Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00568/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 October 2019	**On 7 November 2019**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr ZYDRUNAS SATKUS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Jones, Home Office Presenting Officer
For the Respondent: Ms K Tobin, Counsel instructed by Legal Practitioners & Co Ltd

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal.

2. The Appellant is a citizen of Lithuania. His date of birth is 6 June 1966. The Appellant came to the UK on 1 January 2014 with his wife and daughter. On 14 September 2014 the Appellant committed an offence of theft (shoplifting) for which he was, on 28 July 2016 ordered to pay a fine. Between 5 December 2015 and 21 August 2016 he committed 25 fraud offences. He was convicted of these offences on

22 August 2016. He was sentenced to imprisonment of 24 weeks suspended for 24 months. In addition, he was ordered to pay compensation of £987.35. On 26 March 2018 he was convicted of nineteen fraud offences and breach of a suspended sentence. The fraud offences were committed between 12 June 2017 and 25 August 2017. On 27 August 2018 he was sentenced by the Crown Court to 32 weeks' imprisonment on each count to run concurrently and 24 months for breach of a suspended sentence which was reduced to twelve weeks' imprisonment. In total he was sentenced to 44 weeks' imprisonment.

3. The Secretary of State made an order pursuant to Regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") to deport the Appellant. The Appellant appealed against that decision. The Appellant's appeal was allowed by First-tier Tribunal Judge Kainth. First-tier Tribunal Judge Saffer granted permission on 14 June 2019 to the Secretary of State, having concluded that it was arguable that the judge had not adequately assessed the adverse impact on society of the Appellant's criminality and may have erred regarding the extent to which a fundamental interest of society being protected from a prolific offender was engaged. He concluded that all grounds may be argued.

The decision of the FTT

4. The parties agreed at the hearing that the Appellant was entitled to the basic level of protection under the 2016 Regulations. He had been here since January 2014, however, taking into account periods of imprisonment he was not entitled to permanent residence.

5. The judge heard evidence from the Appellant, his wife (Mrs Zinalda Satkiene) and their adult daughter (Miss Zydrune Satkiene). The judge recorded the Appellant's evidence at [22] as follows:

> "22. He apologised with regards to his offending behaviour and explained that it took place during a very turbulent time in his personal life. His employer had become bankrupt, his wife had lost her job and his daughter who was pregnant had separated from her partner. He had learnt a valuable lesson during his period of incarceration in prison. He was assaulted on two separate occasions sustaining a broken jaw for which he still receives treatment. He disputed under cross-examination that he actually fallen out of the top bunk which resulted in the injury sustained as opposed to being assaulted by a fellow inmate. He did not recall an incident as recorded within the prison log that on 11th June 2018 he was involved in an altercation and a prison officer had noted that the appellant had cuts to his finger and knuckles".

6. He recorded the Appellant's wife's evidence at [23] as follows:

> "23. His wife adopted her witness statement taken at court. She was asked no supplementary questions and was tendered for cross-examination. In summary her evidence was that she was not aware of her husband's offending. That he is an integral part of the family unit and provides support to her, their younger daughter and their two older children. They

no longer have property in Lithuania. She repeated the appellant's explanation with respect to the difficulties that they had experienced as a family unit when the offending took place".

7. The judge found that the Appellant and the witnesses were credible and said as follows at [27]:

> "27. There was no dispute that the appellant was in a genuine and subsisting relationship with his wife and adult children. I found the appellant and his witnesses to be credible in the evidence they provided in their witness statements and orally. In carrying out the balancing exercise required, I must take account of the fundamental rights at stake, in particular the right to respect for private and family life and ensure that the principle of proportionality is observed. The principal concept of public policy and public security provides a legitimate aim which can justify an interference with those fundamental rights. For example, the fight against crime in connection with drug trafficking as part of an organised group will be included within the concept of public security as will the fight against terrorism. Expulsion decisions must be found on the existence of a genuine, present and sufficiently serious threat to the requirements of public policy or public security, in view of the criminal offences committed by the appellant".

8. The judge directed himself in relation to the law and the Respondent's guidance at [28] and [29]:

> "28. In **R v Bouchereau 1978 QB 732 (ECJ) 760** it was said that the presence or conduct of the individual should constitute a genuine and sufficiently serious threat to public policy. In **SSHD v Straszewski** and **SSHD v Kersys [2015] EWCA Civ 1245**, the Court of Appeal noted that Regulation 21(5) provided their decision to remove an EEA national with a permanent right of residence must be based exclusively on the personal conduct of the person concerned and matters that did not directly relate to the particular case or which related to considerations of general prevention did not justify a removal decision. The Court of Appeal also noted in **R v Bouchereau** that in exceptional cases, where the personal conduct of an alien had caused deep public revulsion, public policy required his removal. This was an element of pragmatism and the recognition of the right to deport those who had committed the most heinous of crimes, which was at odds with the principles of the Citizens' Directive.
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> 29. The respondent's own guidance with respect to EEA decisions taken on grounds of public policy reads;
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> > 'Present – the threat must exist but it does not need to be imminent. An indication of a present threat may include intelligence or any other precautionary measures which have been imposed on the individual for example a licence condition imposed because there is a genuine and present risk. Even a low risk can constitute a present threat, especially where the consequences of any offence could be serious. An argument by the individual that they pose a low risk of offending should not be determined automatically in their favour when making a public policy decision. For the purpose of

> determining whether a person is a present threat while they are detained, the fact that they are detained should not be taken into account. The threat does not need to be imminent at the point of release'".

9. At [37] he further directed himself:

> "37. As I have already indicated, despite the appellant having been sentenced before the Magistrates' Court to a suspended sentence and the Crown Court, I would have expected a pre-sentence report to have been prepared for at least one of those hearings more likely the former as opposed to the latter. Because the appellant received a custodial term of under twelve months, he would have been subject to post-licence conditions for a period of twelve months as issued by the Probation Services. It was not suggested that he had breached such conditions".

10. The judge acknowledged that the Appellant had previous convictions for dishonesty. The judge set out the sentencing remarks of the Crown Court Judge at [31] of his decision as follows:

> "On 26th March you were sent to this court to be sentenced for a catalogue of nineteen fraud by false representation charges and a breach of a suspended sentence order. On 23rd good police work took them to the Asda fuel station in Gillingham... You were found with a vehicle and a pump – or the noise of a pump was heard. You, claimed not to be able to get access to the back of the vehicle but the police got into the back of the vehicle and discovered a 1,000 litre tank inside with 800 litres of fuel. This tank had been filled via the filler neck leading from the outside of the vehicle and the vehicle was fitted with stolen number plates... Between 12th June 2017 and 24th August 2017 you had committed no fewer than nineteen offences of fraud by obtaining fuel using foreign bank cards which were not honoured by the relevant banks. You used two vehicles to carry out this fraud, the overall loss was £757.
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> This was quite a sophisticated fraud with multiple offences on several occasions... Regrettably, it was not your first venture into criminal activity. On 22nd August 2016 you had been convicted of no less than 25 similar offences, using the same scheme, the same technique to obtain fuel from Asda in Stevenage between 5th December 2015 and 21st August 2016. For those offences you received what I would consider a lenient sentence, a suspended sentence order for 24 weeks suspended for two years and you were ordered to carry out 240 hours of unpaid work. I give you some small credit for completing the hours of unpaid work but it is clear that you took no notice of the terms of the suspended sentence..."

11. The judge set out the Respondent's case at [32]. The Respondent's case was that the Appellant offended during a suspended sentence and had not taken heed of the original sentence which was imposed as a deterrent. Furthermore, it was asserted that the Appellant had not undertaken the necessary rehabilitation to reduce offending and that he was not genuinely remorseful. It was asserted that his convictions established a pattern of repeated offending within a relatively short period of time and that there was a propensity to commit like offences in the future.

12. The judge set out his findings at [33] to [45]. He said that he was not provided with a pre-sentence report and was not aware one existed. He did not have a copy of any post-licence conditions that may have been imposed. The judge stated that the Appellant's entire family are in the UK and settled, that he has regular contact with his adult children and grandchildren for whom he has caring responsibilities. The judge recorded that prior to coming to the UK the Appellant sold what assets he had in order to start a new life here.

13. The judge made the following findings:

> "34. The respondent takes the view that in light of the appellant's criminality and the risk that he may commit further offences in the UK, the decision to deport him is a proportionate measure and that his presence in the United Kingdom is not conducive to the public good. At first blush, that may be correct, but it does not take into account that the 240 hours of unpaid work that were imposed by the Magistrates' Court in August 2016 had all been completed before the appellant found himself in violation of the suspended custodial term. In my assessment, that indicates that the appellant was aware of the consequences of finding himself in breach and accordingly undertook the community aspect of the suspended sentence requirement. It clearly does not demonstrate that he continued to offend in a like nature.
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> …
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> 37. As I have already indicated, despite the appellant having been sentenced before the Magistrates' Court to a suspended sentence and the Crown Court, I would have expected a pre-sentence report to have been prepared for at least one of those hearings more likely the former as opposed to the latter. Because the appellant received a custodial term of under twelve months, he would have been subject to post-licence conditions for a period of twelve months as issued by the Probation Services. It was not suggested that he had breached such conditions.
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> 38. I note that the loss in financial terms equated to £757. Ms Tobin at paragraph 12 of her skeleton argument highlighted that the Crown Court Judge when applying the sentencing counsel's guidelines placed the appellant's offending in the lowest category because the loss caused by the appellant was low. The appellant received maximum credit by way of sentence reduction in light of his early guilty plea (committal for sentence). The appellant continues to play a committed role within his close-knit family unit. He has re-entered the workforce and in his oral evidence came across as extremely apologetic and remorseful.
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> 39. Because the sentence was a term not exceeding twelve months, the practise is that the appellant would not be eligible to undertake any type of rehabilitation programme in prison. The respondent's assertion and the absence of the same indicates that the appellant continues to have a propensity to commit like offences is misconceived.
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> 40. The appellant's previous convictions in themselves are not a sufficient basis for his deportation. There must be a risk of re-offending and in light of the appellant's evidence which I find credible, I accept that he has learnt a valuable and solitary lesson and is now shameful for his past criminality.

…

42. Even if I am wrong with respect to that assessment, under the umbrella of proportionality, there was no dispute that the appellant's younger daughter suffers from gross motor delay which continues to have an impact on her and she is heavily dependent upon both her parents for support. The appellant continues to have an active role with respect to his grandchildren. None of this evidence was challenged."

The law

14. The relevant law is contained in Regulation 27 and Schedule 1 of the 2016 Regulations

'**Decisions taken on grounds of public policy, public security and public health**

27.— (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(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.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) **[**F1has a right of permanent residence under regulation 15 and who**]** has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(1).

(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—

(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.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010(**2**); or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

(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.).'

'SCHEDULE 1

CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.

Considerations of public policy and public security

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

Application of paragraph 1 to the United Kingdom

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

3. Where an EEA national or the family member of 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 sufficiently serious threat affecting of the fundamental interests of society.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating 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 in custody.

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including—

(a) entering, attempting to enter or assisting another person to enter or to attempt to enter, a marriage, civil partnership or durable partnership of convenience; or

(b) fraudulently obtaining or attempting to obtain, or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

The fundamental interests of society

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

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the

immigration control system (including under these Regulations) and of the Common Travel Area;

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

(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;

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);

(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);

(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;

(j) protecting the public;

(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);

(l) countering terrorism and extremism and protecting shared values.'

Conclusions

15. The Secretary of State's grounds of appeal are insufficiently particularised. I was provided with a skeleton argument which was served on 8 August 2019. This effectively repeats the grounds. I heard oral submissions from both representatives.

16. The grounds comprise twelve paragraphs. Paragraphs 4 to 12, under the heading "making a material misdirection of law/inadequate reasoning," assert that the judge made a number of errors.

17. I shall deal firstly with [4] and [5] of the grounds and the submission that the judge has not properly applied the law. The judge was unarguably aware of the test that had to be applied to this Appellant within the relevant hierarchy of the Regulations. I refer specifically to the decision of the judge at [13], [17] and [27]. The judge concluded that the Appellant did not present such a threat, having lawfully attached weight to his early guilty plea, the evidence of the Appellant and witnesses who

were found credible, the absence of a pre-sentence report and that the Appellant completed the unpaid work element of the suspended sentence. The judge rationally took into account that despite having breached a suspended sentence, there was no suggestion that the Appellant had breached post-licence conditions following his release from prison. In addition, the judge rationally attached weight to the sentencing Counsel's guidelines which placed the offending in the lowest category (because the loss caused was low) and that the Appellant received maximum credit because of his guilty plea.

18. As properly observed by the judge there is limited case law giving guidance on what constitutes serious grounds of public policy. However, the judge properly directed himself on the law. Whilst the cases he referred to, at [28], relate to the test applied to different levels of within the hierarchy, the principles identified by the judge applied equally to the Appellant. It is, in any event, wholly unarguable that the judge assessed threat posed by the Appellant on the basis that he was entitled to a greater level of protection.

19. Paragraphs 6 and 7 of the grounds assert that the judge did not make a proper assessment of risk, that the decision is inadequately reasoned, and credibility findings are flawed. On any reading of the decision the judge unarguably assessed the threat and risk posed by the Appellant. The grounds amount to a disagreement with that assessment. The judge understood the Appellant's criminality and the extent of it. He was wholly aware that he had repeated offences which involved dishonesty and that he had breached a suspended sentence. He was aware that the Appellant had deceived his family who was not aware of his criminality at the time of the offending. All these matters were taken in to account.

20. The judge found that the Appellant was credible. The grounds assert there is no adequate reasoning for this, particularly in the light of the Appellant's criminality involving dishonesty. It is also asserted that the sentencing remarks were not taken into account in so far as they commented on the Appellant having deceived his family. The grounds ignore that the judge heard evidence from the Appellant, his wife and daughter (set out above). Whilst there was a challenge to how the Appellant broke his jaw in custody, see [22], this is not a matter raised in the grounds. The grounds do not assert that there was a challenge of material significance to the evidence of the Appellant and witnesses which was not resolved by the judge.

21. The judge accepted the Appellant's oral evidence of contrition which was supported by the evidence of his wife. The judge was unarguably aware that the Appellant had not been straight with his family about his criminality at the time of offending. The judge had the benefit of hearing the Appellant and witnesses give evidence. He was entitled to accept it and to find at [38] that "his oral evidence came across as extremely apologetic and remorseful." The grounds do not take proper account of the burden of proof. Whilst the Appellant's criminal conduct tells part of the story, it was incumbent on the judge to make an overall assessment of risk, taking into account all the evidence. I am satisfied that he did this.

22. A proper reading of [40] of the decision discloses that the judge assessed risk and found that the Respondent had not discharged the burden of establishing that the conduct of the Appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The ground that there was an absence of a proper assessment is without substance. The findings are adequately reasoned.

23. At [8] of the grounds the issue of rehabilitation is raised; however, there is no proper identification of an error of law. It is asserted that it has not been shown what, if any, attempts have been made at rehabilitation. This is repeated at [13] of the skeleton argument with reference to [36] of the judge's decision. At [39] of the decision the judge assumed that because the sentence of imprisonment was under twelve months, the Appellant would not be eligible to undertake a rehabilitation programme in prison. It is not clear the source of this; however, it is not challenged in the grounds. The judge was entitled to conclude that the absence of a rehabilitation programme in prison was not material to his assessment of this Appellant. There is no legal requirement for the Appellant to complete a programme or a course in order to establish rehabilitation. The judge was unarguably aware that the Appellant had breached a suspended sentence which led to a twelve- week sentence and which unarguably established that when he committed the second tranche of offences he was not rehabilitated. Time had moved on and the judge had to assess the Appellant's conduct at the hearing before him which was after the Appellant had received a custodial sentence for the breach. What weight to attach to the evidence, that the Appellant had in fact completed the community aspect of a suspended sentence, in this case unpaid work, was a matter for the judge. The judge was entitled to conclude at [40] that the Appellant "has learnt a valuable and solitary (sic) lesson and is now shameful for his past criminality". The judge was unarguably entitled to proceed on the basis that the Appellant had not breached the conditions of his licence in the absence of evidence to the contrary.

24. Paragraph 9 of the grounds assert that [34] of the decision is unclear. It also repeats that the judge erred in attaching weight to the Appellant having completed community service before re-offending, which according to the Respondent is an immaterial matter because he went onto reoffend. Whilst I accept that the last two sentences of [34] are not entirely clear, as was accepted by Ms Tobin in oral submissions, there is nothing unlawful in attaching weight to the Appellant having completed unpaid work when assessing the threat that he presents. It was a factor in favour of the Appellant notwithstanding that he went onto re-offend. What weight to attach to the matter was for the judge to decide. In any event, it was not a finding which is determinative of the outcome. Any lack of clarity in [34] does not amount to an error of law.

25. The grounds at [10] assert that the judge did not take into account the overall financial implications of the Appellant's criminality. Ms Jones did not expand on this in oral submissions. The issue can be dealt with briefly. It is unarguable that the judge would not understand the "overall financial implications" of a prosecution.

Moreover, he was similarly entitled to attach weight to the loss to the victim as a result of the offences.

26. At [11] of the grounds the issue of proportionality is raised. There is a challenge to the assessment made by the judge. I conclude that the judge did not make an error of law when assessing risk and the threat posed by the Appellant. It follows that it is not necessary for me to engage with the grounds in so far as they challenge the proportionality decision.

27. I was not assisted by the Secretary of State's grounds. They are diffuse. They do not properly identify an error of law capable of making a difference to the outcome in this case. The skeleton argument does not improve on the grounds. The grounds are an attempt to reargue the case and amount to nothing more than a disagreement with the findings of the judge. The findings are unarguably rational. The overall conclusion was open to him on the evidence before him.

28. The decision of the First-tier Tribunal to allow the Appellant's appeal is maintained.

No anonymity direction is made.

Signed *Joanna McWilliam* Date 5 November 2019

Upper Tribunal Judge McWilliam