Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00442/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 7 October 2013	**On 14 October 2013**

Before

UPPER TRIBUNAL JUDGE WARR
UPPER TRIBUNAL JUDGE O'CONNOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARTURAS DUMBLIAUSKAS

Respondent

Representation:

For the Appellant: Mr G Saunders, Home Office Presenting Officer
For the Respondent: Ms M Cohen of Counsel instructed by Wilson Solicitors LLP

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State but we will refer to the original appellant, a citizen of Lithuania born on 4 October 1965, as the appellant herein.

2. The appellant arrived in this country in May 1998 as a visitor and applied for asylum in January 1999. This application was only dealt with after a long delay in May 2012.

3. The appellant has been addicted to heroin since his experiences in the Russian army in Afghanistan in the mid 1980s. He has been prescribed methadone as treatment for controlled drug dependency. He has residual symptoms of PTSD.

4. The appellant has a lengthy criminal history largely caused by his desire to obtain money to fuel his drug dependency.

5. On 8 June 2010 at Snaresbrook Crown Court the appellant was convicted of robbery and sentenced to three years and six months' imprisonment.

6. The sentencing judge noted that the appellant had pleaded guilty at the first available opportunity to a robbery of a lady of 60 who was the sole occupant of her shop as she opened it in the morning. The appellant had sought to attack the shopkeeper and had taken about £150 to £200 from the till. He had pushed her through the back door and into the storeroom but because the appellant could not get out he had had to get her assistance to exit the shop and he had led out the shopkeeper too. The judge found that the appellant had attacked a vulnerable individual and that the offence represented a huge step-up in the appellant's offending behaviour.

7. On 22 May 2012 the respondent decided to deport the appellant, on the same day refusing his application for asylum.

8. An appeal was lodged against the Secretary of State's decision but the appeal was not proceeded with on asylum grounds before the First-tier Tribunal who dismissed that aspect of the case and we need to say no more about it.

9. The appellant's appeal came before a panel on 4 June 2013 when the appellant was represented, as he was before us, by Ms Cohen. The panel heard oral evidence from the appellant. The panel also had the benefit of a report from a consultant psychiatrist, a letter from the appellant's probation officer and medical documentation in respect of the appellant. The appellant was expected to have surgery on the day following the hearing at Hillingdon Hospital.

10. The appellant had had a number of opportunities in the past to address his drug dependency and the panel turned to assess the credibility of his evidence that he would not suffer another relapse. It was agreed that he had not had any alcohol or drug relapse or problems while in custody for the period of three years since his imprisonment. Having assessed the appellant's evidence-in-chief and in cross-examination the panel found the appellant to be genuine, honest and credible in his evidence as to his belief that there would be no further relapses. The panel also accepted him as genuine and credible in his acceptance and regret of his past conduct. The panel noted the appellant had attended a number of courses in prison and had been made aware of various supporting systems which would be of substantial assistance to the appellant on his release. The panel found genuine the

appellant's evidence that he wanted to see his grandson who had been born in December 2012. He was concerned that he might not have much longer to live, particularly in the light of the pending operation. The panel took into account the courses undertaken by the appellant and the fact that he would be supervised on his release was well as receiving support from the community mental health team, the Hackney Drug Treatment Agency and an alcohol treatment provider. The panel accepted the appellant's evidence that he would readily co-operate with the supervision and assistance. The appellant was found to be genuinely contrite and genuinely determined to rehabilitate himself.

11. The panel considered the submissions based on the Regulations and the appellant's length of residence. The panel considered Regulation 21 of the EEA Regulations. It was accepted that the appellant could not establish a permanent right of residence under Regulations 21(3) as he had not resided in the United Kingdom for a continuous period of five years in accordance with the Regulations. The panel found that the appellant could not establish that he had resided in the United Kingdom for a continuous period of ten years to bring himself within Regulation 21(4)(a) having considered **FV (Italy) [2012] EWCA Civ 1199** and **Tsakouridis [2011] 2CMLR 11**. The panel noted that it had been accepted by Ms Cohen that the question of integration was a basic factor in the assessment of continuous residence under Regulation 21(4)(a).

12. In the circumstances the panel turned to consider the issues raised under Regulation 21(1) and whether the decision had been taken on the grounds of public policy, public security or public health. The panel then considered Regulation 21(5) and (6):

> '(5) 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:-
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> (a) the decision must comply with the principle of proportionality;
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> (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 particulars of the case or to 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.

(6) 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."

13. The panel found that the appellant's state of health was precarious at best and reiterated that the appellant had impressed the panel as genuine in his determination not to relapse. There was very little contact between the appellant and his son and his social and cultural integration into the United Kingdom had been of an extremely limited nature. His links with Lithuania were also limited and he had not lived there for the previous fifteen years.

14. The panel turned to consider the issues in Regulation 21(5). The panel noted that the line to be drawn in assessing the requirements of Regulation 21(5)(c) was a difficult one. It found that the appellant's conduct had represented a genuine and sufficiently serious threat affecting one of the fundamental interests of society in the past and it would continue to do so unless the appellant was able properly to rehabilitate himself and not relapse. That would depend on his future conduct. The panel found that he had a genuine determination to avoid relapsing and to concentrate on rebuilding his health in view of his serious health problems and because of his desire to build a relationship with his son and grandson. The threat was nevertheless present because it was a hope for the future that he would not relapse.

15. The panel considered the cases of **Essa [2012] EWCA Civ 1718** and **Tsakouridis** and the issue of rehabilitation. It found that if the appellant was able to avoid relapsing then the prospects of rehabilitation would be very substantial. The appellant would have a comprehensive rehabilitation programme in the United Kingdom and there was no indication that any such rehabilitative programme would be available in Lithuania although appropriate medical treatment would be. The panel did not consider that the Secretary of State's decision was proportionate in all the circumstances and allowed the appeal under the Regulations. The panel emphasised that if the appellant did not take the opportunity to rehabilitate himself and refrain from offending, any future assessment would be different.

16. The Secretary of State appealed the decision on the basis that the issue of rehabilitation was not a material consideration in the proportionality assessment given that the panel had found that the appellant had not integrated into UK society. In the alternative, in the absence of evidence of the prospects of rehabilitation in Lithuania the panel was not in a position to be able to make a comparison between rehabilitation in the two countries. The panel's findings about the appellant's prospects for rehabilitation in the UK were speculative.

17. The First-tier Tribunal refused the application for permission to appeal finding that rehabilitation was a relevant consideration for the panel in the light of the appellant's state of health and the importance that absence from drug abuse was to that state of health. However Upper Tribunal Judge Macleman granted permission to appeal on 26 July 2013 finding it debateable whether prospective rehabilitation in the UK ruled out deportation of a person not integrated in the UK.

18. On 12 August 2013 the appellant filed a reply drafted by Ms Cohen. It was submitted that the principle of rehabilitation was relevant and Ms Cohen referred among other things to the decision of the First-tier Tribunal to refuse the application for permission to appeal. The Secretary of State had adduced no evidence in relation to the prospects for rehabilitation and there were no submissions by the Presenting Officer on the subject either.

19. Mr Saunders submitted that the First-tier Tribunal had not conducted an overall assessment. While there was not a bright line concerning rehabilitation no integration had been found in this case and there was no reason why rehabilitation should not take place in the United Kingdom rather than Lithuania. All the appellant had was a decade or so of residence of no great quality. There was no evidence that Lithuania lacked facilities that might be required for the appellant. Reference was made to paragraph 95 of the opinion of the advocate general in **Tsakouridis**. In the Court of Appeal in **Essa** at paragraph 16 the Court of Appeal had found the opinion to be over prescriptive in stating it was incumbent upon a primary decision maker "to state precisely in what way that decision does not prejudice the offender's rehabilitation".

20. Ms Cohen relied on her response. While the question of integration was of some weight it was not the only factor and the issue of rehabilitation was a relevant factor. It had been accepted that this was not a bright line issue. It was a question of fact. The case of **Essa [2013] UKUT 00316 (IAC)** did not assist Mr Saunders. Ms Cohen referred to paragraph 28 of **Essa** – the longer the residence, the greater the degree of integration was likely to be – this indicated a fact-sensitive approach was required.

21. The appellant had resided in this country for fourteen years and the length of residence was a weighty factor to place into the scales. There may be cases where there was little integration but rehabilitation would mean the decision would be resolved in the favour of the appellant.

22. There was a principle involved in that it was not in the interests of the EU for persons to be removed to the detriment of their rehabilitation. The panel had made a reasoned decision taking into account factors such as the medical issues and the courses undertaken by the appellant. What was said in paragraph 35 of the Tribunal decision in **Essa** was obiter and of course the panel had not had the case before it. It was clear the panel had the consideration in mind. The appellant had demonstrated a genuine commitment to avoid a relapse. Accordingly he was not likely to remain a present threat for the indefinite future.

23. Mr Saunders submitted that what had been said in **Essa** in paragraph 26 was not obiter. Genuine integration must be directed at qualified persons. People who had just arrived and had not yet become qualified persons or had not been qualified persons for five years could always be removed. If their presence during their period of residence made them a present threat to public policy it would be inconsistent with the purposes of the Directive to weigh in the balance against deportation their future prospects of rehabilitation.

24. The appellant had been in the UK for fourteen years but had not integrated for fourteen years. This was not a question of being partly integrated. The issue of rehabilitation did not arise at all.

25. At the conclusion of the submissions we reserved our decision. We remind ourselves that we can only interfere with the determination if it was flawed in law. We further remind ourselves that the First-tier Tribunal had the benefit of hearing oral evidence from the appellant and were plainly impressed by what he said.

26. The key issue in this case is whether the panel erred in taking into account prospective rehabilitation in the UK. Mr Saunders took the point that because the appellant was not integrated the issue did not arise.

27. Of course if the panel had taken into account an irrelevant matter their decision would be flawed in law. Under paragraph 21(6) of the 2006 Regulations, which we have set out above, the decision maker is required to take into account various considerations. These considerations are not expressed as an exhaustive list. They are considerations "such as the age, state of health" etc. Among the factors is the question of the length of residence and state of health. There is also the issue of the appellant's links with the country of origin. The panel refers to the relevant factors in paragraphs 118 to 119 of its decision. It refers to the appellant's age and state of health. It refers to the appellant's efforts at rehabilitation. There is the issue of his operation. It found the appellant's state of health to be under threat. There was also the issue of limited social and cultural integration. There were however limited links to Lithuania although he had spent his formative years there.

28. We do not see that the panel misdirected itself in referring to the issue of rehabilitation in relation to Regulation 21(6). Firstly, Regulation 21(6) is not an exhaustive list of circumstances to be taken into consideration. Certainly it would be difficult to deal with a person's state of health without considering what steps were being taken to resolve health issues. The health issues were such that the appellant was in doubt about how long he had to live and this was of course one of the factors that impressed the panel when it considered that the appellant's motivation for change was genuine. This was a case where the panel found that the prospects for rehabilitation were both realistic and substantial in the United Kingdom and while there was medical treatment available in Lithuania the rehabilitative programme available to the appellant in the UK would not be available in Lithuania. This was a

case in which the appellant was on the road to rehabilitation and the panel found that the threat to society would very substantially diminish if the appellant did not relapse. The panel found that there was no capacity or interest to assist the appellant in Lithuania in a similar fashion and as is said in paragraphs 24 to 26 of the appellant's reply no evidence had been put before the panel on the matter and no submissions had been made at the hearing on the subject.

29. The key question in this case is whether the panel erred in taking into account the issue of the appellant's rehabilitation in the United Kingdom and the effect on that rehabilitation of removal.

30. We are unable to conclude that the panel took into account an irrelevant matter. What is said in Regulation 21(6) as we have said is wide enough to include this consideration. The impact of removal would in every case be a fact sensitive exercise. The panel clearly went into the facts of this case in very great detail. It had a number of difficult technical issues to resolve.

31. The negative impact of removal on rehabilitation will of course not always be a decisive factor. We accept that the impact will be greater in the case of an integrated EU citizen but we do not accept that it is a factor not to be taken into account when dealing with a person such as the appellant who has been in this country for a number of years and has only limited ties with his country of origin as the panel found. While the Court of Appeal in **Essa** noted that the ECJ had not adopted the suggestion in the advocate general's opinion that a decision maker should state precisely in what way the decision did not prejudice the offender's rehabilitation no doubt the panel would have been assisted by some material on the matter. We are not satisfied that the panel materially misdirected itself in commenting on the absence of material. It may be that not every panel would have reached the same decision but as we have said it did have the benefit of hearing from the appellant and assessing the evidence with very great care. The panel did not reach this decision lightly. In the circumstances of this case we are not persuaded it materially misdirected itself. As it noted in paragraph 134 of its decision this is very likely to be the final opportunity of the appellant to demonstrate that he can take the advantage of the opportunity he has been offered.

32. We are grateful to Mr Saunders for his characteristically clear, concise and trenchant submissions. However, for the reasons we have given we find that the decision of the First-tier Tribunal was not materially flawed in law and we direct that it shall stand.

Signed Date 11 October 2013
Upper Tribunal Judge Warr