Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00522/2018

THE IMMIGRATION ACTS

Heard at Birmingham Justice Centre	**Decision & Reasons Promulgated**
On 17th September 2019	**On 29th November 2019**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MR. MARIJUS [Z]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms. M Chaggar, Counsel instructed by Goshen Solicitors
For the Respondent: Mr. D Mills, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals the decision of First-tier Tribunal Judge Robertson promulgated on 30th April 2019 dismissing the appellant's appeal under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") against the respondent's decision to make a deportation order.

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Background

2. The appellant is a national of Lithuania. He claims to have arrived in the UK in February 2006. The appellant first came to the adverse attention of the authorities in the UK in June 2006. on 29 June 2006, the appellant was convicted at Stratford Magistrates Court of a number of driving offences including driving whilst disqualified, driving otherwise than in accordance with a licence and using a vehicle whilst uninsured. The appellant continued to offend and on 20 June 2018 he was convicted at Snaresbrook Crown Court of having a bladed article which was sharply pointed in a public place. The appellant was sentenced to 12 months imprisonment.

3. The appellant was served with notice of liability to deportation on 5 July 2018. The appellant was notified that the respondent intended to make a deportation order against the appellant on grounds of public policy/public security in accordance with Regulation 23(6)(b) and Regulation 27 of the EEA Regulations. Representations were received from the appellant and following consideration of the representations made on 13th and 16th July 2018, the respondent decided to deport the appellant from the UK for the reasons set in a letter dated 30 July 2018. That decision that was the subject of the appeal before FtT judge Robertson.

The decision of FtT Judge Robertson

4. Judge Robertson sets out the numerous convictions that the appellant has amassed in the courts at paragraph [2] of her decision. The judge refers to the evidence given by the appellant at paragraph [7] of the decision and the evidence given by the appellant's partner at paragraph [8] of her decision. The submissions made on behalf of the appellant are set out at paragraph [10] of the decision.

5. The Judge's findings and conclusions are set out at paragraphs [11] to [30] of the decision. The judge noted that it is common ground between the parties that the appellant has acquired a permanent right of residence having resided in the UK in accordance with the EEA Regulations for a continuous period of five years. At paragraph [14], the judge states:

> "It is clear from the appellant's criminal record that he is repeatedly prepared to put himself and others at risk by his behaviour. Although lesser offences, his numerous driving offences reveal a blatant disregard for the law and the safety of others. His submission that his activities were related to his particular circumstances and drinking problem does little to explain his willingness to take risks."

6. The judge referred to the OASYS report and noted the report records that alcohol has never been a problem. Furthermore, the appellant confirmed in his evidence that he had stopped drinking prior to his most recent offence. The judge noted that the evidence from the Probation Service refers to the appellant attending appointments and engaging in supervision sessions. She noted the Probation Officer assesses the appellant to be a "medium risk of serious harm to the public". The judge noted the appellant's concerns as to the effect of his behaviour on his children but noted also that his concern for his family has not proved to be a preventing influence in the past. At paragraph [17], the judge stated:

> "Since being in the UK the appellant has committed a series of offences which I find to show a pattern of offending behaviour. He is undeterred by previous convictions and has repeatedly shown disregard for the law, continuing with his antisocial behaviour with no apparent consideration for the consequences."

7. The judge refers to Regulation 27(5) and the principles set out. The judge reminded herself that the fact of the appellant's criminal convictions does not, in itself, provide sufficient justification for the decision to deport him. She also reminded herself that matters isolated from the particulars of the appellant's case, or which relate to considerations of general prevention, do not justify the decision. At paragraphs [19] to [22] of her decision, the judge stated:

> "19. I have had regard to the nature and severity of the appellant's convictions. Many of the appellant's convictions in the UK may be for summary offences but due to the frequency and nature of his offending they cannot be dismissed as minor. His most recent offence which resulted in 12 months imprisonment highlights his readiness to take unacceptable risks. Although I accept that he may have taken steps to address his use of alcohol it is not clear that this is at the root of his offending. His propensity to ignore the possible risk and impact on society of his behaviour is serious.
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> 20. I have considered whether the evidence supports the submission that the appellant does not represent a genuine, present and sufficiently serious threat. On the limited evidence before me, and for the reasons set out above, I concur with the respondent's view that the appellant presents a risk of harm to the

> general public. In terms of the likelihood of further offences being committed, I have taken into account the appellant's apparent lack of insight by virtue of the fact that although engaged in one to one sessions with his probation officer, he is still assessed to be at medium risk of serious harm to the public.
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> 21. In the light of the above I consider it likely that the appellant will continue to reoffend and will continue to pose a risk of harm to the public. That threat is genuine, present and sufficiently serious to justify his deportation on grounds of public policy.
>
> 22. I have considered the appellant's age, state of health, family and economic situation, his length of residence in the United Kingdom, his social and cultural integration into the United Kingdom and the extent of his links with his country of origin. The appellant is a man now aged 40 years old has been in the UK since 2006. The evidence before me does not support finding that he has any significant health problems or disabilities. He is not currently in employment, but he has worked in the past and has the capacity to work to support himself."

8. The judge went on to note that the appellant has presented some evidence of social and cultural integration into the UK but noted that his criminal behaviour would suggest that he is not someone who is integrated well into the society and culture of this country.

9. At paragraphs [24], the judge refers to the appellant's partner and his two children who are settled in the UK. She noted that they are all Lithuanian nationals and the appellant's partner has family in the UK that were able to provide support when the appellant was in prison. The judge noted the appellant's partner is a student but is also self-employed as a pet breeder. The judge noted that both children are in education and the eldest child is preparing to take her GCSEs next year. The judge refers, at [25], to the links that the appellant and his partner continue to have to Lithuania. The judge noted there is some support available to the appellant on his return, if only for a temporary period whilst he finds employment and accommodation. She noted that the appellant would have no difficulty with language and can transfer any skills gained whilst in the UK to obtain employment. The judge considered the impact the appellant's deportation would have on his family. At paragraph [26], the judge stated:

> "The appellant's deportation would clearly have a detrimental impact on his family. However, his partner is currently supporting the family financially and has the support of her extended family to continue to do so. The children are settled in school. The youngest child has lived in the UK all his life and the older

> child for most of her life. They have a genuine relationship with their father but were able to adapt to his absence during his imprisonment. Their mother is their main carer, having provided consistent care throughout. It is open to the family to return to Lithuania with the appellant should they choose, though I note that the eldest child is at an important stage in her education. Whilst I accept that such a move would prove difficult for the children given the change in language and culture, they would be guided and supported by their parents. Alternatively it is possible for the family to remain in the UK, maintaining contact with the appellant via social media and visit. It is a matter of choice for the family, but I do not find either option to be unduly harsh."

10. The judge also considered the impact of deportation upon the appellant's rehabilitation. She noted that there has been no rehabilitative work in the UK to interrupt and found there is no reason why the appellant could not work towards rehabilitation in Lithuania. At paragraph [28] the judge concluded as follows:

> "... having had regard to all of these matters and to all of the circumstances of the case, I am satisfied that the requirements of the regulations are met, that there are grounds of public policy, and that deportation is a proportionate response to the appellant's conduct. Deportation is conducive to the public good and in the public interest given the appellant's conviction and sentence to 12 months imprisonment.".

The appeal before me

11. The appellant claims the judge made a number of material errors of law. It is said the judge appears to have been motivated to dismiss the appeal largely on the basis of the appellant's offending history, whereas Regulation 27(5)(e) provides that a person's previous criminal convictions do not in themselves justify the decision. The appellant contends the judge failed to have proper regard to Regulation 27(8) that requires a Tribunal considering whether the requirements of the regulation are met, to have regard to the considerations contained in Schedule 1 (consideration of public policy, public security and the fundamental interests of society etc). The appellant claims the judge's consideration was too restrictive, and the judge did not look beyond the appellant's offending or placed excessive weight on the appellant's previous convictions. Furthermore, a number of the previous convictions should be treated as spent pursuant to the Rehabilitation of Offenders Act 1974 and should not have been relied upon by the respondent to discharge the burden of proving the appellant's deportation is necessary.

12. The appellant claims the judge fails to address the point that the burden of proving that the appellant represents a genuine present and sufficiently serious threat affecting one of the fundamental interests of society under the EEA Regulations, rests upon the appellant. The appellant refers to the decision in MG and VC [2006] which emphasises the assessment of future risk is crucial, and that deportation measures are not be used as further punishment or a deterrent in themselves.

13. The appellant claims that in his sentencing remarks, the Crown Court judge noted the appellant did not point the knife, and the appellant had, subsequent to the events of that day, reflected, and, before the jury, indicated remorse that he had felt in hindsight, as to his behaviour. It is said the appellant has engaged well with the probation service and in a letter that was before the Tribunal, the Probation Officer noted that "there is no evidence to suggest any further offending at this present time". The appellant also claims that the index offence was committed in 2016 but took over two years to get to Court. It is said that demonstrates the appellant had not re-offended for a number of years as at the date upon which his appeal was heard. It is said that the various factors should have formed part of the Judge's assessment, and it is difficult to see how the judge arrives at the conclusion that the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

14. The appellant also claims the judge failed to understand the impact of the decision upon the appellant's children, particularly the eldest child, and the suggestion that the children can keep in touch with their father through modern means of communication and/or visits to Lithuania, does little to engage with the evidence of the eldest child. The appellant claims the judge has failed to give anxious scrutiny to the claim, has ignored parts of the evidence, and misunderstood other parts.

15. Permission to appeal was granted by First-tier Tribunal Judge Keane on 20th June 2019. Judge Keane considered it arguable, that the judge took into account an irrelevant consideration in according excessive weight to the appellant's convictions, contrary to Regulation 27(5)(e) of the EEA Regulations.

16. Before me, Ms Chaggar adopts the grounds of appeal and maintains the judge attached excessive weight to the criminal offending of the appellant, that is set out at paragraph [2] of the decision. She submits the index offence for which the appellant was convicted and sentenced in June 2018, was one committed in 2016, and the judge failed to have regard to the fact that the appellant had not reoffended for a number of years, before the hearing of his appeal. She referred me to the letter that was before the Tribunal from the Probation Service Officer dated 26th November 2018. The author of that letter confirmed the appellant was released from prison on 18th October 2018, subject to licence conditions. Although the appellant had previously attended weekly supervision sessions, that had been reduced to fortnightly appointments and the author notes the appellant's attendance had been very good. It was noted the appellant is punctual for his appointments and engages well in the supervision sessions. Ms Chaggar accepts the author of the letter confirms, *"... Mr [Z] is assessed as a medium risk of serious harm to the public."*, although, she submits, that was about five months before the hearing of the appeal. The author of the letter confirmed that the appellant will be subject to post-sentence supervision until 2nd July 2019 and appeared to be motivated to engage with probation and complete his licence period. The author stated; *"... There is no evidence to suggest any further offending at this present time."*.

17. Ms Chaggar submits that in reaching her decision, the Judge failed to have proper regard to the impact the deportation of the appellant will have upon the children. There was a letter that had been written by the eldest child, before the Tribunal. She confirmed that she has her GCSE's coming up next year. She stated that it will be extremely difficult for her and her brother to return to Lithuania because it will be damaging to their education. She confirms that she was very upset and saddened when her father was in prison, and she and her brother were completely heartbroken. She is happier since her father's release from prison and she has been able to concentrate on her studies and has been supported by her father tremendously. Ms Chaggar submits the judge does not properly engage with the evidence. She submits the impact the appellant's deportation would have upon the

children at a critical stage in their lives, is such that the deportation cannot be proportionate.

18. In reply, Mr Mills accepts submission made by Ms Chaggar that criminality and convictions, cannot in themselves justify deportation. However, he submits the judge properly reminded herself at paragraph [18] of the decision that the fact of the appellant's criminal convictions does not, in itself, provide sufficient justification for the decision to deport him. Mr Mills submits the judge made a number of relevant findings regarding the question whether the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, having had regard to the appellant's conduct and properly noting, at [15], that the appellant's probation officer assesses him as being a medium risk of serious harm to the public. That is consistent with the letter referred to by Ms Chaggar, that was before the Tribunal from the Probation Service Officer dated 26th November 2018. Mr Mills submits that at the time the letter was written by the Probation Officer, the appellant had been out of prison only for a few weeks. Mr Mills submits that a careful reading of paragraphs [20] to [22] of the decision in particular, demonstrates the judge had in mind the proper approach to the principles set out in Regulation 27(5) of the EEA Regulations.

19. Mr Mills submits that Schedule 1 of the EEA Regulations confirms the fundamental interests of society in the United Kingdom include excluding or removing an EEA national with a conviction and maintaining public confidence in the ability of the relevant authorities to take such action. It also includes combating the effects of persistent offending, particularly in relation to offences which if taken in isolation, may otherwise be unlikely to meet the requirements of Regulation 27.

20. Mr Mills submits the judge carefully considered whether the decision complies with the principle of proportionality, and was entitled to conclude at [28], that the requirements of the regulations are met, and the deportation is a proportionate response to the appellant's conduct. It is, as the judge noted, open to the appellant's partner and children to return to Lithuania with the appellant. Alternatively, it is

open to the appellant's partner and children to remain in the UK. As the judge noted, it is a matter of choice for the family. Mr Mills submits it was open to the judge to conclude that either option would not be unduly harsh.

21. Finally, Mr Mills submits the judge recognised that the deportation of the appellant would clearly have a detrimental impact on his family. He submits that is undoubtably correct, but there was no evidence before the Tribunal that the family was simply unable to cope when the appellant was in prison. In reaching her decision, the judge took into account the evidence given by the appellant and his partner regarding the impact upon the children, but it was in the end open to the judge to conclude that the strong public interest in deportation is not outweighed by the best interests of the children, and the impact the appellant's deportation, would have on the children.

Discussion

22. It is useful to begin with the European Regulations. Regulation 23(6)(b) provides that an EEA national who has entered the United Kingdom may be removed if the respondent has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27. Regulation 27 insofar as it is material to this appeal provides:

> '27. - (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
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> …
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> (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.
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> …
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> (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—
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> (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.

…

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).'

23. Schedule 1 insofar as it is relevant provides:

'…

The fundamental interests of society

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

…

(f) excluding or removing an EEA national or family member of 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;

…

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);

…'

24. To justify interfering with the appellant's rights to free movement and residence in the UK, the respondent must establish the appellant's removal is justified on grounds of public policy and public security. It is uncontroversial that the appellant has acquired a permanent right of residence. The respondent was therefore required to establish that the appellant's deportation is justified on serious grounds of public policy and public security.

25. By operation of Regulation 27(5), the decision must be taken in accordance with the principles set out. Regulation 27(5)(c) operates so that the personal conduct of the appellant must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, considering the past conduct of the appellant, and that the threat does not need to be imminent.

26. I reject the claim that in reaching her decision, the judge attached excessive weight, and unduly focused upon the convictions that are referred to at paragraph [2] of the decision. The appellant has amassed a number of convictions during the 12-year period between June 2006 and June 2018. I accept that a number of the earlier convictions relate to driving offences, but one cannot ignore the fact that they include numerous convictions for driving with excess alcohol, and that in March 2018 the appellant was convicted for dangerous driving. The appellant's convictions include a conviction for assault occasioning actual bodily harm in December 2011, and the index offence, that led to the conviction in June 2018.

27. The claim by Ms Chaggar that the index offence for which the appellant was convicted in June 2018 was an offence committed in 2016 and the appellant had been free of offending behaviour for a number of years at the time that his appeal was heard, is misconceived. Although the index conviction may relate to an offence committed in 2016, the appellant was convicted, in March 2018 at Bedfordshire Magistrates Court for dangerous driving and sentenced at Luton Crown Court on 2nd July 2018, to 12 months imprisonment. The appellant plainly continued to offend following the offence committed in 2016. At its highest, the appellant had not

committed any further offences following his conviction for dangerous driving in March 2018, and so had been free of offending for just over a year before the hearing of his appeal, but the appellant was in prison until his release on 18th October 2018.

28. The judge reminded herself at paragraph [18] that the fact of the appellant's criminal convictions does not, in itself, provide sufficient justification for the decision to deport him. The judge correctly directed herself in accordance with Regulation 27(5)(e). There is no duty on a judge to deal with every argument presented by a party and it is sufficient if what is said in the decision shows the parties and, if needs be, the Upper Tribunal on appeal, the basis on which the judge had acted. Where, as here, the judge properly directed herself that the appellant's previous convictions do not in themselves justify the decision, I must assume that in reaching her decision, she had proceeded upon that premise, unless the appellant can point to convincing reasons leading to a contrary conclusion. I have carefully considered the submissions made by Ms Chaggar but in my judgement, there has been no misdirection of law and there is nothing to justify the claim that the judge appears to have been motivated to dismiss the appeal largely on the basis of the appellant's offending history.

29. I reject the claim that the judge adopted too restrictive an approach as to the public policy and public security requirements in order to protect the fundamental interests of society. The judge was required to consider whether the threat is sufficiently serious to affect one of the fundamental interests of society. Schedule 1 of the EEA Regulations, confirms that for the purposes of the regulations, the fundamental interests of society include the removal of an EEA national with a conviction and maintaining public confidence in the ability of the relevant authorities to take such action; and combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27).

30. In my judgement, in reaching her decision, the judge had proper regard to principles referred to in Regulation 27(5) of the EEA Regulations. The judge carefully

considered the threat posed by the appellant and whether that threat is realistic. In evidence the appellant confirmed that he had stopped drinking prior to his most recent offence. The most recent offence chronologically, was the offence of dangerous driving for which the appellant was convicted at Bedfordshire Magistrates Court and sentenced at Luton Crown Court on 2nd July 2018. In reaching her decision, the Judge noted that there was little supporting evidence of there being a problem in respect of the appellant's drinking. The judge had regard to the letter that is referred to by Ms Chaggar, and as the Judge correctly noted at [25], the appellant's Probation Officer assessed him as being *"... A medium risk of serious harm to the public."*. The judge was entitled to have regard to the past conduct of the appellant and the assessment of the future risk was equally crucial. The judge noted that concern for his family has not proved to be a preventing influence in the past, and the appellant has shown disregard for the law with no apparent consideration for the consequences. The judge noted at [20], that she had considered whether the evidence supports the submission that the appellant does not represent a genuine, present and sufficiently serious threat. The judge concluded that on the limited evidence before her, she concurs with the respondent's view that the appellant presents a risk of harm to the general public. The judge considered the likelihood of further offences being committed and in reaching her decision, considered the assessment by the Probation Officer as set out in the letter relied upon by the appellant. At paragraph [21], the judge concluded that she considers it likely that the appellant will continue to reoffend and will continue to pose a risk of harm to the public. She concluded that the threat his genuine, present and sufficiently serious to justify his deportation on grounds of public policy. In my judgement, the judge properly considers the risk of reoffending/offending, the triggers and the extent to which these have been addressed. The judge also properly considered the appellant's history of offending in reaching her decision.

31. Although the judge does not state in her decision that the burden of proving the appellant represents a genuine present and sufficiently serious threat of affecting one of the fundamental interests of society under the EEA Regulations rests upon the

respondent, she was not required to do so. The First-tier Tribunal is a specialist Tribunal. As Lord Hoffmann said in Piglowska v Piglowski [1999] 1 WLR 1360, 1372, "reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions, and which matters he should take into account". Some principles are so firmly embedded in judicial thinking that they do not need to be recited. It would be surprising to see in every civil judgment, a paragraph dealing with the burden and standard of proof. I accept that the reader of any judicial decision must be reassured from its content that the court or tribunal has applied the correct legal test to any question it is deciding, but there is nothing within the decision here to indicate that the judge did not appreciate that the relevant burden rests upon the respondent.

32. An appeal to the Upper Tribunal does not provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits. In reaching her decision that the personal conduct of the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, the judge correctly directed herself as to the law and reached a conclusion that is neither irrational, unreasonable or a decision that is not supported by the evidence.

33. I reject the claim that the judge failed to understand the impact of the decision to deport upon the appellant's children. At paragraph [26], the judge accepted that the deportation would clearly have a detrimental impact on the appellant's family. On appeal, the Tribunal should resist the temptation to subvert the principle that it should not substitute its own discretion for that of the judge, by a narrow textual analysis which enables the Tribunal to conclude that the judge misdirected herself. The judge had regard to the children's length of residence in the UK, their schooling and accepted that the children have a genuine relationship with their father. The judge was entitled to take into account the way in which the family had adapted during the appellant's absence whilst he was in prison. The findings and conclusions reached by the judge were neither irrational nor unreasonable in

the *Wednesbury* sense, or findings and conclusions that were wholly unsupported by the evidence.

34. In my judgement it was properly open to the Judge to dismiss the appeal for the reasons set out in her decision promulgated on 30th April 2019. It follows that I dismiss the appeal before me.

Notice of Decision

35. The appeal is dismissed.

Signed Date 26th November 2019

Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

36. I have dismissed the appeal and I make no fee award.

Signed Date 26th November 2019

Upper Tribunal Judge Mandalia