Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00487/2018

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On : 28 January 2020	**On 31 January 2020**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ARNOLDAS MIGLINAS

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Allen, instructed by TMC Solicitors
For the Respondent: Mr P Singh, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Lithuania, born on 22 February 2000. Following a grant of permission to appeal against the decision of the First-tier Tribunal allowing his appeal against the respondent's decision to deport him from the United Kingdom, it was found that the Tribunal had made errors of law in its decision and the decision was set aside, to

the extent set out below. Directions were made for the decision to be re-made by the Upper Tribunal.

Background

2. The appellant claims to have arrived in the United Kingdom in November 2010 with his family, at the age of 10 years. On 15 June 2017 he was convicted at Suffolk Juvenile Court of possession of class B drugs, cannabis, and failing to surrender to custody and he was sentenced to a three-month referral order and £15 victim surcharge. On 14 July 2017 he was convicted at Ipswich Crown Court of robbery, possession with intent to supply class A crack cocaine, possession with intent to supply class A heroin and possession of an offensive weapon in a public place. He was sentenced on 5 September 2017 to an 18-month detention and training order. On 12 December 2017 he was served with a liability for deportation notice and on 19 April 2018 the respondent signed a deportation order against him. The appellant was initially served with a decision to make a deportation order certified under regulation 33, but following the submission of documentation demonstrating five years permanent residence in the UK, the respondent withdrew the certified decision and on 12 July 2018 served a new, non-certified, decision to make a deportation order.

3. In that decision, the respondent accepted that the evidence produced by the appellant was sufficient to demonstrate that he had acquired the right to permanent residence under the EEA Regulations. However, the respondent considered that his deportation was justified on serious grounds of public policy. The respondent noted that the appellant had been convicted on two occasions for six offences between 15 June 2017 and 5 September 2017 and that he continued to pose a risk of harm to the public. The respondent considered that the appellant posed a genuine, present and sufficiently serious threat to the interests of public policy and that the decision to deport him was proportionate and in accordance with the EEA Regulations 2016. The respondent considered further that the appellant's deportation would not breach his Article 8 rights under the ECHR.

4. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal on 4 June 2019 by First-tier Tribunal Judge Mayall. The judge considered an OASys report and the evidence of the appellant and his parents. He found the appellant's mother and father to be honest and credible witnesses and accepted their evidence that he had arrived in the UK with them in 2010, that he had carried out his offences when he was a child, that he had been making efforts to find employment since being given permission to work, that he no longer associated with those with whom he had previously been criminally involved and that he spent most of his time at home with his family. The judge treated the appellant's own evidence with caution, however, because it became apparent that he had not been truthful to his parents about his drug use and had been using cannabis since his release, albeit on a relatively small scale when offered it by friends. The judge noted that the appellant's brother had been deported from the UK for drugs offences and considered that he would not be able to provide the appellant with support in Lithuania. The judge considered that the prospect of rehabilitation for the appellant was

higher in the UK than in Lithuania as he had his family here. On the basis of the continuing risk posed by the appellant, the judge was satisfied that "serious" grounds of public policy had been made out. However, he considered that the respondent's decision did not comply with the principles of proportionality. He accordingly allowed the appeal under the EEA Regulations.

5. The respondent sought permission to appeal to the Upper Tribunal on the grounds that the judge had failed to give adequate reasons for finding that the deportation decision was disproportionate, that he had failed to include material matters in his proportionality assessment such as the appellant's parents' lack of knowledge of his drugs use, that he had failed to give adequate reasons for finding that the appellant's brother in Lithuania was not able to provide him with any support and that he had failed to undertake an effective proportionality assessment.

6. Permission to appeal was granted in the First-tier Tribunal on 25 September 2019.

7. Following an error of law hearing on 27 November 2019, the First-tier Tribunal's decision was set aside in relation to the proportionality assessment, as follows:

> "10. The judge's conclusions on proportionality are to be found at [55] of his decision, whereby he simply states that the respondent's decision did not comply with the principle of proportionality. It was Ms Allen's submission that the judge had clearly taken account of all relevant factors and that his conclusion at [55] had to be read together with [35] to [52] where he assessed the evidence. She submitted that the judge had taken account of the appellant's age, family, economic situation, integration in the UK and his links to his country of origin. However, we do not agree. The judge may have listed various factors in those paragraphs but there is no indication that there was any proper consideration of, and engagement with, those factors and no indication of any balancing exercise conducted or consideration of the public interest factors in schedule 1(7) of the EEA Regulations.
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> 11. As the respondent's grounds assert, the judge gave weight to the appellant's parents' evidence about him no longer associating with those with whom he had had been criminally involved, but failed to explain how he could accept their assertions when the appellant admitted to being untruthful to them about his drug use. The judge considered that the appellant would struggle in Lithuania but provided no proper reasons for concluding that his parents could not assist him as they had assisted his brother, or for concluding that he would be unable to find employment and that he would have language difficulties.
>
> 12. There was, accordingly, no proper reasoning in relation to the factors to which the judge gave weight and no balancing against those factors of the matters relevant to the public interest, including in particular the finding that serious grounds of public policy had been made out. For all these reasons we consider that the judge's decision has to be set aside so that a full and proper proportionality assessment can be made on the basis of all relevant factors.
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> 13. Ms Allen requested that the matter be remitted to the First-tier Tribunal but we do not consider that to be appropriate. There has been no challenge to the judge's finding that serious grounds of public policy have been made out and the re-making of the decision simply requires a proper proportionality assessment under regulation 27(5) and (6) which

> can be undertaken in the Upper Tribunal. We accept, however, that the matter should proceed on a later date in light of the further evidence produced by Ms Fijiwala in her Rule 15(2A) application, in order to provide the appellant with an opportunity to respond to the matters and evidence therein."

Appeal hearing and submissions

8. The appeal then came before me for a resumed hearing on 28 January 2020, to re-make the proportionality assessment. Mr Singh relied upon the most recent PNC report for the appellant, which had been produced at the error of law hearing with an application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, and which showed a recent conviction, on 15 October 2019, for possession of a Class B drug, cannabis, and obstructing a constable.

9. I heard from the appellant and his parents. The appellant claimed to have had a cannabis grinder on him when he was stopped by the police for failing to have his bicycle lights on, but claimed to have stopped taking drugs. He was now working and had been employed for over seven months, at the same place where his father, uncles and brother were employed. He had a girlfriend. He was not in contact with his brother in Lithuania and did not know his circumstances there, although his parents were in contact with him. He last visited Lithuania for two weeks in 2014 with his mother, at a time when his brother was still in the UK, and they stayed with his mother's friend. The evidence of the appellant's parents was that they would speak to their son in Lithuania about once or twice a month, that he had no permanent work or accommodation in Lithuania, that the appellant's father had not visited Lithuania for seven to eight years and that his mother had last visited two to three years ago and had stayed with her husband's sister who had since moved to the UK and lived in Ipswich.

10. Both parties made submissions. Mr Singh submitted that deportation was justified as the appellant was an adult in good health whose claim to be remorseful could not be believed. The fact that he was recently caught carrying paraphernalia used for taking cannabis showed that he was still taking drugs. His parents did not have sufficient control over him. His parents could support him if he returned to Lithuania, as they did for his brother and he would be able to find odd jobs there and earn money as his brother did. Ms Allen submitted that the appellant was a product of our own system, who had always lived with his family aside from his time in prison and who had acquired permanent residence, and thus been integrated into our society, before being convicted. He was a secondary player in the index offence and there was no indication of violence, threats of violence or causing alarm or distress to the public. His conduct did not represent a genuine, present and sufficiently serious threat, he had a stable and supportive family, he had the ability to make positive choices and he was getting his life back on track. All of that would go if he had to return to Lithuania. The respondent had not discharged the burden of proof.

Relevant legal framework

11. The relevant legal framework, in Regulation 27 of the EEA Regulations 2016, states as follows:

> "**Decisions taken on grounds of public policy, public security and public health**
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> **27-**(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
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> (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(17).
>
> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—
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> (a)the decision must comply with the principle of proportionality;
>
> (b)the decision must be based exclusively on the personal conduct of the person concerned;
>
> (c)the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
>
> (d)matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
>
> (e)a person's previous criminal convictions do not in themselves justify the decision;
>
> (f)the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.
>
> (6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin."

12. Schedule 1(7) of the EEA Regulations 2016 states as follows:

> "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."

Consideration and findings

13. As confirmed in my decision of 2 December 2019, there has been no challenge to the First-tier Tribunal Judge's finding that serious grounds of public policy have been made out and accordingly that finding stands. The decision is to be re-made on the basis of the considerations in Regulation 27(5) and (6). I note that there was no specific finding by the First-tier Tribunal as to whether the appellant's personal conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, although the Secretary of State's grounds of appeal at [5] suggested that that was implied by the fact that the "serious grounds" had been made out. That was not specifically addressed in my decision, but in any event I am to re-make the decision on the situation and circumstances at the present time, starting from the unchallenged findings made by the First-tier Tribunal Judge at [52] and [53] of his decision.

14. An important factor which affected the risk assessment in the OASys report was the appellant's lack of ability to work at that time, given the emphasis in the report on the link between the appellant's financial circumstances and his offending. That is made clear at R10.3 of the OASys report and at R10.4 where the author refers to the circumstances likely to increase the level of risk. At R10.3, page 38 of the report, it is stated that: "*The risk to the public (currently low) is likely to be greatest if Arnoldas continues to be in a situation whereby he cannot support himself financially through pro-social means*". At page 21 the report states that "*the majority of the problems Arnoldas' has faced during this time on Supervision were linked to lack of employment…*" The evidence before the First-tier Tribunal, as referred to at [43] of

the judge's decision, was that the appellant had recently been given permission to work and was keen to find work. Since that time the appellant has, according to the evidence before me which I accept, found employment at the same place as his father, uncles and brother, and has been working since June 2019. There are salary slips to confirm that employment and the appellant's father confirmed the appellant's evidence.

15. Accordingly, whilst the OASys assessment concluded that the appellant posed a medium risk of re-offending and a medium risk to the public, that has to be qualified by the fact that one of the risk factors, namely lack of financial income, has thus far been eliminated or at least significantly reduced. Other risk factors identified in the OASys report are engagement with probation and association with pro-criminal peers. The OASys report makes it clear that the appellant engaged well with staff during supervision and was willing to study and learn. The Independent Reviewing Officer's Report for the appellant, at Annex F of the respondent's appeal bundle, speaks of the appellant's good behaviour, although the report pre-dates the OASys report by some two years. Although there is some reference to the appellant being aggressive with his mother at times, the OASys report confirms that that appeared to have subsided. As for the appellant's association with pro-criminal peers, the fact that he is now working five days a week is of relevance. I note that the appellant was not alone when caught by the police in October 2019, although he claims that his friend who was with him at the time was not one of those with whom he had previously associated.

16. Nevertheless, given the risk assessment in the OASys report, the finding of the First-tier Tribunal that "serious grounds of public policy" had been made out and the fact that the appellant has since acquired a further conviction for possession of cannabis, it seems to me that it would be premature to conclude that his personal conduct did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. However, that threat is mitigated by the above considerations and in particular the appellant's new responsibilities of employment, and that is clearly of relevance to the proportionality assessment in Regulation 27(5)(a) of the EEA Regulations, to which I now turn.

17. Having heard from the appellant and his parents myself, I find that I reach the same decision as that reached by the First-tier Tribunal Judge in relation to proportionality. I can see why he reached the decision that he did, albeit making the errors I have already identified in reaching that decision.

18. In so concluding I emphasise that there is a strong public interest in this case in favour of the appellant's deportation, given the risk he poses to society, as discussed above. The fundamental interests of society, as set out at Schedule 1(7) of the EEA Regulations 2016, have to be protected. The impact of involvement in drugs cannot be underplayed and the appellant's own history has shown that possession of class B drugs only too often leads to involvement with more dangerous drugs and the offending behaviour with which that is associated. The fact the appellant continued to use cannabis, and acquired a further conviction in that regard, after deportation proceedings being

commenced against him and after initially succeeding in his deportation appeal in the First-tier Tribunal, is a factor weighing strongly against him.

19. However, there are also very strong factors weighing in the appellant's favour. It is apparent from the evidence overall that the appellant's parents offer a supportive family unit and that there is a close family bond, especially between the appellant and his mother, as the OASys report describes at R10.3. I have no doubt as to the sincerity of the appellant's parents and it was evident that the appellant's behaviour has caused them much stress. It is also apparent that the appellant's parents have been unable to influence him sufficiently to prevent his engagement with offending behaviour and his association with an unsuitable peer group and that he has not always been honest with them. Nevertheless, the appellant retains the support of his family and appears, at this stage, to appreciate the situation that he is in and the consequences he is facing. He is clearly at a significant turning point in his life. He is about to leave his teenage years and has found employment and is in a position to turn his life around. The financial motivation for his offending has now diminished with his new job. He has positively engaged with supervision, as I have mentioned above.

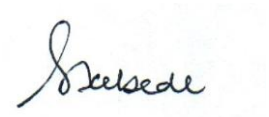
20. I agree with Ms Allen that if he is deported to Lithuania all of those positive factors are likely to disappear or at least to significantly diminish and his prospects of rehabilitation in that country are plainly limited. Although he has a brother there, his brother does not offer him a stable life as he has no permanent job, income or accommodation. The appellant's parents' evidence in that regard was entirely consistent and credible and I accept that his brother moves around from friend to friend and does bits of work here and there, but with nothing substantial. The appellant speaks the language fluently and may be able to find some work, but he has no particular skills and no qualifications to secure anything substantial. He is a 19 year old boy who has never lived apart from his parents and siblings, other than when detained, who has no experience of living in Lithuania beyond possible childhood memories prior to the age of 10 years and who has returned there only once in 2014, whose entire family live in the UK and who has no family other than his one brother in Lithuania, who has been educated in the UK and who, as Ms Allen rightly submitted, is essentially a product of our system and society.

21. As for the appellant's offending, it is relevant to note the Crown Court Judge's sentencing remarks, from page 2, namely that the appellant at that time was very lightly convicted, that there was no offence of violence or threats of violence to the person and no sign of any indication to frighten, threaten or alarm members of the public. He was a secondary party to the index offence, albeit a significant mover in it and was a minor at the time. I also take account of the matters raised by Ms Allen arising from the OASys report, namely that the appellant's offending was linked to a financial motive (as I have discussed above), that he was not considered to be a prolific offender and that the purpose of his sentence was said, at page 3 of the report, to be punishment as opposed to public protection.

22. For all of these reasons, and despite the fact that "serious grounds of public policy" have been made out as a result of the appellant's offending, and despite the level of future risk, I find that the balance ultimately lies in the appellant's favour in the particular circumstances of this case and that the respondent's decision to deport him does not comply with the principle of proportionality. I would make it clear that the appellant is being offered a chance at this point, in the light of his previous impressionable age and considering his family circumstances, and that if he re-offends it is unlikely that a future decision would be in his favour.

DECISION

23. The making of the decision of the First-tier Tribunal involved an error on a point of law and the decision has accordingly been set aside to the extent stated. I re-make the decision by allowing the appellant's appeal again.

Signed:  Dated: 28 January 2020

Upper Tribunal Judge Kebede