Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00681/2018

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre **Decision Promulgated**
On: 7th June 2019 **On: 12 June 2019**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Donatas Pakalnas
(no anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: **-**
For the Respondent: **Mr McVeety, Senior Home Office Presenting Officer**

DECISION AND DIRECTIONS

1. The Appellant is a national of Lithuania born in 1996. He appeals with permission the decision of the First-tier Tribunal (Judge Lloyd-Smith) to dismiss his appeal against the Respondent's decision to deport him, pursuant to regulation 27 of the Immigration (European Economic Area) Regulations 2016 ('the Regs').

Proceeding in the Appellant's Absence

2. The hearing of this appeal was listed at 10.00am. There was no appearance by or on behalf of the Appellant. My clerk informed me that the solicitors last on record, TMC Solicitors in Manchester, had come off the record. Mr McVeety checked the Home Office records. In doing so he discovered that the Appellant had in fact been removed from the United Kingdom on the 12th March 2019, only four days after Judge Grant-Hutchinson had granted him permission to appeal to the Upper Tribunal.

3. Before proceeding in the absence of the Appellant the following checks were undertaken:

   i) I established through the Tribunal record system ('FHINS') that the Appellant had not made an application for a stay on his removal to Lithuania;

   ii) I spoke with Mr Chugtai of TMC Solicitors who confirmed that the Appellant's family in the United Kingdom had been made aware of this hearing and that all notices of hearing sent to TMC had been forwarded to their address;

   iii) Neither the Home Office, nor Mr Chugtai, nor the Tribunal record hold any current contact details for the Appellant in Lithuania;

   iv) The Appellant has not made an application to return to the United Kingdom in order to attend this hearing;

   v) There has been no contact with the Tribunal by the Appellant or any member of his family since the First-tier Tribunal hearing.

4. Having had regard to all of this information I decided that it would not be in the interests of justice to adjourn this matter in order to give the Appellant an opportunity to participate in these proceedings. That is because I was satisfied that there was at this stage little to no prospect of contact being re-established. The Appellant's solicitor came off record only because the Appellant ceased contact and he was without instructions. The Appellant was clearly aware, at the very least, that he had an application for permission pending before the Upper Tribunal. It has now been three months since that application was made. It would remain open to the Appellant to remain in touch with either that solicitor or the Tribunal if he wished to pursue the appeal. Mr Chugtai has further spoken with the Appellant's family who have been unable to furnish him with any contact details for the Appellant. I therefore decided to proceed with the appeal in the absence of the Appellant.

Background

5. The Appellant claims to have arrived in the United Kingdom in 2011 when he was aged 15. He attended school and upon leaving was for a time employed as

a security guard. Between the 1st June 2016 and the 30th September 2017 – when he was caught – he was engaged in a conspiracy to steal motor vehicles. This conspiracy involved him cloning keys and putting false registration plates on luxury vehicles. In sentencing him to a period of 21 months' imprisonment the trial judge stated that he had played a "significant if not leading role" in the criminal conspiracy. The Respondent duly made a decision to deport the Appellant from the United Kingdom. The Appellant exercised his right of appeal.

6. When the matter came before the First-tier Tribunal the first question was whether the Appellant had accrued a period of five years continuous residence in accordance with the Regs so as to attract a right of permanent residence, and a higher degree of protection from exclusion under the Regs. Although it was accepted that the Appellant had attended school in the United Kingdom, his Counsel conceded on his behalf that he could not be considered as a 'qualified person' as a student because he did not have comprehensive sickness cover. Rather the Appellant contended that he had accrued his five years as the family member of an EEA national exercising treaty rights, viz his mother whom he said had been economically active throughout the relevant period. The Tribunal rejected this contention. The evidence was inconsistent and the Appellant's mother was an unsatisfactory witness for several reasons. Further there was "no evidence whatsoever" to support the claim that she had been economically active throughout the five years.

7. That finding meant that when the Tribunal came to make its assessment of whether the Appellant should be deported, it did so on the basis that he attracted no enhanced protection from expulsion (ie "serious" or "imperative" grounds). The question was whether the Respondent had shown the deportation to be justified having regard to the following matters set out in Reg 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—
>
> (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. The Tribunal took into account the fact that the Appellant was, prior to his conviction, a man of good character. It described him as an "intelligent and hardworking young man" who had managed to pass GCSEs very soon after his arrival in the United Kingdom, had gone on to take other qualifications and had, in his role as a security guard, apprehended a shoplifter who had produced a syringe and announced that he was a drug addict. The determination recognises that the Appellant was only 15 when he came here, and that he has a number of close family members living in the United Kingdom including his mother, brother and sister. These matters were all weighed in his favour.

9. The matters that weighed against the Appellant were these. The sentencing judge, and Tribunal, were satisfied that the Appellant's role in the conspiracy was significant. He had however sought to diminish his role by stating that he was young and influenced by others. When asked at hearing whether he would maintain contact with the other criminals involved in the conspiracy he said "probably not", which was not a categorical assertion that he had turned his back on these associates. As for his role in apprehending a shoplifter, this was commendable, but it was after all his job at the time, and he had been fortunate to receive a significant reduction in his sentence because of this incident. The Tribunal was not satisfied that the family circumstances were as they were portrayed in the evidence. Although it was claimed that his family in the United Kingdom were close, there was lack of contact when he was in prison, they had not been able to prevent him committing the offences in the first place. His mother and sister attended the hearing but did so "without much forward planning". They had a flight booked to Lithuania that afternoon. Since they knew that the case might have still been running into the afternoon the Tribunal inferred from their flight booking that they were not that interested in assisting the Appellant: "to therefore have pre-booked flights to Lithuania on the same day from a different city goes some way to indicate where their priorities lay".

The Appellant and his family members claimed that their ties to Lithuania were minimal and that the Appellant would have no-one to help him re-establish himself there. The Tribunal had regard to the contradictory evidence about why his mother and sister were going to Lithuania, and how often they go; it concluded from this that the most likely reason they were going was to visit relatives. These regular trips also meant that the Appellant could maintain contact with his family here.

10. In respect of rehabilitation the Tribunal was not satisfied that deportation would prejudice his prospects of this, particularly in light of the fact that he failed to complete any courses in prison, and his comments about his criminal associates here.

11. Weighing all of these matters in the balance the Tribunal concluded that the Respondent had discharged the burden of proof, and dismissed the appeal.

Error of Law: Discussion and Findings

12. The first ground of appeal is that the Tribunal erred in fact when it states, at paragraph 31, that there is "no evidence whatsoever" of the Appellant's mother being a qualified person. In the bundle before the Tribunal was a letter from HMRC confirming that from 2014 she was employed and paying taxes. The Appellant submits that the Tribunal erred in overlooking that documentary evidence.

13. That documentary evidence was irrelevant. The Tribunal expressly accepted that the Appellant's mother was employed from 2014 on. The period in issue was the two years preceding that. The five-year period identified at the hearing was from the 12th March 2012 to the 12th March 2017, that being the Appellant's 21st birthday, and the day that he ceased to be a 'family member' under the Regs. The HMRC letter was silent about the period prior to employment commencing. At the hearing the Judge was told that the Appellant's mother had been earning £8000pa in 2008-2014 as a self employed cleaner. This was contradicted by written evidence from her daughter that prior to commencing that employment in 2014 she had been an unemployed housewife. There was no evidence from HMRC to confirm that any taxes had been paid in either 2012 or 2013. The Judge was quite correct to find that the burden of proof on this matter had not been discharged.

14. Ground 1 further contends that the First-tier Tribunal erred in overlooking material evidence to the effect that the Appellant's sister had been working. What the relevance of that is I have no idea.

15. Ground 2 concerns the Tribunal's approach to rehabilitation. In brief, the first point made is that the Tribunal was unjustified in characterising the Appellant

as someone seeking to evade responsibility for his crime. I reject that. The determination quotes directly from the Appellant's own statement: "I was not the ringleader who masterminded the operation and was naively influenced". This is contrasted with the clear conclusions of the trial judge, and his uncontested summation of the evidence that it was the Appellant who cloned keys, produced and fitted false licence plates and passed the cars on. It was plainly open to the Tribunal to draw an adverse inference from the Appellant's attitude.

16. Ground 2 also makes reference, at §15, to an 'OASys' report before the Tribunal which stated that the Appellant presented a "low" risk of reoffending. Other that stating that the document existed, the grounds do not go on to develop an argument as to why that might be relevant. The OASys report was considered by Judge Lloyd-Smith, who expressly refers to it at her §33. The point there made is that was the view taken by a probation officer at the time of sentencing. Judge Lloyd-Smith took that into account. She also took into account the Appellant's apparent lack of remorse, the lack of protective factors preventing re-offending and his equivocal attitude as to whether he might re-establish contact with his co-conspirators. I do not consider that in so doing she erred in law.

17. On a related note, ground 3 concerns the principles in Essa. It is submitted that the First-tier Tribunal erred in failing to make a finding on whether there was no prospect of rehabilitation; taking into account the principle of deterrence; and in failing to place weight on the positive evidence of integration in its assessment of propensity to reoffend. In fact the Judge expressly directs herself to consider the principles in Essa, and goes on to do so. Whilst Mr McVeety was prepared to concede that the reference to 'deterring others' at §39 was unfortunate, I agree with him that this played only a marginal role in the decision making overall. The Judge had before her a young man who had taken a lead role in a prolonged and sophisticated criminal enterprise. He had sought to diminish his own role in the offence, and had not taken the opportunity to emphatically distance himself from the other criminals involved. His case was based on his allegedly strong family links and support in the United Kingdom, which upon careful analysis by the Judge, were found to be sorely lacking.

18. The remaining grounds are wholly unmeritorious. Ground (iv) describes as "truly perplexing" the Tribunal's finding that the planned trip to Lithuania by the Appellant's mother and sister was "contrived". If the author of the grounds believes the finding to have been that this trip was "contrived" there is little wonder that he is perplexed. That was not however the finding of the Tribunal. The point made in the determination is that the claims being made about the strength of the bonds in this family was inconsistent with the actual evidence: this indicated that his family had not been able to prevent him offending, had not been to visit him in prison, and that on the very day of his deportation

appeal they had planned a trip to Lithuania. The Tribunal was plainly entitled to draw adverse inference from those matters.

19. Ground (v) contends that the Tribunal erred in taking an inconsistent approach to the aggravating and mitigating features. Insofar as I understand the grounds, it is submitted that the Tribunal focused unduly on the former and diminished the significance of the latter. As my paragraph 5 above illustrates, that is wholly untrue: the Tribunal gave full and detailed regard to those matters that went to the Appellant's credit.

20. For those reasons, I dismiss the appeal.

Decisions

21. The decision of the First-tier Tribunal contains no material error of law and it is upheld.

22. There is no order for anonymity.

Upper Tribunal Judge Bruce
7th June 2019