Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00456/2013

THE IMMIGRATION ACTS

Heard at North Tyneside Magistrates Court on 8th August 2013

Determination Promulgated on 9th August 2013

Before

UPPER TRIBUNAL JUDGE HANSON

Between

EDGARAS FIRSTOVAS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Anderson of Immigration Legal Advice Centre.
For the Respondent: Mr Diwnycz – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel of the First-tier Tribunal composed of First-tier Tribunal Judge Holmes and Mr BD Yates (non-legal member) (hereinafter referred to as 'the Panel'), promulgated on 19th April 2013, in which they dismissed the appellant's appeal against the decision to deport him from the United Kingdom under the relevant provisions of the Immigration (European Economic Area) Regulations 2006 (hereinafter referred to as 'the 2006 Regulations') and on human rights grounds.

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2. Permission to appeal was initially refused by a Designated Judge of the First-tier Tribunal but granted on a renewed application by Upper Tribunal Judge Rintoul who considered it arguable that the Panel erred in their consideration of regulation 21 (5) of the 2006 Regulations by focusing on proportionality and in failing to address the other relevant factors. Judge Rintoul thought it appeared from the determination, at paragraph 60, that the Panel erred in particular by taking into account the deterrence of crime contrary to regulation 21 (5) (b) and that the Panel erred in drawing adverse inferences in paragraph 51 from material they considered had not been produced to them by the appellant.

3. The Panel set out their findings from paragraph 15 of the determination, under headings dealing with the various issues it was necessary for them to consider. It is accepted that the appellant has not acquired a right of permanent residence in the United Kingdom.

4. The Panel examined the extent of the appellant's integration and his personal history but did not find that he had been truthful regarding family and friends still living in Lithuania [28] or that he had proved he had integrated himself to any significant extent into the community in the United Kingdom as his social life appears to have been limited to members of the Lithuanian community in Leeds [29-37 and 58].

5. The question of the appellants propensity to reoffending and risk to the community was considered at paragraphs 49 to 51 of the determination in the following terms:

> 49. On the basis of our findings the appellant has the protection from deportation of Regulation 19(3)(b). Under Regulation 19(3)(b) a decision to deport has to satisfy Regulation 21(5), in particular the proportionality test. Such a decision may not be taken to serve economic ends (Reg. 21 (2)) but it is not suggested on behalf of the appellant that it has been. Instead it is argued that his deportation is not a proportionate response to his circumstances and to the risk that he poses to the community.
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> 50. It is not argued that the appellant's offence is not serious, and it plainly was. This was a punishment beating of a man that the appellant does not admit to knowing, or to having had any prior dealings with. We have grave reservations as to whether he has told the truth about this, given the necessarily small Lithuanian community in Leeds. The appellant's theft of the laptop made it an offence of robbery, but the primary motivation of the group appears to have been violence, with the theft a somewhat opportunistic addition.

> 51. As set out above the appellant relies upon the assessment that he poses a low risk of reoffending in the report of 14 June 2012, but we are not satisfied that this is the whole picture. We are satisfied that other assessments of risk posed by the appellant will have been made of him, and that they have not been disclosed by him. We infer that this is likely to be because they are less favourable to him. We note that the author of this report does not comment upon the fact that the account given to him by the appellant of the offence and his role in it, is not that which was relied upon by the sentencing Judge. We note also that when faced with deportation the appellant's response was in effect to threaten that he would be forced to offend further in order to be able to support himself in Lithuania. Looking at the evidence in the round we are not satisfied that the appellant poses no risk, or a negligible risk of reoffending. If he re-offends then we are satisfied that there is at least a medium risk of serious harm arising from that.

6. It is clear that having analysed the evidence the Panel found that the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Background

7. The appellant was born on 11th March 1993 and is a national of Lithuania who is in the United Kingdom exercised treaty rights. He has been made the subject of the decision to deport him as a result of his involvement in an offence for which he was convicted on 26th March 2012 at Leeds Crown Court. On 16th April 2012 he was sentenced to three years in a Young Offenders Institute. There was no appeal against conviction or sentence. The Panel referred to differences between the facts upon which the appellant was sentenced and his own account of his involvement in the events in question. The Panel chose to rely upon the sentencing remarks which noted that the offence had a number of aggravating features being (i) the offence occurred in the victim's own home, (ii) there were three assailants including the appellant to one victim, (iii) the assailants were intoxicated, and (iv) the appellant's co-accused was armed with a hockey stick. The sentencing Judge dealt with both the appellant and his co-accused on the basis of their pleas and although they claimed to have taken the hockey stick in case they needed to defend themselves, the reality was that within moments of entering the victims property the man was attacked and beaten with the hockey stick until it snapped.

8. In relation to the appellant HHJ Marson QC stated:

> "You, Firstovas, by your basis of plea, admitted punching him once in the face, but you continued to participate in the offence and it has to be in the context of violence being inflicted by others. This was a joint offence of robbery and although the violence you inflicted yourself is relevant, what was happening to

> this man at the time - being attacked by three people - cannot be overlooked, and you were the one who took the laptop at the suggestion of someone else.
>
> This was a sustained attack using more violence than was necessary and causing him a fracture to the left orbital floor, a wound and other bruising. I bear in mind he discharged himself from hospital against medical advice, but it must have been a terrifying experience.

Discussion

9. The deportation of EU nationals is covered by Directive 2004/38/EC which is incorporated into our domestic legislation by the Immigration (European Economic Area) Regulations 2006 (as amended).

10. By virtue of Regulation 19(3) a person who has been admitted to, or acquired a right to reside in the United Kingdom under these Regulations may be removed from the United Kingdom if:

    (a) he does not have or ceases to have a right to reside under these Regulations; or

    (b) he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

11. The respondent relies upon Regulation 19 (3)(b).

12. Regulation 21(5) states that, where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
    (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.

13. Regulation 21(6) states that before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

14. It was accepted that the appellant could not prove he has acquired, or was entitled to, a permanent right of residence in the United Kingdom and so it is the lower level of protection afforded to EEA nationals that is applicable in this appeal; that the appellant's removal can be justified on grounds of public policy, public security or public health. In this appeal we are not concerned with public health.

15. The Grounds raise a number of issues some of which are not relevant to the core question in dispute, whether the appellant's personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The interest in issue is the protection of citizens from crimes of violence.

16. The Grounds challenge the weight given to the evidence by the Panel but weight is a matter for the Panel and, provided it is shown they considered the evidence with the degree of care required in an appeal of this nature and gave adequate reasons for their findings, the Upper Tribunal should be slow to interfere with the decision - SS (Sri Lanka) [2012] EWCA Civ 155. Having read the determination it is clear this is precisely what the Panel did. No error is proved.

17. The Grounds also allege the Panel stated in paragraph 49 that the decision to deport has to satisfy regulation 21 (5) and, in particular, the proportionality test which is only one of the five principles set out in the Regulations. The Grounds allege the Panel seem to have placed more emphasis on proportionality than any of the other principles throughout the determination but, as is noted in the determination, the proportionality of the decision was the main argument relied upon by Miss Anderson who claimed deportation was not a proportionate response to the appellant's circumstances and to the risk that he poses to the community. In any event, if one reads the determination it is clear that all the relevant elements the Panel were required to consider were taken into account by them. No error is proved on this ground.

18. The Grounds allege the Panel had no evidence before them showing that the appellant was a threat as the reports from the National Probation Service state that he is has been assessed as a low risk of re-offending. The Panel is criticised for finding that the failure of the appellant to produce other reports must mean he had something to hide. The Panel were concerned about the lack of other reports and, as noted from the record of the case management review hearing, the question of which reports were available was considered by the First-tier Tribunal at the earliest opportunity. No further reports were produced for the

hearing notwithstanding the record of proceeding showing that an enquiry was made at the start of the substantive hearing by Judge Holmes regarding whether the additional reports were now available. They were not. The Panel could only make its decision based upon the evidence that was available to it, although did speculate that the reason the reports had not been produced was likely to be because they were less favourable to the appellant. There are additional reports and these have now been produced in the bundle prepared for the proceedings before the Upper Tribunal. Even if the Panel's speculation regarding the content of the reports that were not been disclosed amounts to an error of law it is not material.

19. The information the Panel had available to them describes the commission of a serious violent offence. Whilst it is clear from reading the Regulations that the conviction is not in itself sufficient to constitute grounds for removing the appellant it was accepted in Commission v The Netherlands C50/06 that convictions could be taken into account in so far as the circumstances which have given rise to a conviction were evidence of personal conduct constituting a threat to the requirement of public policy. The Court of Appeal recognised in Bulale [2008] EWCA Civ 806 that although the Regulations made it difficult to expel an individual for dishonesty, offences of violence are a different matter. The Regulations made no separate provision regarding different levels of violence and Member States are given a certain amount of judgment in deciding what their nationals could be expected to put up with.

20. This is a first offence and so there is no history of violence but it is clear that the OASys report identified a number of factors stated to have contributed to the offence including (i) the appellant mixing with the wrong people, (ii) alcohol, and (iii) the appellant's attitude.

21. The Panel analysed the evidence regarding the appellant's associations with the named individuals and the evidence given by family members. They do not dispute that the appellant may have fallen in with the "wrong crowd". It is clear that those he chose to associate with were all members of the small Lithuanian community in Leeds. Unless the appellant is somehow able to avoid associating with such individuals there is a real risk this element will remain of concern for the future. Alcohol was identified as a factor and although it is stated the appellant has undertaken an alcohol awareness course, there does not appear to have been evidence before the Panel indicating there would be any reduction in his drinking when back into society. Also of concern is that alcohol is identified as having been a disinhibiter rather than the root cause of the assault. The fact alcohol was identified as the element which removed the personal constraints the appellant may otherwise have had, indicates that the root cause of the problem is more likely to relate to the appellants own personality.

22. The Panel note the difficulties the appellant experienced in his younger years but there was no evidence from an expert psychologist/psychiatrist or

somebody dealing with adolescents and young people from troubled backgrounds to explain why he behaved in the way he did and what steps have been taken to prevent a recurrence in the future. In section 12 of the OASys report 'attitudes' are said to be linked to a risk of serious harm, risks to the individual and other risks, and to offending behaviour. The reason the appellant engaged in the violent assault is because there is an element of his personality that enabled him to do that whereas others will not even contemplate getting involved in such an enterprise. There is also within the documents an example of the appellant resorting to violence when alcohol could not have been a relevant factor. It is noted that when the appellant was at HMP Doncaster on 29th May 2012 he was found guilty of fighting with another prisoner for which he received 14 days forfeiture of privileges, suspended for two months. Whilst he has remained out of trouble since, this is again illustrative of something within the appellant's personality and profile which indicates a risk of reoffending and violent nature.

23. The Panel also noted the appellant's own evidence that if returned he may be forced to re-offend showing he identified this as a means of being able to support himself rather than by legitimate means. This is suggestive of a propensity to resort to criminal conduct if he thinks it warranted.

24. The Panel did not find the appellant to be anything other than a low risk of re-offending as mentioned in the reports now relied upon. What they state in paragraph 51 is "looking at the evidence in the round we are not satisfied that the appellant poses no risk, or a negligible risk of reoffending. If he re-offends then we are satisfied that there is at least a medium risk of serious harm arising from that."

25. As the appellant does not have a permanent right of residence the level of protection is at the lower end of the scale. The Panel clearly took great care in assessing the competing elements and only came to the conclusion that the appellant did pose a threat having considered all matters "in the round". The Grounds alleging that this is an incorrect decision are in effect a mere disagreement.

26. The Grounds also allege that if it was necessary for further reports to be made available, the Secretary of State should have obtained them but I find this ground has no merit. The burden of proof is upon the appellant to prove his case and there is no obligation on the Secretary of State to do as suggested. The fact that at the case management review hearing the question of the availability of additional reports was discussed should have alerted the appellant to the fact that this was a matter of some concern to the Tribunal. The Grounds seeking permission to appeal state that reports were not provided as they were deemed not to be necessary. That is a decision taken by professional representative but it cannot be an error for a judge to take into account the evidence made available and use that as the basis for findings the made.

27. The Grounds also allege that the appellant has a low risk of offending but this does not mean there is no risk. This was a factor that was considered by the Panel but the appellants own conduct in relation to the offence and the act of violence in prison support the conclusions reached.

28. The Upper Tribunal grant of permission refers to focusing on proportionality which I have dealt with above and claims the Panel may have erred in paragraph 60 by taking into account the deterrence of crime contrary to regulation 21(5)(b) but if the author of the grant had read the determination carefully he would have realised that this was not in the section in which the Panel set out their findings in relation to the 2006 Regulations but rather their assessment of the proportionality of the decision under Article 8 ECHR, in which the case of Masih was relevant.

29. As announced in court, having considered the matter very carefully, having read the determination thoroughly, and having reviewed all the evidence, I find that the Panel's conclusions are within the range of those they were entitled to make on the evidence and accordingly no material error of law is proved.

Decision

30. **There is no material error of law in the First-tier Tribunal Panel's decision. The determination shall stand.**

Anonymity.

31. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order as none was requested and no basis for such an order has been established.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 8th August 2013