Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19985/2018

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre	**Decision and Reasons Promulgated**
On: 11th October 2019	**On: 05th November 2019**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Waseem Akhter
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Ms Hashmi, Mamoon Solicitors**
For the Respondent: **Mr Bates, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on the 22nd November 1986. He appeals with permission the decision of the First-tier Tribunal (Judge Foudy) to dismiss his appeal against a decision to deport him.

Error of Law

2. The first matter in issue in this appeal is whether the First-tier Tribunal applied the correct legal framework in reaching its decision. The Judge applied the Immigration Rules and Part 5 of the Nationality, Immigration and Asylum Act 2002. The Appellant submits that as he is the family member of an EEA national, his case should have been considered under Regulation 27 of the Immigration (European Economic Area) Regulations 2016 ('the EEA Regs').

3. The pertinent history is as follows. The Appellant was given leave to enter the United Kingdom as a Tier 4 (General) Student Migrant in 2009. He overstayed that visa. On the 2nd July 2014 he was convicted of conspiracy to defraud and sentenced to 18 months' imprisonment. On the 18th July 2016 he was convicted of conspiring to convert criminal property and on two counts of possessing articles for the purpose of fraud. He got four years. A deportation order was signed on the 8th August 2017, pursuant to s5(1) of the Immigration Act 1971 and with reference to s32(1) of the UK Borders Act 2007. The Appellant appealed against that decision. The appeal form is left blank under the headings 'protection decision', 'human rights decision', 'revocation of protection decision' and 'deprivation of citizenship decision'. The only ground of appeal that the Appellant appears to rely upon is that headed 'EEA decision'. In his grounds of appeal he submitted:

    i) That he is the durable partner of an EEA national exercising treaty rights in the United Kingdom, a Lithuanian woman whom I shall refer to as P;

    ii) P and the Appellant have a daughter together, born in 2015, and it would be contrary to her best interests if he were to be deported.

4. When the matter came before the First-tier Tribunal the Appellant relied on evidence demonstrating his relationships with his partner and child, including live evidence from P. He further relied on a third relationship, with his step-son: this is P's child born in 2010. The First-tier Tribunal noted that the Appellant had applied for an EEA residence card on the 12th April 2018 but that this had been refused on the 30th April 2018. The Tribunal was satisfied that the family relationships were as stated, but measured against the "considerable" public interest in deporting him, found them to be outweighed. The determination makes specific reference to sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 and makes findings on the best interests of the children. There is however no mention of the EEA Regs, or the framework set out therein at Regulation 27.

5. The Appellant contends that it was an error of law for the First-tier Tribunal to apply this framework. Its first task should have been to make a finding on whether the Appellant was an extended, or family member, of an EEA national, and from there consider the factors set out in Regulation 27. At a hearing before me on the 17th June 2019 Mr Bates for the Secretary of State accepted that this was so and invited me to set the decision of the First-tier Tribunal aside and remake the decision in the appeal.

6. The matter was then adjourned in order that probation reports could be produced.

The Re-Made Decision

The Evidence and Submissions

7. The Appellant has been an overstayer since 2010 when his student visa expired. He claimed asylum and that was refused and certified. The Appellant made no arrangements to leave the country as he was then required to do. Instead he embarked on a campaign of fraud, aimed against the some of the most vulnerable members of our society, namely elderly people living alone: the eldest of the known victims was 92 years old.

8. Between April 2013 and April 2014 the Appellant was part of a conspiracy known as a 'courier fraud'. The methodology is described by the trial judge, HHJ Field QC, as follows:

> "The plan started with a call from a bogus Police Officer to the intended victim to tell him or her that their card was being used fraudulently. It continued, or the pretence continued, with inviting the individual to cancel the card with the bank, another conspirator posing as a bogus bank employee. And then, demonstrating a high degree of planning and organisation that was necessary to make this fraud effective…once the victim had been persuaded to give up the card and the associated Personal Identification Number a taxi would be sent to collect the card so it could be delivered, ostensibly to the Police but, in fact, as we all know, to willing conspirators who were primed and ready to extract as much cash and money's worth from the cards by using ATMs, betting shops or buying high value goods and gift cards from shops in shopping centres in and around Manchester."

9. This is where the Appellant's involvement would begin:

> "Your role was as a user of the stolen cards, and you proved yourself to be an accomplished fraudster and brazen with it. Indeed you were not deterred by your arrest on the 9th August 2013 and continued to use the cards and to assist others to do so. You played a very active role, indeed, I have particularly in mind the spending spree on the 6th August 2013 when, almost single handedly, using [a 92 year-old victim's] card you managed to clock up bills on that credit card exceeding £20,000"

10. HHJ Field went on to note the devastating impact that the crime had on the victims, who were left suffering "enormous emotional distress" at a time of life when they were entitled to be enjoying some independence. The sentencing remarks also record that whilst on bail in respect of these charges, the Appellant was arrested again for further crimes, namely the possession of articles for the purpose of fraud, and conspiring to transfer criminal property. In total he was sentenced to 4 years' imprisonment, Judge Field remarking that this was the least possible sentence that she could impose.

11. I have 3 documents produced by the National Probation Service in respect of the Appellant.

12. The first was the 'pre-sentence' report prepared for Judge Field on the 16th June 2016. Pertinent information to note therein is that the Appellant was convicted after trial, and that the probation officer was highly sceptical about his explanation that he had been duped by a family friend who had asked him to spend some money on the card of an 'investor'. The officer concluded that in his commission of these offences the Appellant had displayed a lack of consideration for the consequences of his actions. Mr Bates asked me to note that the Appellant appears to have been less than frank with that probation officer, who notes that he portrayed himself as having only a basic education and little command of English: in fact the Appellant completed a degree in Mechanical Engineering at the University of Glasgow. Having had regard to the fact that this was the Appellant's first conviction, and there being no evidence of any violent tendencies, the officer concluded that the Appellant posed a 'low' risk of harm. Mr Bates submitted that this was a rather bizarre conclusion given that the officer was at that time aware that the Appellant was already awaiting trial for the second set of fraud related offences, committed after his arrest for his part in the 'courier fraud'.

13. The second document is a letter dated the 16th August 2018. This was written 'to whom it may concern' by a probation officer who visited the family home prior to the Appellant's release from prison, as well as meeting with the Appellant himself. The officer noted that the assessment of the Appellant as being 'low risk' was made applying the service's strict definition of "serious harm can be defined as an event which is life threatening and/or traumatic and from which recovery, whether physical or psychological can be expected to be

difficult or impossible". It was on this basis that the Appellant was assessed as being of 'low risk of serious harm to the public'. He was further assessed according to the 'Offender Group Reconviction Scale', which similarly came out as 'low', or more specifically at 14% within 2 years. At the date of writing the author was able to confirm that the Appellant had attended all seven of the probation meetings he had so far been offered. He had been deemed unsuitable to take a 'Thinking Skills' course in prison: as Ms Hashmi explained this is because of his 'low' risk assessment and because he has only been convicted on one occasion. The fact that he had not undertaken this work should not be weighed against him. The author of the report was unable to comment on whether the Appellant's attitude or behaviour had improved since the date of the pre-sentence report, because his contact with probation services had been over such a short time.

14. The third document was the most recent: a letter from probation services dated the 29th June 2019. This explains that the Appellant was released from his prison sentence on the 27th April 2018, but was taken into immigration custody where he was held until he was bailed on the 28th June 2018. Later that year he was taken back into immigration detention for two months whilst P – his surety – was away visiting family in Lithuania. At the time of writing the author confirmed that the Appellant had attended all 26 of his probation meetings bar two, which were authorised absences (he was in immigration detention at the time). The Appellant had completed work on a one-to-one basis to look at his offending behaviour, victim awareness, his attitude and consequential thinking skills. The officer commented: "I think he would benefit from further work on his victim awareness".

15. In his oral evidence before me the Appellant was asked why he committed the crimes that he did. He said:

> "I was under pressure I had no work. I was used by my friends. I told the police the whole story and gave the same statement to the court".

He said that he had learned his lesson and had behaved himself in prison. He will do everything probation asks. Mr Bates asked the Appellant how he thought that his crimes might have impacted the victims. He replied:

> "I know it affected them. I know what I did was wrong but my friend he used me. Since I got arrested I have never spoken to him – 5-6 years now I never speak with those people"

Mr Bates also asked him about the other offences that were 'taken into consideration' by the trial court (possession of articles for use in the commission of fraud/disposing of criminal property). The Appellant said that this was nothing to do with him. A friend had left a bag at an old house of the

Appellant's in Stockport and when he had moved he had brought that bag with him. It turned out to have the incriminating evidence in it and when the police came to the new property they found it and the Appellant got the blame. He said that the charge was dropped.

16. The Appellant states that he now a dedicated family man. P works long hours and so he takes responsibility for the house and children. He takes them to school/nursery, collects them, cooks and cleans. He wants to remain in the United Kingdom with his children and partner.

17. The Appellant told me that his family in Pakistan are ethnically Pathan, and that their home village is near Abbotabad. They have a house in that village but they also live, however, in Karachi where the Appellant was brought up. His sister is divorced and she lives with his mother. They live off the rent of some markets in Karachi that his father had bought when he was alive. The Appellant said that his mother knows about P and the children but she is not very happy. She does not know that the children are being brought up in P's Christian faith and when she finds this out, she will not accept them. This will cause problems for the Appellant.

18. I heard oral evidence from P, who adopted her witness statement. P was an emotional and powerful witness. She spoke movingly of how difficult it was for her son (her eldest child) when the Appellant was sent to prison and how strong their relationship is now. Her previous partner (the child's biological father) was not a good husband – he beat her and was very abusive. It therefore means a lot to her that her son now has a father figure in the Appellant and she knows that he looks to the Appellant for support and guidance. Nobody helps her in the house except him – he does cleaning and cooking etc when she is tired from work. P said that for her family the prospect that the Appellant could be deported seems "impossible". She does not know how she will live without him. If he were to be removed it would break all their lives. P was adamant that she will not be moving to Pakistan with her children. She does not speak the language, she does not share their faith and she will not wear hijab. She fears that his family will not accept her or the children. Similarly she fear that they would not be able to settle together in Lithuania. The people there do not like Muslims and her family are not happy that she chose him. She stressed that she and the Appellant and the children are 'everything' to each other. They do not have friends or a support network apart from each other.

The Legal Framework

19. The relevant part of the Regulations is Regulation 27:

> **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) 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.

(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(18); 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.).**

20. The relevant part of Schedule 1 is paragraph 7:

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.

Findings

21. By her undisturbed finding of fact Judge Foudy accepted that the Appellant is in a genuine and subsisting relationship with P, a Lithuanian national. Before me Mr Bates accepted, having seen the evidence produced, that P is exercising treaty rights. The parties invited me to dispose of the appeal with reference to the Regulations.

22. The Secretary of State accepts the burden to demonstrate that the expulsion of the Appellant would be proportionate and necessary on the grounds that the Appellant's personal conduct represents a genuine, present and sufficiently serious threat to the fundamental interest of society, namely the preservation of law and order and the protection of the public from crime. Mr Bates submits that he can discharge that burden by reference to two matters: to the nature of the Appellant's criminal offending, and to the lack of evidence that he is rehabilitated.

23. The offending was, I find, of the most serious nature. It was premeditated, callous and repeated. The Appellant had already been arrested for his part in the courier fraud when he was picked up again. It is clear that the victims were selected on the basis of their particular vulnerability. As older members of society they were targeted because the conspirators knew that they would be more likely to comply with requests from a 'police officer' or a 'bank official' for them to hand over their security details.

24. The impact upon the victims is not hard to imagine. An older person living alone has not always been elderly. Each of those victims has, at one time in his or her life, been a fully functioning member of society, visible and valued, going

to work, bringing up their families. As they grew older their role in society has slowly diminished; he or she no longer works, or looks after children, but he or she can retain the pride and dignity of having played those roles. The elder person can hope to live life in retirement with the respect of others, and with the security of the savings that he or she has accumulated. What this particular crime does is completely undermine that security and dignity. Yes, it leaves the victim without his or her hard-earned cash, but more than that it leaves them feeling foolish, vulnerable and unvalued. Many of them will not recover from that humiliation.

25. It is not hard to understand the impact of this crime, and yet that is something that the Appellant has singularly failed to show himself able to do. In 2016, prior to sentence, the Appellant tried to persuade his probation officer that it was somehow he that was the victim of this enterprise, having been tricked by a friend into participating in the conspiracy; despite having served his sentence, and having engaged with probation services over many months, by June 2019 his offender manager still considered that he needed to do more work on victim awareness. Before me the Appellant displayed a shocking disregard for the victims of his crime. He repeatedly tried to minimise his role in the fraud, blaming his further convictions on a friend who 'left a bag' at his house, and when specifically asked by Mr Bates to reflect on the victims, simply spoke about himself. I am not satisfied, on the basis of the evidence before me, that the Appellant has learned from his mistakes at all. Any remorse he has verbalised is lip service.

26. I have given some weight to the fact that the Appellant has attended all of his appointments, and that the probation service has consistently classed his risk of reoffending as 'low'. I bear in mind however, that this assessment has been made applying specific scales. I accept that the Appellant is, for instance, at a low risk of committing violent crime. I agree with Mr Bates that there must be some doubt about the initial assessment, made in 2016, that the Appellant posed a low risk of reoffending after the index offences: he had at that point *already* been charged with more. I also bear in mind that the Appellant had to attend those appointments, otherwise he would be in breach of his licence conditions and risk returning to jail: as such his compliance only attracts limited weight. Having taken all of the evidence into account, in particular the detail of the probation service opinion, and the testimony of the Appellant himself, I am not satisfied that there has been any successful rehabilitation of the Appellant thus far. I am satisfied that he represents a genuine and present and sufficiently serious threat to law and order to justify expulsion action.

27. I fully accept P's evidence that she loves the Appellant, and wants him to stay in this country to help her bring up their children. I accept her evidence that at present she relies upon him emotionally and practically. I utterly reject the suggestion that P and the children could relocate to Karachi or a village in the Khyber-Pukhtunkwa. I accept that this would be extremely difficult, and

possibly dangerous for her, and that it is very unlikely that the Appellant's family would accept her decision to bring the children up as Christians. I also accept that the wholesale relocation of this family to Lithuania is unlikely, since the Lithuanian authorities would be entitled to rely on this decision to refuse the Appellant entry. The reality is that the consequence of the Appellant's deportation will be that this family is split up, and the children will be deprived of meaningful contact with their father.

28. Even having regard for those very serious consequences I am nevertheless satisfied that the decision to deport is proportionate. P has shown, throughout the time that the Appellant spent in prison and/or immigration detention, that she is able to care for the children and work. The evidence does not suggest that either child suffered any profound or lasting harm when he was away. I accept of course that they would miss him, and feel sad that he was not there, but this is the price that family members must, unfortunately, pay when someone commits a crime. This is not a decision that is taken lightly, and I am sorry that this decision will impact upon P and the children. They played no role in the Appellant's offending. It is however a consequence of his criminality, and his utter failure to demonstrate insight or remorse for the very serious harm that he has inflicted on numerous vulnerable victims.

Decisions

29. The determination of the First-tier Tribunal contains material error of law and it is set aside.

30. The decision in the appeal is remade as follows:

"the appeal is dismissed under the Immigration (European Economic Area) Regulations 2016"

31. There is no order for anonymity.

Upper Tribunal Judge Bruce
18th October 2019