Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00327/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 18 November 2019	**On 25 November 2019**

Before

UPPER TRIBUNAL JUDGE PITT

Between

MR ROBERTS [I]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Sellwood, Counsel, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision dated 1 August 2018 of First-tier Tribunal Judge I F Taylor which refused the appeal of Mr [I] brought under the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations). The decision refused Mr [I]' appeal under the EEA Regulations and under Article 8 ECHR.

2. Mr [I] is a Latvian national born on 19 December 1983. He came to the UK in 2012. For the purposes of this decision, it is not disputed that he does not have permanent

residence and is therefore entitled to only the lower level of protection from expulsion under the EEA Regulations.

3. Mr [I] was convicted of battery on 2 April 2014 for which he was sentenced to a community order and compensation. Also on 2 April 2014 he was convicted of destroying/damaging property for which he was sentenced to a community order. He was also convicted of racially/religiously aggravated harassment, alarm or distress for which he received a £210 fine.

4. On 5 June 2014 the appellant was cautioned for possession of cannabis. On 15 March 2016 the appellant was sentenced to twelve weeks' imprisonment, suspended for eighteen months and a restraining order for a battery on his wife. This occurred during a domestic argument in which he threw a butter knife at her.

5. On 1 November 2016 the appellant was arrested for breaching the restraining order. He was sentenced to twelve weeks' imprisonment and his suspended sentence of ten weeks was activated. He therefore sentenced for a total of 22 weeks.

6. It was following the most recent conviction that the respondent took deportation action against the appellant. On 12 January 2017 the respondent signed a deportation order.

7. Mr [I] appealed against the decision of the respondent to the First-tier Tribunal. He had an appeal hearing on 4 June 2018 at which he gave evidence. By the time of the hearing, it is not disputed that he had separated from his wife and their three children had returned to Latvia to live with the appellant's mother in line with a court order.

8. Before the First-tier Tribunal the appellant maintained that his profile did not show that the "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" that was required in line with Regulation 27(5)(c) of the EEA Regulations for deportation action to be justified. He also maintained that the decision to deport him was not proportionate with reference to the provisions of Regulation 27(5), 27(6) and Schedule 1 of the EEA Regulations.

9. In support of his case that he did not represent a sufficient risk for triggering the exercise of the power to deport, the appellant relied on an independent risk assessment report from Ms Rabina Haque dated 14 May 2018. The First-tier Tribunal found as follows concerning that report in paragraphs 14 to 20 of the decision:

> "14. The appellant relies upon an independent risk assessment in respect of the appellant by Rabina Haque dated 14 May 2018. It is apparent that Ms Haque has not had sight of any of the prosecution papers which also includes the victim impact statements. At 12.4 of the report Ms Haque states that 'it is my opinion that he is completely rehabilitated'. At R10.6 of the appendices the risk descriptors are explained. A low risk equates to current evidence that does not indicate a likelihood of cause or serious harm. A medium risk is where there are identifiable indicators of risk of serious harm. The offender has the potential to cause serious harm but is

unlikely to do so unless there is a change of circumstances, for example failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol abuse. At the summary section R10.4 the expert states:-

> 'It is my clinical assessment that Mr [I] poses a medium risk of physical harm to partners in a domestic setting and emotional harm to children within a domestic [setting]. To reduce the risk of harm in the future Mr [I] must understand the ramifications of such behaviour. I therefore assess that his finance and substance misuse is a trigger factor to his offending behaviour.'

15. I find this hard to square with the expert's opinion that the appellant is completely rehabilitated and therefore presumably poses no risk at all. Furthermore, at 10.2 of the main report it states:-

> 'As can be observed in Appendix 1, Mr [I] is assessed as presenting a low risk of committing further violent offences. According to guidelines provided by OGRS score, this translates as follows; Mr [I] is assessed as presenting a 25% chance of being convicted for further violent offences within a two year period, a 15% chance of being convicted for further violent offences within a one year period.'

16. Again, I find this difficult to equate with the appellant being completely rehabilitated as what is suggested is that the appellant has a one in four chance of being convicted for further violent offences such as those perpetrated upon his estranged wife within a two year period which again I find difficult to reconcile with her conclusion that he is completely rehabilitated. Furthermore, if he has a one in four chance of committing violent offences within a two year period this does not amount to a low risk of committing further violent offences and in my view amounts at least to a medium risk of committing further violent offences.

17. The findings of low risk and medium risk are very confusing.

18. The documentation put before me is complex and very difficult to follow but in my view I am surprised that any firm conclusions can be reached when the expert has not seen any of the prosecution papers and in relying upon the version of events of the appellant there is a strong possibility of distortion of the evidence. In fairness to the expert, as stated at 6.1 and elsewhere, in her report she has not had sight of the Crown Prosecution Service documents.

19. However, in light of the above in my view the expert's conclusion should have been much more qualified given that she had not seen any of the Crown Prosecution papers.

20. In the circumstances, therefore, I can give little weight to the independent risk assessment."

10. The First-tier Tribunal noted in paragraph 22 that the appellant has been helping an organisation assisting addicts to combat drug addiction problems, drug addiction having been a factor behind his own offending.

11. The First-tier Tribunal also noted the appellant's conduct whilst in detention in paragraph 23:

> "23. The appellant dealt with a number of fairly recent disciplinary issues whilst he was in HMP Dovegate. He said that on 11 March 2017 he was found with hooch but there were no disciplinary measures or adjudications. On 20 April 2017 he was one of two prisoners who accessed the B4 netting by way of a protest concerning their immigration status. He accepts that the Tactical Firearm Unit was brought in but there was no violence, he was sentenced to an adjudication of fourteen days in segregation, suspended for six months. On 8 May 2017 there was a similar protest, the appellant was one of four prisoners and again the netting was accessed but the appellant surrendered quietly and was sent to segregation. His previous fourteen days was triggered although some time after this he was sent to an immigration detention centre at Harmondsworth. On 15 September 2017 the appellant was involved in a dispute about cell sharing and the appellant made threats that if he was to have a new cell mate things may start to get aggressive and physical and if it did happen he would hold HMP Dovegate responsible. On 8 February 2018 a prisoner was seen in the corridor to retrieve a note from the appellant. The appellant state (sic) he did not know what it was but that another prisoner on his wing had asked him to give the note to the prisoner in question. It is noted that the appellant seemed very agitated when challenged about this."

12. In paragraph 26, the first paragraph of the judge's findings, the judge confirmed that "the expert's independent risk assessment report is not one that I can attach much weight to", referring back to the findings in paragraphs 14 to 20. He went on to find in paragraphs 29 and 30 that the appellant did represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. His findings were as follows:

> "29. I am also satisfied that the personal conduct of the appellant does represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society taking into account the past conduct of the person and that the threat does not need to be imminent. The appellant has demonstrated that when under the influence of alcohol and/or illicit drugs, either Class A or Class B, when faced with an issue to resolve he may well resort to violence. This applies both to his estranged wife and also other members of the public including the taxi driver that he had a dispute with. His prisoner adjudications must also be taken into account. However, the person most at risk is his estranged wife who has been assaulted twice by the appellant and he has also breached the restraining and other orders that were placed upon him. The appellant's estranged wife has been put in a very vulnerable position because of her own short comings and her responsibility towards her three children which has resulted in them being looked after by their paternal grandmother in Latvia. The appellant has demonstrated that in any relationship he may have there is a real risk of domestic violence. One of the fundamental interests of society must be that domestic violence in all its forms must be eradicated and people can be confident they are safe in their own homes and that their children (unlike those of the appellant) will not be witnesses to domestic violence at home. I am also satisfied that the behaviour of the appellant does represent a genuine, present and sufficiently serious threat, I am not satisfied that his

behaviour would be restricted to a single individual, rather I am satisfied that there is a real risk this may apply to any partner.

30. With regard to the person's previous criminal convictions not in themselves justifying the position, I am satisfied that they do manifest a present or future propensity to act in a manner contrary to public policy for the reasons as stated above. Mr Sellwood submitted that the offending of the appellant amounted to a blip, and that there was a low chance that anything like that would happen again. In the circumstances of this case I have to disagree. I am satisfied that the appellant's behaviour over a period of just over two years, which was largely directed at his estranged wife, does not amount to a blip and I am confident similar attacks on partners of the appellant are likely to happen again.

31. I have also taken into account Schedule 1 of the 2016 Regulations which sets out a number of factors that do amount to the fundamental interests of society. I note that the list is not exclusive and therefore other matters can also be considered. I note that preventing social harm, excluding or removing an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action are all listed. Combating the effects of persistent offending (particularly in relation to offences, in which if taken in isolation may otherwise be unlikely to meet the requirements of Regulation 27) I am satisfied it is right to describe the appellant's offending as persistent.

32. I have also taken into account Regulation 27(6) which states as follows:-

> 'Before taking a relevant decision on grounds of public policy and public security in relation to a person (P) 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin'.

33. I take into account those identified by Mr Sellwood at paragraph 38 of his skeleton argument. I also note that at Schedule 1(3) it states 'where an EEA national…has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine present and sufficient serious threat affecting the fundamental interests of society'. The appellant was eventually sentenced to 22 weeks in custody which in my view is a significant custodial sentence and I also take into account Schedule 1(4) which states that:-

> 'Little weight is to be attached to the integration of an EEA national or the family of the EEA national … within the United Kingdom if the alleged integrated links were formed at or around the same time as
>
> (a) the commission of a criminal offence;
>
> (b) an act otherwise affecting the fundamental interests of society;
>
> (c) the EEA national or family member of an EEA national was custody.'

(a) and (b) apply in this case.

34. In relation to Schedule 1(5) I am not satisfied that the appellant has successfully reformed or rehabilitated for the reasons I have set out above.

35. With regard to the other factors set out in Regulation 27(6) the appellant is in his mid-30s, in good health, no longer enjoys family life and his residence in the United Kingdom is about six years.

36. I am not satisfied that any rehabilitation of the appellant in the UK, which is fairly minimal, would not prevent his deportation.

37. I accept that Ms Hunk, the residential unit manager at HMP Dovegate concludes the appellant does not present a risk to the public. How she reaches that conclusion is not set out and in any event the risk is more to do with any partner he may have. I accept the appellant has taken a number of educational courses whilst in prison. It is clear that he does have adjudications and negative reports. I accept that he has shown remorse, I am not satisfied, however, that remorse is genuine. I accept that he has spent a significant period in custody but not satisfied following that he is rehabilitated as stated by Ms Haque.

38. Overall, and taking into account the EEA Regulations and case law, I am satisfied that the deportation of the appellant to Latvia is a proportionate one. I note also that I would except (sic) he would have access to his children although at the moment bearing in mind his background and addictions he may not have physical or one to one contact with them."

13. At the hearing, Mr Sellwood took the challenge set out in paragraph 9 of the written grounds first. He referred to the post-decision evidence contained in Tab E of the appellant's bundle. This material sets out on pages E5 toE8, E12 and E17 to E27 evidence that the appellant had addressed his drug and alcohol problems which had been significant drivers in his offending behaviour. Mr Sellwood confirmed his back sheet was endorsed with a note confirming the agreement of the First-tier Tribunal that material could be provided after the hearing and the cover letter to the further materials dated 4 June 2018 (the date of the hearing before the First-tier Tribunal) also refers to the First-tier Tribunal having permitted post-hearing evidence. Mr Clarke did not seek to argue otherwise.

14. The extracts from the decision of the First-tier Tribunal set out above show that in paragraphs 29, 34, 36 and 37 the First-tier Tribunal approached the appellant's risk of reoffending on the basis of his abuse of drugs and alcohol. It is unarguable that abuse of illicit substances did play a part in his past offences. What these paragraphs do not do is address the post-hearing material of compliance with drug screening procedures, negative drug tests and courses attended specifically addressing alcohol and drug abuse. The reference in paragraph 37 to "a number of educational courses" is not, in my view, a sufficiently clear reference to the substance of the post-hearing material which goes beyond attending educational courses to voluntary compliance with drug testing over the period of detention in 2017 and 2018. This material was, in my judgment, capable of having a material impact on the assessment of whether the appellant remained a genuine, present and sufficiently serious risk where it addressed a change to a key driver to his past offences. That was additionally so

where the post-hearing material was consistent with the appellant's evidence given to the Tribunal and to the risk assessment expert of having addressed his drug addiction and problems with alcohol, nothing in any of the materials suggesting that he had relapsed in any way.

15. Albeit the decision of the First-tier Tribunal sets out rational reasons for approaching the expert risk assessment with some caution and the judge was clearly entitled to take into account matters not considered by the expert, for example the disciplinary issues set out in paragraph 23 of the decision, it is my conclusion that where the criminal offending at its highest comprised 22 weeks imprisonment, the issue of whether the appellant had addressed his drug and alcohol problems was highly material to the assessment of whether there was a genuine, present and sufficiently serious risk shown and also to the proportionality assessment required if paragraph 27(5) (c) was shown to have been met. Put simply, the decision of the First-tier Tribunal on paragraph 27(5)(c) and on proportionality cannot be maintained where this part of the evidence was not properly addressed.

16. For these reasons, I find that the grounds of appeal have merit and show a material error on a point of law in the decision of the First-tier Tribunal such that it must be set aside to be re-made. The nature of the error of law is such that none of the findings can be preserved and this is therefore an appropriate case to remit to the First-tier Tribunal for a re-making de novo.

Notice of Decision

The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade in the First-tier Tribunal.

Signed:  Date: 20 November 2019

Upper Tribunal Judge Pitt