Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00207/2015

THE IMMIGRATION ACTS

Heard at Birmingham Magistrates Court	**Decision & Reasons Promulgated**
On 19 April 2016	**On 27 April 2016**

Before

UPPER TRIBUNAL JUDGE H H STOREY

Between

MR ANDRIUS MASCOLAITIS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Blundell, Counsel
For the Respondent: Mr D Mills, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Lithuania aged 32. He came to the UK on 4 May 2008. He resided in Northern Ireland from 2008-2013, taking occasional work in the building trade on a self-employed basis. He did not register as self-employed with HMRC and never paid tax or national insurance on his earnings. On 17 August 2011 he was convicted at Newry Magistrates Court of abstracting electricity and cultivating cannabis. He was not given a custodial sentence or community penalty, the matter being dealt with by fines and ancillary orders. In 2013 the appellant went to Norway but returned to the UK on 18 March 2014 and found work again on a self-employed basis as an online retailer earning

between £2,000 and £3,000 a month but again not registering as self-employed with HMRC. The appellant has family in Lithuania, namely his mother, father and sister, with whom he is in regular contact.

2. In November/December 2014 the respondent began action to deport the appellant. It appears (so far as is ascertainable from the file and Mr Mill's own perusal of the Home Office file at my request) that this action was initiated because it came to light in November 2014 that on 25 June 2002 at Klapeida Regional Court in Lithuania the appellant had been convicted of murder and theft for which he was sentenced to 9 years imprisonment. On 20 January 2004 the Court of Appeal in Lithuania had varied the sentence to 6 years imprisonment.

3. On 3 December 2014 the respondent served the appellant with a notice that he was liable to deportation in accordance with the Immigration (European Economic Areas) Regulations 2006. On 27 May 2015 the appellant lodged an in-time appeal against this decision. His appeal came before First-tier Tribunal (FtT) Judge Carlin who in a decision sent on 24 November 2015 dismissed his appeal.

4. The judge made clear in his decision that he did not find the appellant to be a credible witness and in particular did not accept that after returning to Lithuania in 2013-14 he lacked family support and did not accept that the appellant had been self-employed throughout all of the period 2008-2013.

5. The judge said he considered both sets of convictions committed by the appellant were serious offences. He stated that the 2002 conviction in Lithuania "speaks for itself. Although I was given no detail as to the circumstances of the offence in question, I accepted that the conviction was for a particularly serious offence which resulted in death…" In regard to the 2011 offences of cultivation of cannabis and electricity, he noted the submissions made on the appellant's behalf that the offences in themselves were "not the most serious", and noted that on the basis of the appellant's statement he was not involved with others and was producing cannabis for his own use. However, he concluded:

> "17. … even allowing for the fact that I have not been provided with any information to indicate that the cultivation of cannabis was not of a few plants only with no intention to supply others, I was of the view that this is an offence which involves a significant amount of planning and represents a significant breach of the criminal law. The same can be said of the offence of abstracting electricity."

6. He stated that he did not therefore accept the submission that these were not serious offences.

7. The judge next considered the appellant's employment history noting that his failure to register as self-employed with HMRC revealed "a man who has scant regard for the law". At [19] he stated:

> "The appellant is self-employed. His business cannot be described as well established in that it has not been running for a lengthy period of time. It is also dependent on the appellant. Should he fall ill, the business may not operate and the appellant may be without an income. Given that the appellant has scant regard for the law and has committed an offence involving dishonesty in the

> past, I take the view that there is a significant risk that the appellant may commit further like offences in the future. Moreover, when in times of difficulty in the past, the appellant took to taking illicit drugs and cultivating illicit drugs. There is a significant risk that the appellant may commit like offences in the future should his business hit difficulties. Given the appellant has committed the offence of cultivating drugs, I was of the view that any future offending may involve supplying drugs. The appellant has committed a particularly serous offence of violence in the past. Even whilst accepting that the appellant is older now and the offence was committed some 13 years ago, there is a risk of offences of violence in the future. I therefore deal with this appeal on the basis that the appellant is a person who is likely to commit further offences should he remain in the UK."

8. At [23] he added:

> "In my view the fact the appellant may commit [further offences of the type outlined earlier which included risk of offences of violence – see [19]]- represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In coming to this conclusion, I was influenced by the risk of further offending generally but in particular the risk of cultivation and supply of illicit drugs … In making my decision, I do not rely on the appellant's criminal convictions but also on [his] actions in carrying out self-employment whilst making no effort to pay tax and National Insurance. This indicates somebody who has scant regard to the law."

9. The judge also considered that so far as rehabilitation was concerned the evidence was that the appellant had strong links to Lithuania and the disadvantage of not being able to obtain work there was outweighed by the support the appellant would get from his family. He concluded that the fact that the appellant had got some employment tin the UK despite no family support and with inevitable language difficulties "led me to conclude that he is likely to get employment in Lithuania".

10. The grounds of appeal challenge (i) the "huge leap" the judge made from the evidence that the cultivation of cannabis was for his own use to the finding that there was a significant risk of the appellant committing offences in the future that may involve supplying drugs; (ii) the lack of any evidential basis for the judge's conclusion that the appellant was at risk of committing further violent offences; (iii) the failure of the judge when considering the 2002 offence to take into account that the appellant was only 16 at the time; (iv) the lack of evidential basis for the judge's finding that the appellant would be able to obtain support from his family in Lithuania and would be able to find work there, notwithstanding the appellant's evidence that he could not get a job in Lithuania in 2013 and had to use all his savings from the UK to live there.

11. In deciding whether the judge materially erred in law it is helpful to first set out the precise text of regulation 21 and then to identify two cases that have a particular bearing on this case. In order for a deportation decision to be compatible with the 2006 Regulations, it must adhere to the criteria set out in regulation 21, which provides:

> **"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.

(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 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.

(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.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease to which section 38 of the Public Health (Control of Disease) Act 1984 applies (detention in hospital of a person with a notifiable disease) shall not constitute grounds for the decision; and

(b) if the person concerned is in the United Kingdom, diseases occurring after the three month period beginning on the date on which he arrived in the United Kingdom shall not constitute grounds for the decision."

12. In Straszewski v Secretary of State for the Home Department [2015] EWCA Civ 1245 Moore Bick LJ was concerned with the cases of persons who had acquired a right of permanent residence, but in the course of his judgment he identified key features that must govern all proportionate deportation decisions made under the Regulations, including that: the burden is proof is on the respondent ([12]); that a deportation measure is an exception to the principle of free movement of persons and hence must be applied restrictively ([13]); that the necessary threshold is one of sufficient severity; it is not enough that a person's conduct may adversely affect the fundamental interests of society ([25]); that the principal focus must be on propensity to re-offend ([15], [16]); and that decisions must not take into account deterrence or public revulsion in the same way as is justified under non-EEA deportations. The last two points were stated in [30] in the following terms.

> "… is to be determined solely by reference to the conduct of the offender (no doubt viewed in the context of any previous offending) and the likelihood of re-offending. General considerations of deterrence and public revulsion normally have no part to play in the matter."

13. At [25] Moore-Bick LJ noted:

> ""Public policy" for these purposes includes the policy which is reflected in the interest of the state in protecting its citizens from violent crime and the theft of their property. These are fundamental interests of society and therefore, although regulation 21(3) does not speak in terms of the risk of causing harm by future offending, in a case of this kind that is the risk which the Secretary of State is called upon to assess when considering deportation. That requires an evaluation to be made of the likelihood that the person concerned will offend again and what the consequences are likely to be if he does. In addition, the need for the conduct of the person concerned to represent a "sufficiently serious" threat to one of the fundamental interests of society requires the decision-maker to balance the risk of future harm against the need to give effect to the right of free movement. In any given case an evaluative exercise of that kind may admit of more than one answer. If so, provided that all appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in the sense of falling outside the range of permissible decisions."

14. The other case is MC (Essa principles recast) [2015] UKUT 520 (IAC) The headnote to that decision states:

> *1. Essa rehabilitation principles are specific to decisions taken on public policy, public security and public health grounds under regulation 21 of the 2006 EEA Regulations.*
>
> *2. It is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (regulation 21(5)(c)) that it becomes relevant to consider whether the decision is proportionate taking into account all the considerations identified in regulation 21(5)-(6).*
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> *3. There is no specific reference in the expulsion provisions of either Directive 2004/38/EC or the 2006 EEA Regulations to rehabilitation, but it has been seen by the Court of Justice as an aspect of integration, which is one of the factors referred to in Article 28(1) and regulation 21(6) (Essa (2013) at [23]).*

4. Rehabilitation is not an issue to be addressed in every EEA deportation or removal decision taken under regulation 21; it will not be relevant, for example, if rehabilitation has already been completed (Essa (2013) at [32]-[33]).

5. Reference to prospects of rehabilitation concerns reasonable prospects of a person ceasing to commit crime (Essa (2013) at [35]), not the mere possibility of rehabilitation. Mere capability of rehabilitation is not to be equated with reasonable prospect of rehabilitation.

6. Where relevant (see (4) above) such prospects are a factor to be taken into account in the proportionality assessment required by regulation 21(5) and (6) ((Dumliauskas [41]).

7. Such prospects are to be taken into account even if not raised by the offender (Dumliauskas [52]).

8. Gauging such prospects requires assessing the relative prospects of rehabilitation in the host Member State as compared with those in the Member State of origin, but, in the absence of evidence, it is not to be assumed that prospects are materially different in that other Member State (Dumliauskas [46], [52]-[53] and [59]).

9. Matters that are relevant when examining the prospects of the rehabilitation of offenders include family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like (Essa (2013) at [34]). However, lack of access to a Probation Officer or equivalent in the other Member State should not, in general, preclude deportation (Dumliauskas [55])

10. In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor (Dumliauskas [44] and [54]). Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 EEA Regulations require is a wide-ranging holistic assessment. Both recognise that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence (Dumliauskas at [46] and [54]).

Analysis

15. I remind myself that I am not entitled to interference in the decision of the judge unless it is vitiated by legal error and that "[i]n any given case an evaluative exercise of that kind may admit of more than one answer. As noted by Moore-Bick LJ in Straszewski at [25] then, "[i] so, provided that all appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in the sense of falling outside the range of permissible decisions."

16. I am not persuaded by the appellant's third and fourth grounds (as I have numbered them) because even though the judge's findings as regards family support and employment prospects in Lithuania were different from the appellant's own account, the judge did not find his evidence credible in certain respects. The grounds do not as such challenge the judge's primary findings of fact and in any event I am satisfied that it was open to the judge to come to those findings, even if the finding regarding prospects of work in Lithuania did border on the speculative. However, I see force in the first two

grounds and observe that Mr Mills himself accepted that the judge had fallen into error in his assessment of the core question of risk of re-offending.

17. Two essential planks to the judge's finding that the appellant represented a genuine, present and sufficiently serious threat affecting fundamental interests of society were that he would engage again in drug offending extending to supplying drugs and would commit crimes of violence. However, neither of these planks had a proper or sufficient evidential foundation. On the judge's own description of the facts, there was nothing to show that the appellant had cultivated cannabis fin significant quantities or to supply others. The offences committed in Newry had not attracted any custodial sentence or community order. If the risk was only of similar offences occurring in the future, it could not fairly be described as a sufficiently serious one posing a threat "affecting the fundamental interests of society". The judge was only able to get to the conclusion that they would be sufficiently serious by presuming such drug offences would escalate into offence of supply. Not only was there no evidential basis for that but the appellant had no history of supply activities of any kind. It is true the judge appeared to consider that he could reach such a conclusion based on the fact that the appellant's lack of registration as self-employed with HMRC showed "scant regard for the law", but the appellant's own history of offending in the UK did not in any way suggest that his scant regard to the law in relation to paying taxes had inclined him to commit other criminal offences. In addition the judge's assessment that the appellant would commit such offences was in turn predicated on the appellant falling ill, even though there was no evidence that the appellant had poor health. The judge's reasoning on this issue was riddled with non-sequiturs.

18. The judge's evidential basis for the second main plank of his reasoning is even more lacking. Despite avowing that he fully appreciated that regulation 21(5) proscribed reliance solely on a previous criminal conviction, the judge's subsequent assessment depended heavily on the fact of past convictions. The judge proceeded to conclude that the appellant posed a risk of committing violent offences in the future, even though the appellant had no conviction for violence for the past 13 years and when he committed his only offence of violence, particularly grave as it was - it was when he was 16. On the judge's own reasoning – that the appellant's criminality was likely to manifest itself when he faced difficulties – the appellant could have been expected to commit violent offences in Northern Ireland at the time when he was cultivating cannabis and abstracting electivity. He plainly didn't. Effectively the judge treated the murder conviction in Lithuania as one that demonstrated a continuing propensity to commit violent offences, despite there been no evidence whatsoever to suggest that there was any significant risk of that propensity translating itself into action.

19. Another shortcoming in the judge's determination was that despite reaching a conclusion that the appellant represented a "present" threat, there was nothing to suggest that the judge gave any weight at all to the fact that the appellant had not committed an offence of any kind since mid-2011, that is, nearly 5 years ago. It is impossible to avoid the conclusion that for the judge the past offences were regarded as decisive notwithstanding the need to show present threat and, as part of that, a significant future risk of re-offending.

20. For the above reasons I consider that the judge materially erred in law and his decision must be set aside.

Decision re-made

21. I turn to consider whether I am in a position to re-make this decision without further ado. Neither party has sought to adduce any further evidence. I have decided that I am in a position to proceed on the basis of the evidence before me.

22. Even on the basis of the judge's principal findings of fact relating to the appellant's lack of credibility and the reality of his incomplete working history in the UK and the real prospects of him being able to obtain both family support and employment back in Lithuania, I consider that the deportation order is not consistent with the criteria set out in regulation 21. In particular, the evidence does not establish that the appellant represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society in the UK.

23. It is clear from the agreed chronology of events that the decision to take deportation action would not have been made in respect of the appellant's last offences committed in 2011 on their own as they did not come anywhere near qualifying him for deportation action. Those offences, to repeat, did not even attract a custodial sentence, and on the findings of fact made by the First-tier Tribunal judge (which I have no reason to depart from) involved only cultivation of cannabis for the appellant's personal use. The only reason that deportation action was taken – after a very considerable delay – was because it came to light that the appellant had been convicted of murder in 2002. It is hard to understand why such information was not unearthed earlier, but Mr Mills said that in 2014 procedures were less rigorous than they are today.

24. It is entirely understandable that information regarding the 2003 offence of aggravated murder should cause the case to be considered for deportation action, but at the same time, in order to comply with the 2006 Regulations, such consideration was required to address, inter alia, whether there was any basis for considering that the 2002 offence demonstrated a propensity to re-offend in the form of a crime of violence. One looks in vain in the respondent's supplementary decision letter of June 2015 for any such consideration. What was said was simply this:

> "Even though the exact circumstances of your offence in Lithuania are not known, on 25 June 2002 … you were convicted of murder and theft for which you were sentenced to 9 years imprisonment … [reduced in January 2004 to 6 years].
>
> The consequences for all those involved in, or touched by, violent crime are enormous. You did not give any thought for the consequences of your actions. Your victim would have doubtless suffered great pain and the sense of fear by the events which led to there [sic] death. Moreover, incidents of this nature can have a wider impact upon society in that they create a climate of fear and insecurity in our communities and especially the impact of this appalling crime on the family and friends".

25. Further on, the refusal letter observed that:

> "You have demonstrated through your actions that you are capable of causing psychological and physical harm to others. You appear to have given no consideration to the consequences of your actions. The nature of your offence shows that you have the potential to act violently, with no provocation, especially when you feel wronged, this resulted in the death of the victim."

26. The troubling feature of these statements is that there was nothing on the file to suggest that the respondent had any details regarding the 2002 offence beyond the bare criminal conviction information which did not give any details about the circumstances of the crime.

27. Whilst it was within the range of reasonable responses for the respondent to infer from these bare details that the crime was one a grave one and perhaps that it was inflicted to cause pain and suffering, the same cannot be said for the observation that "[y]ou did not give any thought for the consequences of your actions". That may have been the case, but it was not necessarily so and one is left with the strong impression that this paragraph was a stock one applied without regard to the appellant's particular circumstances. That is also suggested by other passages in the decision letter, e.g. "[y]ou have shown no remorse for your behaviour" and "[y]ou have the potential to act violently, with no provocation ..." There was no evidential foundation for those findings. Another passage almost suggests that the respondent wrongly considered the appellant to have been a frequent offender ("… you appear to have given no consideration to the time and public funds spent each time you offend …").

28. The impression that the decision letter did not pay proper regard to the appellant's actual case was reinforced by another paragraph of the decision letter dealing with the appellant's drug convictions, which appears to be based on the mistaken premise that he had been convicted of supply: "The trade in illicit drugs has a severe and negative impact on society…since addicts are often driven to commit ancillary crimes in order to finance their habit, those involved in supplying drugs are involved in a process that has harmful consequences for society as a whole…" Nor does the language of this letter inspire confidence that its author understood that in EEA deportation appals regard cannot be had to deterrence and public revulsion: see Straszewski.

29. It was entirely within the range of reasonable responses for the respondent to have stated, on the basis of the 2002 offence, that "The nature of your offence shows that you have the potential to act violently"; but, as already noted, what the respondent was further required to do under the 2006 Regulations was asses whether this propensity was one that posed a present and sufficiently serious threat and in that context to consider whether the fact that the appellant was a minor at the time of the offence and that he had not committed any violent offence in the 13-14 years since were factors that made any difference.

30. On the basis of the evidence before me there is an insufficient evidential basis for the conclusion that the appellant poses a present threat of committing violent offences. To repeat what was said earlier when finding a material error of law, the appellant had not committed any offence of violence for the past 13-14 years, despite on the judge's findings. On the evidence before me, given that the appellant had not committed any further drugs offence since 2011, there was an insufficient basis for considering that he posed a present

threat of committing such an offence again – and certainly not one involving supply (as the First-tier Tribunal judge had thought). I remind myself that in EEA deportation cases, the onus is on the respondent to justify restriction of a person's exercise of freedom of movement. In light of the evidence before me, the only conclusion I can reach is that the respondent had not discharged the onus on her of showing that the deportation decision was proportionate. This conclusion is not to belittle the horror of the 2002 conviction for murder or the fact that the appellant's drug offence (and abstraction of electricity offence in 2011 were serious offences, but it is to underline that to cross the thresholds set out in regulation 21 of the 2006 EEA Regulations it is not enough to show a history of commission of serious offences without regard to temporal considerations which include that there had been no further crime of violence for over 13 years and no offence of any kind since 2011.

31. As regards rehabilitation, since the appellant was not someone who had acquired permanent residence, significant weight cannot be attached to the prospects of rehabilitation (see MC) and I do not do so. However, it cannot be said that in this case rehabilitation was of any particular relevance since in the absence of any present threat posed by re-offending of a type that would affect fundamental interests of society, the fact that the appellant might be able to live and work in Lithuania and be supported by family there was irrelevant. It is a blot on the appellant's character that he has not registered with HMRC and he may wish to bear in mind that albeit a civil matter his failure to do so will be a relevant factor should he commit any further criminal offences and face further action to deport. It may also impact negatively on any future claim by him for permanent residence as it makes it much more difficult for him to demonstrate continuous economic activity.

32. For the above reasons:

The First-tier Tribunal materially erred in law.

The decision I re-make is to allow the appellant's appeal against deportation under the 2006 Regulations.

Signed 

Date: 23 April 2015

Judge of the Upper Tribunal