IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00311/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House by Video Skype	**Decision & Reasons Promulgated**
On 3rd November 2020	**On 19th November 2020**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR ELMANTAS [T]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Philps, instructed by Owens Stevens Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

The appellant appeals against a decision of First-tier Tribunal Judge James promulgated on 5th February 2020 which dismissed the appellant's appeal under the European Economic Area Regulations 2016 against a deportation order dated 6th June 2019.

The grounds of appeal set out that the appellant is a 30 year old national of Lithuania who lived in the UK with his partner and daughter. It asserted he had

never been sentenced to a term of imprisonment in the UK. The grounds are as follows.

Ground 1

The Tribunal erred in its assessment of the best interests of the appellant's child by failing to have regard to relevant evidence.

It is submitted that the appellant was currently working and supporting his family and played an active role in the child's upbringing but the Tribunal failed to have regard to these factors and instead gave only cursory remarks in relation to the issue such as "Taking into account Section 55 best interest matters, I am not persuaded the appellant's presence is a positive impact on his son, or in the son's best interests", [60(g)]. No explanation was provided for why the appellant's presence and his financial support of the family were not in the child's best interests and although the appellant had offended in the past that was not sufficient justification for finding the child's best interests did not outweigh the removal of the appellant.

Further, it appears the Tribunal erroneously took into account the alleged best interests of the appellant's partner's two children who were in care in Lithuania by stating:

> *"It may be in the best interests of all three children to be in the same geographic area as their mother"*, paragraph 48.

As the children were not in the UK their best interests did not form part of the assessment. The appellant's partner's evidence was that she was only in touch with them "a little bit".

Ground 2

The Tribunal erred in finding that the appellant's offending represented an incremental increase in risk of harm and use of violence by failing to have regard to relevant evidence.

During the hearing the appellant gave evidence regarding his conviction for "assault by beating of an emergency worker". His clear evidence was that there was no beating and that this conviction related to spitting at a police officer during the course of his arrest.

The Tribunal ignored this evidence and found the appellant's "use of violence against others in his more recent UK conviction" reflected "an incremental increase in risk of harm and use of violence" (paragraph 50). The Tribunal goes on to say that "his alcohol addition, pro-criminal behaviour was exacerbated by his attacking a police officer, thus increasing the seriousness of his offending behaviour, such that he was given a suspended prison sentence of twelve months", paragraph 56. The Tribunal erred in assuming that the suspended sentence related to the fact that the appellant spat on an emergency worker rather than the fact that it was his third conviction in the UK.

The Tribunal also erred in failing to acknowledge that the appellant's offending throughout his life had become increasingly less serious. No offence he has ever committed whilst being in the UK has warranted the imposition of a term of imprisonment.

At paragraph 56 the Tribunal stated: "I do not accept the appellant's claim that the entry of psychoactive substances on his Lithuanian court disposal was a mere error, not least as he has admitted during his oral evidence taking such substances."

The appellant admitted having smoked cannabis many years ago, not as recently as 2017.

Ground 3

The Tribunal errs in fact by finding that the appellant had said that he and his partner had arrived together in the UK.

At paragraph 41 the Tribunal found: "The appellant claimed [his partner] entered the UK seven years ago, which would have been 2013, but also claims that they entered the UK together from Lithuania at the same time." Then at paragraph 44 the Tribunal explained as follows:

> *"During oral evidence the appellant claimed that he and his partner entered the UK from Lithuania together, which due to the above adverse findings regarding the contradictory residential period in the UK is a concern. When this was brought to his notice, the appellant then claims that what he had just stated was a mistake."*

Counsel put forward an extract in Counsel's note which makes it clear that when the appellant said "we arrived" he misspoke and immediately corrected himself.

Ground 4

The Tribunal erred in finding that the appellant and his partner had not cohabited prior to 2nd August 2019 by failing to have regard to the consistent oral evidence given by the appellant and his partner.

The Tribunal found as follows: "I do not accept that the couple have cohabited prior to 2nd August 2019 due to the number and type of discrepancies in both written and oral evidence. Thus, I find that cohabitation is a fairly recent event."

The relevant passages from Counsel's note of the evidence appeared at the Appendix of these grounds. In summary the Tribunal failed to consider the following consistent evidence provided by the two witnesses orally regarding their cohabitation. They started living together in 2015, at first they stayed with friends, in 2017 they moved into their current accommodation, but at that

time it was rented by the appellant's brother and when he moved out they took over the tenancy but it was in the appellant's partner's name.

The Tribunal stated at paragraph 34 the following:

> *"The partner in her oral evidence said variously that they started cohabiting in January, then June or July or 2015. She then said in 2017 they left living with friends and moved into their current address, although the Appellant said that he lived alone in his previous address i.e. without his partner. She then said that her partner the Appellant was away in October 2018 so he could not sign the tenancy agreement at their new address in 2017; which in turn was the same time the Appellant also claims he was in Lithuania undertaking his eight month alcohol/substance abuse programme after being convicted of an offence on 31 January 2017 i.e. until September 2017"*,

The Tribunal erred, however, because (a) the appellant's partner only said they moved in together in June or July 2015 and Counsel had no record of her saying anything about January, (b) the appellant never said he lived alone, (c) the appellant's partner said the appellant was at work in October 2018 when the tenancy agreement was signed, (d) the appellant did not claim that he undertook an eight month alcohol/substance abuse programme in Lithuania.

These errors were material as they formed the basis of the Tribunal's assessment of the length of time the appellant had been in the UK which is relevant to the proportionality of removing him and depriving him of his rights under EU law.

Ground 5

The Tribunal erred in law by ascribing the burden of proof to the appellant.

As per **Arranz (EEA Regulations - deportation - test) [2017] UKUT 00294** the burden of proving that a person represents a genuine, present and sufficiently serious threat rests with the respondent and the standard of proof is the balance of probabilities but at paragraph 64 the Tribunal found as follows:

> *"In conclusion I find on balance the Appellant has failed to counter the objections of the Respondent set down in her refusal decision regarding her concerns or the deportation order, and reasons for deportation, which abide by the 2016 EEA Regulations. The evidence before the Tribunal confirms the Respondent's concerns and further supports the Respondent's objections and deportation decisions. Thus in summary the Appellant's documentation, oral evidence of witnesses, and submission made in support of his appeal fails to properly address the Respondent's objections and deportation order."*

This was a clear reversal of the burden of proof.

Permission to appeal was granted by First-tier Tribunal Judge Holmes on 20th March 2020, stating:

> *"Grounds 5 and 2 appear to me to set out the strongest arguments, although all grounds may be argued. Arguably the judge fell into error in his approach to the offending history which arguably showed a reduction in seriousness, rather than the increase identified by the judge. Moreover it is arguable the judge reversed the burden of proof on the proportionality test."*

Submissions

Ms Philps relied on her further submissions, in particular that the judge had not taken into account the active role of the appellant in the child's life and had taken an erroneous approach to the best interests of the child. The appellant's additional income supported the partner, albeit that she claims benefits and thus the child. There was no proper analysis of Section 55, which was a primary consideration, no proper analysis of them being able to go back together or her living separately from the appellant. In relation to ground 2 the judge had not taken into account that the severity of offending had decreased. At this point Mr Clarke interjected and pointed out that the appellant had entered a guilty plea on 7th March 2020 for battery for which he received a sixteen-week sentence of imprisonment suspended for eighteen months.

Ms Philps nonetheless submitted that the trajectory had been downwards in terms of the offending, which went to the test of whether the appellant remained a present threat.

In relation to grounds 3 and 4, which were taken together, the judge had not taken proper account of the consistent oral evidence set out in the grounds of appeal. At paragraph 34 she noted that there was no reference to January in the oral evidence. Where the judge referred to being away in October he was actually at work. At paragraphs 24 and 25 the evidence was wrongly recorded. There was a 'shockingly' inaccurate record of the evidence at paragraphs 24 and 25. The credibility findings made, bearing in mind the judge had inaccurately recorded the evidence, the finding that the witnesses were not credible was based on a misrecording of the evidence. For example, the appellant had stated he was in Holland in 2014, not at a later date. At paragraph 25 the appellant had stated that the payslips giving the address where in fact wrong and mistaken. At paragraph 46 the appellant had not given evidence of contact with aunts, uncles and cousins. The credibility findings were unsustainable.

At paragraph 64 it was clear that there was a reversal of the burden of proof.

Mr Clarke made comprehensive submissions and referred extensively to the evidence. He submitted that the ground of appeal in relation to the best interests of the child was misconceived. Ground 2, clearly, the offending pattern of the appellant reflected an increasingly serious pattern of offending

within the United Kingdom and Mr Clarke submitted that the grounds failed to engage with the categoric finding that the appellant had not engaged with factors which triggered his offending. Mr Clarke specifically referred to paragraphs ranging from 49 to 57 in the decision which were not challenged. It could not be argued that there was anything other than an increasing level of seriousness of offending.

Grounds 3 and 4 had no merit. The judge had clearly identified that the appellant had corrected his evidence by asserting that it was a slip of the tongue but it was open to her to make adverse credibility findings. The findings were open to the judge to make and in particular she found that the assertion that he had remained in the United Kingdom prior to October 2018 was not supported by the documentary evidence.

In relation to ground 4 it was necessary when considering the reference to January the judge had made to look at the actual evidence of the partner and there was a reference to six months from the beginning of the year.

Both the oral and the written evidence was inconsistent, for example the appellant's witness statement at page 2 was inconsistent with the 'moving in together' date in June and July.

The dates in the evidence were all over the place and the evidence was vague. When questioned in relation to his address in 2015 it was entirely vague and when further questioned the appellant said he was away when the partner said he was at work. There was no consistency and as such there was no material error in the recording and assessment of the evidence.

Ground 5, it was necessary to read the decision as a whole and to consider paragraph 61 before reading the findings at 64. It was quite clear that the judge understood the burden of proof and found the burden of proof had been discharged and it was important to consider the overall context. The appellant had no permanent residence, remained a risk, his partner had no reason to stay as she was dependent on him and the decision was not disproportionate.

Analysis

Taking each ground in turn, I am not persuaded that the judge failed to consider the best interests of the child. At paragraph 35 the judge set out, in accordance with the principles established **ZH (Tanzania) [2011] UKSC 4** and **Azimi-Moayed** (Decisions Affecting Children: Onward Appeal) [2013] UKUT 197 (IAC) that the child is now 13 months old and quite clearly found it was in his best interests to remain with both parents. That, however, was a starting point. There was no indication that the judge has failed to take this as a primary consideration. It is not, however, a paramount consideration and is not determinative. The judge reasoned that the parents and the child were all nationals of Lithuania and were able to go to Lithuania together as a family unit and also noted that the child did not attend nursery. His youth clearly indicated adaptability. Albeit that the judge set out the appellant was not a positive role model for his son in regard to his substance abuse and ongoing

criminal behaviour, which was an accurate observation, the judge also found that "the child is wholly dependent emotionally on his primary caregiver, the mother, who is a stay at home mother". That was a fair observation.

In terms of financial assistance, it was also open to the judge to observe that the bank account of the partner showed large sums recently being transferred from the partner to the appellant, for example in November 2019. No criticism was made as to the judge's approach to whether the appellant or the partner claimed working tax credit or not in the light of the finding that the appellant was given financial support by his partner. I find there is no material error in the assessment of the financial support given to the partner and thus to the child by the appellant. It would appear that it was the judge's finding that it was the partner who was the mainstay of the financial arrangements in the family.

It is also misconceived to criticise the judge for taking into account the two children of the partner who are currently in care in Lithuania. As Mr Clarke rightly pointed out, although there is no obligation to consider Section 55 in relation to children who are not within the jurisdiction, cases such as **T (s.55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483(IAC)** show that it is possible and good practice for the Secretary of State to invoke the spirit of Section 55 as to how it affects other children even outside the jurisdiction. Certainly, the children in Lithuania are a relevant factor and not to be ignored.

There were unchallenged findings that the partner was not working, not studying and that she had previously worked illegally with the consequence that she was within the UK as a dependant on the appellant. On those findings, which were, as I say, unchallenged, it is not clear on what basis she could lawfully reside in the United Kingdom. As the judge stated, her findings were based on the lack of evidence before her in relation to family, friends or neighbours, local community ties and the appellant's residence and working history.

In relation to ground 2 and the increase of serious offending, and the claimed failure to take into account the appellant's evidence that he did not beat the emergency worker but merely spat at him, it is not for the judge to go behind the charge, conviction and sentence which is recorded merely on the later evidence of the appellant. The appellant had been convicted of beating an emergency worker and that is evidenced by the Police National Computer printout.

The judge helpfully set out a framework of the appellant's offending which commenced in Lithuania in 2007. The appellant was imprisoned for 30 days for theft in 2007, imprisoned for one year for theft in April 2008, imprisoned for four years for grievous bodily harm in July 2008, imprisoned for four years and six months for possession of a firearm in October 2008, imprisoned for five years for theft in May 2008 and in January 2017, received a community order and obligation to undergo programmes and not to use psychoactive drug for battery.

In 2017 the appellant came to the United Kingdom and was promptly convicted of damage to property in September 2017 whereupon he received a caution. In August 2018 for driving a motor vehicle with excess alcohol he was fined and disqualified, in January 2019 he was convicted of driving whilst disqualified and failed to provide a specimen and received a community order and inter alia an alcohol abstinence order and in May 2019 was convicted of assault by beating an emergency worker and, inter alia, received a suspended sentence of imprisonment of 12 weeks.

The judge at paragraph 50 described the offending as follows:

> *"I therefore have no documentary evidence from the Appellant to show that his risk has reduced since his last conviction in the UK. [my underlining] In light of his persistent pattern of offending in the UK for identical and similar offences, triggered by abuse of drugs (according to the psychoactive sentence imposed in Lithuania) and abuse of alcohol (according to the drink driving offences committed in the UK), and his use of violence against others in his more recent UK conviction, reflecting an incremental increase in risk of harm and use of violence. I do not accept the Appellant's claim that the entry of psychoactive substances on his Lithuanian court disposal was a mere error, not least as he admitted during his oral evidence taking such substances."*

The judge was referring to the pattern of offending in the United Kingdom and that is clearly set out at paragraph 50. To suggest that assaulting an emergency worker does not represent an escalation in seriousness of offending since the appellant's arrival here cannot be sustained nor can the suggestion that spitting at the worker was not an act of violence. The judge set out quite clearly the development of the appellant's offending history.

There was no material error in the judge's approach to the offending or evidence on psychoactive substances.

The grounds fail to engage with the categoric finding by the judge that the appellant had not engaged with factors which triggered his offending behaviour. At paragraph 49 the judge noted that the appellant continued to drink, "which remains a live risk factor leading to driving uninsured and his violent behaviour of assaulting others". At paragraph 50 (which I repeat for clarity) the judge properly reasoned:

> *"Nor was any OASys Report or OGRS risk assessment submitted. I therefore have no documentary evidence from the appellant to show that his risk has reduced since his last conviction in the UK. In light of his persistent pattern of offending in the UK for identical and similar offences, triggered by abuse of drugs (according to the psychoactive sentence imposed in Lithuania) and abuse of alcohol (according to the drink-driving offences committed in the UK) and his use of violence against others in*

> *his more recent UK conviction, reflecting an incremental increase in risk of harm and use of violence."*

The judge further added: "I do not accept the Appellant's claim that the entry of psychoactive substances on his Lithuanian court disposal was a mere error, not least as he admitted during his oral evidence taking such substances." There was criticism in the grounds of appeal as to the judge's approach to the psychoactive substances, but I note that as late as January 2019 the appellant was sentenced to an alcohol-abstinent pilot area and a rehabilitation activity requirement. Alcohol is a psychoactive substance.

The judge systematically considered the evidence in relation to the appellant undertaking any prison work, and any offending behaviour courses to reduce or ameliorate his risk of harm to others and the risk of reoffending either in Lithuania or in the UK. She noted the sentences he had received and logically found, "I have no evidence he has complied with these court orders with community disposals" and there was no letter from his probation officer. At paragraph 52 the judge explored the appellant's claims for help with his alcohol addiction but again there was no documentary evidence or details about organisations or of any such requests for assistance. She recorded: "He incorrectly claimed that he thought he had to pay to attend NGO support groups, such as AA, clearly indicating he has failed to undertake a simple internet search to find out about such support." Further, she noted that he expected the court to contact him.

At paragraph 52 she noted that the appellant claimed that he cohabited with his partner in the UK which would mean he did not complete the rehabilitation sentence from Lithuania in 2017 and further, at paragraph 54 the judge found: "There is no evidence before me to show the appellant has attended such a programme or complied with this requirement" [a rehabilitation order]. The evidence of rehabilitation was simply absent.

At subparagraph 55 the judge found the appellant had continued to misuse alcohol, the appellant had had a sentence for driving offences on 29th January 2019 but just three months later he was again driving whilst disqualified and refused to provide a specimen of breath for analysis.

The judge's findings culminated in stating that:

> *"It is clear that the appellant has failed to address his alcohol abuse which triggers his offending and risk-taking behaviour including driving whilst under the influence of alcohol and whilst uninsured such that vehicular and pedestrian road users are put at ongoing risk. In addition the appellant becomes violent whilst in drink and he has assaulted a police officer when the officer was on duty and dealing with the criminal behaviour of the appellant."*

As set out, those findings were not challenged. The appellant was recorded as drink-driving in August 2018, failing to provide a specimen for analysis and

driving whilst disqualified in January 2019 and failing to provide a specimen for analysis in May 2019. As the judge found, the appellant had the lowest level of protection under the EEA Regulations and it was open to the judge particularly on the findings made that he continued to constitute a risk and danger to the community.

In relation to grounds 3 and 4, which were taken together, I compared the Record of Proceedings closely with the Record of Proceedings produced by the Counsel attending the First-tier Tribunal but am not persuaded that there was a 'shockingly' poor mischaracterisation of the evidence, if any, and none which is material. It is clear from the note provided by Ms Philps that the appellant corrected his slip of the tongue when stating that both he and his partner came to the UK in 2015 but that was recorded by the judge at paragraph 44 when he stated that his partner and he entered the UK from Lithuania together but that was a mistake. That said, he was unable to recall the address he stayed at or when he and his partner were sofa-surfing and when he moved into his current address, not even the year.

It was open to the judge at paragraph 25 to find that she did not accept that the appellant had cohabited with his partner since May 2015 as claimed. Not only was the appellant clearly on a community order for eight months from January 2017 in Lithuania but as the judge stated, the appellant could easily have obtained a council tax bill or letter from the landlord to confirm where he resided but failed to do so despite being legally represented. Further, the appellant submitted payslips from October 2018 to April 2019 which referred to the appellant residing in an address which was not his partner's (paragraph 25). It was open to the judge to find that this undermined the claim of cohabitancy as well as residency from May 2015 onwards. The judge found that the cohabitation was fairly recent and from 2nd August 2019. That finding at paragraph 26 was open to her on the evidence, albeit that there may be some minor slips in the record of evidence, but I find that nothing outlined was material.

As the judge stated at paragraph 27, there was no documentary evidence before her prior to October 2018 and that the payslips were from 5th October 2018 onwards. The judge also noted at paragraph 27 that there were no payslips between 15th March 2019 and 12th April 2019 and the payslip for 12th April 2019 confirmed that he was not working the week before that day. There was 'then a gap until 2nd August 2019 which includes September and October 2019'. It was open to the judge to reject, on this evidence, the assertion that the appellant was in the UK during this period, even taking into account the permitted period under EEA Regulations for job-seeking or gaps in employment or self-employment or study.

None of this above evidence was challenged and in sum, at paragraph 28 the judge found the appellant "has not adduced evidence that he has exercised any of his treaty rights prior to 5th October 2018".

The assertion that the judge misconstrued or misunderstood the oral evidence from the appellant, or his partner is not made out and material against the

judge's findings in relation to the documentary evidence. Further, it is clear that the judge found, for a variety of cogent reasons, neither the appellant nor his partner credible witnesses because there were inconsistencies and vagueness in the oral evidence and between the oral evidence and the witness statement of the appellant.

The judge's Record of Proceedings does distinctly identify the mention of January but against my findings above in relation to the documentary evidence, that is not material. As Mr Clarke identified, page 2 of the appellant's witness statement was inconsistent with the assertion that he had moved in with his partner in June or July 2015. Indeed, at paragraph 3 of his witness statement signed in January 2020 he states that he came to the United Kingdom in May 2015, met his partner in a club in Manchester, started a relationship six months later, which would suggest October or November 2015, in his oral evidence when asked where he lived in 2015 he said, "I don't remember the road" and when asked what date did he move into the current address, again he said, "I don't remember". As the judge found at paragraph 34, even when it came to signing the tenancy agreement the appellant said he was away in October 2018 so he could not sign the tenancy agreement to their new address (albeit they have lived there from 2017) while the appellant's partner stated he was at work. There was no consistency. The judge's assessment of the evidence was sustainable.

I am not persuaded that, reading the decision as a whole, which is unusually detailed, that there is any material error of law in relation to the recording and assessment of the evidence overall.

What was being decided here was whether the appellant was a genuine and present risk to the community, and on the evidence, which was not challenged, it was wholly open to the judge to find that he was such a risk to the community.

Turning to the final ground 5, I find this has no purchase whatsoever. At paragraph 8 at the outset of the decision the judge clearly states that: "The onus is on the respondent to justify the interference of the appellant's treaty rights". At paragraph 60 the judge set out the respondent's reasoning for issuing the deportation order and listed factors from (a) to (m).

In conclusion, at paragraph 61, the judge stated:

> *"I am satisfied that the respondent has shown by way of the criminal record and ongoing criminal conduct of the appellant that he is at high and present risk of future offending and causing serious harm and threat to the interests of society, that the respondent has justified the removal decision, and it is proportionate and justified in all the circumstances, including taking into account the appellant's relationship with his partner and son and his work record, such that the removal of the EEA national although prima facie would interfere with his right to exercise treaty rights in the UK, the respondent has justified her action."*

Nothing stated at paragraph 64 in the conclusion by writing that the appellant had failed to counter the objections of the respondent undermines the fact that the judge applied the correct approach to the burden of proof. The judge is merely setting out that the appellant has justified the decision.

Notice of Decision

I find no material error of law and the decision of the First-tier Tribunal will stand.

Signed Helen Rimington Date 16th November 2020
Upper Tribunal Judge Rimington