appearance in one year that this claimant achieved, even if he has not turned around his life.

29. Certainly the First-tier Tribunal did not decide the appeal on the basis that the claimant is not a foreign offender but on the basis that he is a foreign criminal with a subsisting parental relationship.

30. However the claimant's child is clearly not a "qualifying child" within s117C(5) as she is not a British citizen or a child with at least seven years continuous residence. It is not appropriate to ask if it is "unduly harsh" for

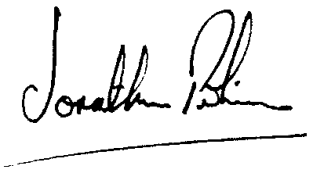
her to remove or live without him. The judge should have been asking if the consequences of removal would have been proportionate. In fairness, this might be what the judge did. Such an approach can be read into paragraph 58 of the Decision and Reasons.

31. Clearly the judge found it in the best interests of child to remain in the United Kingdom where she will now have started school in the care of her mother and her step father the claimant. Given the relatively low level of the claimant's offending and the clear finding that he has given up his criminal ways it may be that the judge was entitled to find that deportation would be a disproportionate interference with the private and family lives of the claimant's close family but that is not what the judge did.

32. However, given that I have concluded that the decision to allow the appeal under the regulation is lawful any error of approach in the decision to all the appeal on human rights grounds is immaterial.

Decision

33. The Secretary of State's appeal is dismissed.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 8 November 2018