



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00446/2018

THE IMMIGRATION ACTS

Heard at Birmingham
On 19 March 2019

Decision & Reasons Promulgated
On 21 March 2019

Before

UPPER TRIBUNAL JUDGE LANE

Between

TOMAS [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ell, instructed by Turpin & Miller

For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 18 July 1988 and is a citizen of Lithuania. On 17 December 2017, the appellant was convicted of causing death by careless or inconsiderate driving and was sentenced 12 months imprisonment and ordered to pay a victim surcharge of £140. On 30 May 2018, the Secretary of State decided to deport the appellant to Lithuania. The appellant appealed to the First-tier Tribunal which, in a decision promulgated on 23 October 2018, dismissed his appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The appellant claims to have entered the United Kingdom in February 2016. He has a partner, also a Lithuanian citizen, with whom he lives in the United Kingdom together with her daughter aged 8 years and their own child was born in August 2018.
3. The appellant fell to be considered under regulations 23(6)(b) and 27 of the Immigration (European Economic Area) Regulations 2016:

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(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if –

...

(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27;

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles –

27(5)

(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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(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;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the 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.

The Burden of Proof

4. The appellant challenges the judge's decision on the basis that she applied the burden of proof incorrectly. At [18], the judge refers to the skeleton argument

submitted on behalf of the appellant, noting that this document asserted that, 'the burden was on the respondent proved that the appellant represented a genuine common present a sufficient threat to one of the fundamental interests of society.' At [19], she recorded that, 'in a written submission [the Presenting Officer] argued that the burden of proof was on the appellant. He provided relevant case law.' The 'relevant case law' is not specified.

5. Before the Upper Tribunal, both parties agreed that, following the authority of *Arranz (EEA Regulations - deportation - test)* [2017] UKUT 294 (IAC), the burden of proving that a person represents a genuine, present and sufficient threat rests on the Secretary of State. Faced with a conflict between the submissions of the representatives at [18] and [19], the judge did nothing to resolve it. Mr Mills, who appeared for the Secretary of State before the Upper Tribunal, argued that it was possible to 'read into' the judge's analysis an understanding that she had correctly placed the burden of proof on the Secretary of State. I disagree. Whilst the judge does not refer either party having discharged or failed to discharge the burden of proof in her analysis at [31] *et seq*, I do not consider that it should be necessary for a reader of a decision to assume that the judge, faced with a clear conflict as to the proper application of the law, has necessarily adopted the correct course of action. The judge's lack of clarity has led her into legal error.

The Judge's Analysis of the Evidence.

6. Given that I find that the judge's decision must be set aside because of her failure to resolve the proper application of the burden of proof, I shall deal with the remaining grounds briefly. I agree with Mr Ell, who appeared for the appellant both Tribunals, that at [36] the judge has misrepresented the evidence concerning the appellant's response to his offence. The judge only states that the appellant had referred to the offence as a 'mistake.' She goes on to say that, 'this not only minimises what he did but in my view demonstrates a lack of understanding of the seriousness of his behaviour. Conceding mistake does not in my view amount to conceding culpability.' The circumstances of the offence were unusual. The Crown Court accepted that the appellant had not been aware that he had struck anyone with his motor vehicle although the judge did comment that, had the appellant been paying attention, the accident might have been avoided. When the accident was eventually brought to the appellant's attention, he pleaded guilty immediately. I consider that it was necessary for the judge to analyse the sentencing remarks and the other evidence regarding the appellant's response to the accident more thoroughly. Her analysis fails to give a proper account of the evidence and it arguably tainted her assessment of the appellant as posing a present threat.

Article 8 ECHR/Proportionality

7. The judge notes that the appellant has a partner, a natural child and a stepchild living with him in the United Kingdom. However, the judge fails to take account of the circumstances of the family in assessing proportionality. At [31], she characterises

the appellant as if you were a single man without dependants. Article 8 ECHR, although pleaded, receives no mention at all.

8. The judge erred in law for the reasons which I have given above. I find that her decision should be set aside. None of the findings of fact shall stand. There will need to be a *de novo* fact-finding exercise which is better conducted in the First-tier Tribunal to which this appeal is returned for that Tribunal to remake the decision

Notice of Decision

9. The decision of the First-tier Tribunal promulgated on 23 October 2018 is set aside. None of the findings of fact shall stand. The appeal is returned to the First-tier Tribunal (not Judge Pacey) for that Tribunal to remake the decision.

Signed

Date 19 March 2019

Upper Tribunal Judge Lane