Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00225/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 October 2014	**On 30 January 2015**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DARIUS KERSYS
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Duffy
For the Respondent: In person

DECISION AND REASONS

1. Mr Kersys is a citizen of Lithuania born in 1975. He appealed against a decision of the Secretary of State made on 21 January 2014 to make a deportation order by virtue of Regulations 19(3)(b) and 21 of the Immigration (European Economic Area) Regulations 2006.

2. Mr Kersys had been convicted on 17 January 2013 at Basildon Combined Crown Court of three counts of making false representations to make gain for himself or another and causing loss to another or exposing another to risk. He was sentenced to 30 months' imprisonment on each count to run concurrently with each other making a total of 30 months. There was no recommendation for deportation.

3. He appealed against the Secretary of State's decision.

4. Following a hearing at Taylor House on 8 August 2014 Judge of the First-tier Mitchell allowed the appeal.

5. The Secretary of State sought permission to appeal which was granted by a judge on 4 September 2014.

6. In proceedings before me the Secretary of State is the Appellant. However, for ease of understanding I will keep the designations as they were before the First-tier Tribunal, thus Mr Kersys is the Appellant and the Secretary of State, the Respondent.

7. Having set out the applicable law the Tribunal's analysis of the evidence and his findings are at paragraphs 18 ff.

8. In summary, he found that the Appellant had been in the UK for more than five years but less than ten years having arrived in the UK in April 2004 [20]; although he had pleaded not guilty he now accepted the conviction and has no intention of re-offending [21]; in prison he was one of a small number of "trusted inmates" in the prison wing working in the kitchen and elsewhere [22]; he is at low risk of re-offending [23]; since leaving prison he has been in work [24].

9. He has four children in the UK born in 1999, 2001, 2002 and 2013 respectively. They had written letters in support [29]; he has no contact with any family members in Lithuania and has not been back since arrival [36]; he owns property but there are mortgage arrears [29]; he is working to pay off his debts; he "*obviously feels great embarrassment as a result of his imprisonment*" [25].

10. The Tribunal found that the Appellant has "*shown remorse*" and has an understanding of his crime [35].

11. The Tribunal noted the Respondent's claim that the "*conviction is one which may be regarded as serious and which compels the Secretary of State to give significant weight to the question of protecting society against crime and disorder*" [37]. It was accepted that the Appellant did not have an extensive criminal record and that his risk of reconviction and of harm is low [37]. However, the Respondent considered it not reasonable to leave the public vulnerable to the potential for him to re-offend. It was considered that the crime the Appellant undertook was "*sophisticated and not without having victims*" [37]. It had been an "*identity-based fraud*"[37].

12. However, going on to consider the jurisprudence the Tribunal, noting the low risk of re-offending concluded that there is "*nothing to suggest that the Appellant's personal*

conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" [39]. There is "*no evidence that the Appellant does constitute a genuine and serious threat to public policy or that his past conduct alone would constitute a threat to the requirements of public policy or that he has a propensity to crime*" [42].

13. The Tribunal next noted the requirement that before the relevant decision is made a decision maker must take account of considerations such as age, state of health, family and economic situation of the person, his length of residence, his social and cultural integration and the extent of his links with his country of origin.

14. In that regard the Tribunal found that the Appellant's three oldest children have been in the UK for more than seven years; they have spent their formative years here; their best interests would require that their father be present; he has been providing for them financially; he has been economically active. Also, he has "*embraced living in the UK*" and his family are "*well integrated*" here demonstrated by the fact that they speak English and very little Lithuanian. He has "*extremely limited links with his country of origin"* [44].

15. The Tribunal concluded by considering the Appellant's criminal record. Although he had a drink driving conviction he was treated by the sentencing judge as a man of previous good character. The offence which had led to the current proceedings had involved the Appellant and his wife spending some £112,000 of a deceased elderly neighbour's savings. The crime was described by the sentencing judge as a "*mean spirited and nasty piece of offending*". The Tribunal considered that there was "*no doubt that the crime would be viewed by the public as being despicable*" [46]. The crimes were premeditated and committed over a period of months. His wife was also convicted of the same crime but not imprisoned [48].

16. However, the Tribunal having noted the requirement of Regulation 21 concluded for the reasons given that it was "*impossible to say that the Appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*". The Respondent's letter and the Presenting Officer could not make clear what "*fundamental interest of society the Respondent is relying on"* [49].

17. At the error of law hearing before me Mr Duffy sought essentially to rely on the grounds.

18. The grounds note that the Appellant was convicted of three counts of dishonesty making false representations to make gain for self/another or cause loss to other/expose other to risk. Also, it noted the sentencing remarks and the sentence and that it was not a one off occurrence and was not opportunistic but rather, premeditated and sophisticated. The Respondent concluded that this was an extremely serious offence.

19. Whilst the risk of reconviction and of harm was assessed as low such was not the only factor to consider. The serious harm which would be caused by any similar instances of offending weighs heavily in favour of the public interest.

20. In addition, he had previously offended albeit for a "*dissimilar matter some years ago*". Such, nonetheless, indicated that he had not been deterred by a previous conviction. Such indicated a lack of regard for the law, a lack of remorse and an ongoing threat of criminal behaviour.

21. All in all the Tribunal failed properly to weigh the public interest in deporting the Appellant on serious grounds of public policy or public security. The appropriate weight had not been applied in finding that the Appellant does not pose a genuine, present and sufficiently serious threat.

22. In conclusion "*the serious nature of the Appellant's offending demonstrates that he clearly is a genuine, present and sufficiently serious threat and … the risk of future offending of a serious nature justifies the Appellant's deportation*".

23. Mr Duffy referred me to two cases. First, **Tsakouridis v Land Baden-Wurttemberg [2010] EUECJ C-145/09 a**t [60-62] where it was stated that Member States have an "area of discretion" within the limits imposed by the Treaty, to determine the requirements of public policy and public security. Second, **Jarusevicius (EEA Reg 21-effect of imprisonment) [2012] UKUT 00120 (IAC)** in particular the head note which includes "*6. Conspiracy to handle stolen goods is different from the kinds of offences referred to in the UKBA Instructions note but the Tribunal was entitled to conclude that it amounted to serious grounds within the meaning of regulation 21(3)…"*

24. The Appellant, in response, submitted a brief set of written comments in which he emphasised the judge's findings that he was at low risk of re-offending. He added that the judge's reasoning when looked at cumulatively was sound. He stated further that the judge had clearly considered the seriousness of the offence but had also noted the embarrassment of imprisonment on him and that he had shown remorse.

25. I reserved my decision.

26. In considering this matter I do not find merit in the Respondent's submissions.

27. It was not disputed that the Appellant having been resident in the UK for more than five years, imprisonment notwithstanding, has permanent right of residence.

28. The Tribunal noted the circumstances of the offence. In essence that the Appellant spent around £112,000 of a deceased elderly neighbour's savings. The Tribunal also noted the sentencing remarks namely that it was "*a mean spirited and nasty piece of offending*". Indeed he stated "*there is no doubt that the crime would be viewed by the public as despicable*".

29. It is clear thus that the Tribunal acknowledged the severity of the Appellant's crime which was reflected in the 30 month sentence of imprisonment.

30. The Respondent has sought to emphasise that the Appellant was not a first time offender. I see no merit in that point, the Tribunal stating correctly that he was treated by the sentencing judge "*as a man of previous good character*".

31. I also do not find merit in the comment that the serious harm which would be caused by any similar instances of offending weighs heavily in favour of the public interest. The Tribunal correctly noted that the National Probation Service Offender Manager had concluded the risk of reconviction and risk of serious harm as low. The Tribunal was entitled to accept that evidence.

32. The Tribunal also considered the wider situation and made findings including that the Appellant' three older children have been in the UK for more than seven years, are well integrated into life here, and speak little Lithuanian and that it is in their best interests to be with him. Also, that he has been economically active and that he has very limited ties with Lithuania. These were findings which, on the evidence, the Tribunal was entitled to make.

33. The difficulty for the Respondent, in my judgment, is that in relation to EU law, public interest has a very different meaning in that it is conditioned by the restrictions on exclusion and expulsion. They must be justified, as the Tribunal correctly noted, on grounds of public policy or public security. These "public interest provisos" are interpreted restrictively by the Court of Justice of the European Union.

34. I do not find the cases to which I was referred by Mr Duffy greatly to assist the Respondent. Each case depends on its own facts. In **Jarusevicius** the sentence was significantly longer, he was not of previous good character and showed little or no remorse or wish to reform. As for **Tsakouridis** whilst it is, indeed, appropriate for Member States to determine the requirements of public policy and public security in light of their national needs, how such policy is administered in the context of EEA law is a separate matter.

35. In that regard the judge also noted that under the Regulations the decision must be based exclusively on the personal conduct of the person concerned; that the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society; that matters isolated from the parties of the case or which relate to considerations of general prevention do not justify the decision; and that a person's previous criminal convictions do not in themselves justify the decision.

36. Public policy measures should only be taken if there is a likelihood that the offender will commit further offences or in some other way infringe public security or policy. In every case the personal conduct of the person involved, and in particular the indications of future risk or threats to public policy, must be assessed.

37. The Presidential Tribunal in **Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC)** stated at [32]:

> *"We observe that for any deportation of an EEA national … to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending."*

38. In this case the Appellant has permanent residence thus the public policy criterion is the more stringent one, namely "*serious grounds of public policy*".

39. The Tribunal considered the Appellant's relevant personal conduct. He went on to make findings that despite the nature and seriousness of the offences which resulted in the sentence of 30 months imprisonment, the Appellant was effectively a first offender and that he was at low risk of re-offending and of harm. These were findings which were clearly open to him on the evidence before him.

40. His conclusion from these findings that the Appellant's conduct did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, in other words that the Appellant's conduct did not satisfy the stringent public policy criteria, was one he was entitled to reach on the evidence and for which he gave adequate reasons.

Decision

The decision of the First-tier Tribunal shows no material error of law and that decision allowing the appeal under the EEA Regulations shall stand.

Signed Date

Upper Tribunal Judge Conway

No anonymity direction is made