Upper Tribunal
Immigration and Asylum Chamber **Appeal Number: DA/00198/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated:**
On 17 October 2014	**On 31 October 2014**

Before

Upper Tribunal Judge Kekić

Between

Arvydas Mykolaitis

Appellant

and

Secretary of State for the Home Department

Respondent

Determination and Reasons

Representation
For the Appellant: The appellant in person
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Details of appellant and basis of claim

1. This appeal comes before me following the grant of permission on 27 August 2014 by Designated First-tier Tribunal Judge McCarthy in respect of the determination of a panel of the First-tier Tribunal chaired by Judge

Petherbridge which dismissed the appeal following a hearing at Taylor House by way of a determination promulgated on 5 August 2014.

2. The applicant is a Lithuanian national born on 22 June 1989. He challenges the decision of the respondent on 15 January 2014 to deport him from the UK following his conviction on 29 May 2013 on two counts of robbery and concurrent prison sentences of 8 and 20 months. It is relevant to mention that the offences were street robberies committed on the same night with two other individuals (also convicted) and that the second offence involved violence. He was previously convicted on 13 August 2010 at Liverpool Magistrates Court of being drunk and disorderly and has three cautions; two for shoplifting on 7 March 2009 and 6 October 2009 (in North Wales) and one from British Transport police on 20 March 2012 for being drunk and disorderly. At the time of his last arrest he was living in Walthamstow.

3. The appellant arrived here with his parents (now divorced) and a younger brother on 5 March 2008. He is unmarried and has no partner or children.

Appeal hearing before the Upper Tribunal

4. The appeal came before me on 17 October 2014. The appellant was present. Although unrepresented, he was content to proceed. He relied on his grounds and argued that the judge had applied the wrong test when assessing whether he should be deported. He argued that as he had completed five years of residence, he was subject to the more stringent criterion applicable to those with permanent rights of residence; i.e. that they may not be removed except on serious grounds of public policy or public security which is a higher level than the general criterion that removal may be justified on the grounds of public policy, public security or public health.

5. Mr Walker responded. He relied upon the respondent's Rule 24 letter and submitted that whilst the Tribunal had not been clear in paragraphs 60 and 62 with regard to the test applied, it was plain from the abundantly clear findings at paragraphs 66 and 67 that the error was not material because those findings are that the appellant was not rehabilitated, that there were no reasonable prospects of rehabilitation at present and that he still represented a threat to public policy.

6. The appellant replied. He said that he had a job, his family was here and he had taken some courses.

7. At the conclusion of the hearing I reserved my determination.

8. On commencing the preparation of my determination, I had some concerns over the calculation of the period of residence accepted by the respondent,

and by the Tribunal. As the appellant had spent time on remand prior to his conviction and as that had been taken off his eventual sentence, I invited further submissions from the parties on this matter to be received by 27 October. Mr Walker took the view that the appellant had not completed five years. The appellant has not responded. I now proceed to determine the appeal on the basis of the evidence before me.

Findings and Reasons

9. The First-tier Tribunal took account of the appellant's circumstances. It took account of supporting letters from the appellant's mother and his employer. It noted that since his release from prison he had resumed work for the same employer he had been working for at the time of his offences. It took account of the appellant's evidence that he had not undertaken any rehabilitation courses whilst in prison, that he had restricted his drinking and that he was in good health. It noted that he had committed two offences, one being violent, at a time when in full time employment and that he had expressed no remorse. He had been assessed at being at medium risk to the public.

10. The Tribunal set out the terms of regulations 19 and 21. The relevant sections are:

> **Exclusion and removal from the United Kingdom**
>
> **19.** …..
>
> (3) Subject to paragraphs (4) and (5), 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.
>
> (4) A person must not be removed under paragraph (3) as the automatic consequence of having recourse to the social assistance system of the United Kingdom.
>
> (5) A person must not be removed under paragraph (3) if he has a right to remain in the United Kingdom by virtue of leave granted under the 1971 Act unless his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.
>
> **Decisions taken on public policy, public security and public health grounds**
>
> **21.** (1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> ….
>
> (3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or 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 necessary in his best interests, 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(**1**).

(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—

(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.

(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.

11. It is the appellant's case that he has acquired the right of residence because be entered the UK on 5 March 2008 and has remained here. He was convicted on 29 May 2013 by which time he had been here for over five years. Although I was at first hesitant as to whether the respondent had been correct in her calculations, I can now see that she was for the reasons I set out below. This an important point to clarify as the threshold of protection afforded to a resident under the Regulations is higher than that a non resident is entitled to: reg 21(3) as opposed to 21(1). It is even greater for an individual who has completed ten years in the UK but that does not apply here.

12. Whilst there is no evidence of the date or place of entry and the appellant's own written evidence suggests he may have entered via Dublin[1] and not the UK (and there is no information on how long he spent in Ireland), I take the date of 5 March 2008 as a starting point as that is accepted by the respondent and has not been disputed during the course of these proceedings. The appellant therefore has to show that he has spent five years from that date excluding time in prison in order to meet the five year residence period and qualify for the 'second tier' of protection - "serious grounds of public policy or public security". His case, put simply, is that he has and that the judge applied

[1] F4: respondent's bundle

the wrong test or at best was unclear about whether he applied the lower level or the second, intermediate, level.

13. It may be seen from the evidence that the appellant committed the two offences, for which he was convicted, on 16 January 2013. It may also be seen that the appellant spent time on remand and that 81 days of that period was deducted from his sentence. It is unclear whether that is 81 days prior to the conviction on 29 May 2013 or the date of sentencing on 26 June 2013. However, even if time is calculated from the earlier date, the appellant had completed his five year period just three days before the start of the 81 day period on remand. There is also reference by the sentencing judge to a period of being electronically monitored[2] but no information on whether that was in addition to the 81 days or part of it. I also have no information on whether the period was an unbroken 81 days or whether an arrest took place soon after the offences in January; plainly if that had been the case, the appellant may well have not completed a continuous period of residence in the UK outside prison. In the absence of this information, I take the issue no further and accept that the position of the respondent[3] and the judge that the appellant had acquired the status of a resident. Given this finding, the appellant's failure to respond to my request for further submissions is of no matter.

14. I now consider whether the appellant has made out his case that the judge applied the lowest level of protection when assessing whether the respondent had done enough to discharge her duty under the Regulations.

15. The appellant has criticised paragraphs 62 and 63 of the determination as being contradictory. In paragraph 62 the panel states:

> Insofar as the appellant is concerned we are concerned with the first level of protection: grounds of public policy, public security or public health. This is because the appellant does have a permanent right of residence.

16. At paragraph 63 the panel states:

> Regulation 19 of the 2006 Regulations provide as set out above with particular reference to Regulation 19(3)(b):
> "It is for the respondent to prove that the personal; conduct of the appellant does represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and it is accepted that there does need to be a sufficiently serious threat affecting one of the fundamental interests of society for an expulsion to be justified".

[2] At B7; respondent's bundle.

[3] The acceptance of permanent residence at paragraph 14 of the refusal letter is however contradicted by paragraph 22 but the Home Office Presenting Officer before the First-tier Tribunal appears to have proceeded on the basis that permanent residence had been acquired.

17. Plainly there is a conflict between the two paragraphs. I now consider whether that error is such as to invalidate the determination and such that I am required to set aside and re-make the decision. For the following reasons I find it is not.

18. It is plain from the determination as a whole that the panel was well aware of the higher level of protection and of the appellant's permanent residence. At paragraphs 4 and 7 it sets out the respondent's case which included application of the correct test of a sufficiently serious threat. The correct threshold is also stated at paragraphs 16, 25, 50 and 63. It noted the appellant's permanent residency at paragraphs 7, 14 and 15. It may be that the first sentence of paragraph 62 was simply a typographical error but notwithstanding that, I have considered whether the Tribunal undertook a full consideration of all the factors argued for and against the appellant and whether its assessment that the appellant posed a sufficiently serious risk to warrant deportation was supported by the evidence and properly reasoned. It is the respondent's case that regardless of the lack of clarity in paragraphs 62-63, the findings made in the subsequent paragraphs are such that no other outcome would have been likely.

19. The panel applied relevant case law (at paragraphs 60, 61, 64, 65 and 70). It also considered the Regulations and the factors that are required to be examined prior to any decision on deportation (paragraphs 50 and 64). As far as the appellant's circumstances are concerned, the panel noted the following facts: 1) the appellant's parents were divorced, 2) the appellant has been living with his father since his release from prison, 3) he has returned to the same employment he held prior to his conviction, and 4) his employer spoke highly of his work. However it also noted that: 1) the appellant had been convicted of two serious offences at a time when he was employed in the same job and when, therefore, he would have had no reason to commit those crimes, 2) it was likely that the offences were committed through alcohol abuse and peer pressure, 3) the appellant has for that reason been assessed as posing a medium risk of harm to the public, 4) it is the job of professionals to make the assessments as to risk posed, 5) the appellant did not provide any evidence that he undertook any alcohol dependency courses in prison, 6) although he said he no longer drank he had only been out of prison three months (and indeed in oral evidence had referred to one occasion when he had indulged), 7) he had not been rehabilitated and there were no reasonable prospects of rehabilitation at the present time, 8) he was in good health, 9) he was resourceful and would be able to use his skills to find work in Lithuania. The Tribunal did not accept that the appellant had no relatives or friends in Lithuania; indeed five years of absence is not that long for ties to have been severed. The panel undertook an article 8 assessment and accepted that the appellant had established private life here via his parents, friends and employment. It found that those ties could be maintained after removal.

There was no evidence of family life. It found that the evidence did not suggest the appellant was estranged from Lithuanian culture or the language and considered he was of an age where he could live independently.

20. The panel's findings are abundantly clear. The medium risk to the public and the lack of rehabilitation are findings which certainly support the conclusion that deportation is justified under reg 21. Notwithstanding the lack of clarity in paragraph 62, they amount to findings that support expulsion in circumstances where the potential deportee is a permanent residence. They are clearly matters which amount to a serious threat to public policy and public security. They relate to the appellant's own conduct and do not simply take account of the convictions. The appellant's circumstances, his previous conduct with regard to alcohol abuse, previous run ins with the police, lack of evidence of courses taken during prison, assessment of risk by a professional, the absence of rehabilitation and the fact that past employment and the presence of his family failed to rein in his offending are all matters which factor into the assessment of whether he poses a sufficiently serious threat to justify expulsion. I am of the view that having properly considered all the factors and circumstances, the panel reached sustainable which are not flawed by the clumsiness of paragraph 62.

Decision

21. The First-tier Tribunal did not make errors of law which render the determination unsustainable. The decisions to dismiss the appeal under the Regulations and under article 8 are upheld.

Anonymity

22. The First-tier Tribunal did not make an anonymity order and no request for one was made to me.

Signed:

Upper Tribunal Judge Kekić

30 October 2014