Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00303/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 July 2017	**On 7 July 2017**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALMAZA IVASKEVICIENE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Staunton, Home Office Presenting Officer
For the Respondent: Mr S Hamid, of Freemans Solicitors

DECISION AND REASONS

1. The Secretary of State for the Home Department (Appellant) appeals against the decision of Judge of the First-tier Tribunal Malone who, in a decision promulgated on 4 November 2016, allowed the appeal of Ms Almaza Ivaskeviciene (Claimant) against the Appellant's decision of 6 June 2016 to make a deportation order against her pursuant to regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations), and a supplementary decision dated 6 July 2016.

Background

2. The Claimant is a national of Lithuania, date of birth 27 November 1976. She has 2 adult children, Toras Ivaskevicius born on 14 February 1992 and Gabriele Ivaskeviciute born on 6 May 1995. She also has a grandchild, YI, the son of Gabriele, born in the UK on 16 February 2014. The Claimant also has a minor son, DI, born in London on the 20 November 2005. The Claimant confirmed that her minor son is being cared for by her parents, that her ex-partner, Roman Ismailov, the father of DI, sees him every day, and that both her adult children and her grandchild also reside with her parents.

3. The Claimant maintains that she entered the UK on 7 March 2005 following the arrival of her parents, also Lithuanian nationals, in 2004. In a letter dated 9 June 2016 the Claimant's parents described themselves as disabled old age pensioners. There were letters from the DWP, dated 19 February 2016 and 5 April 2016 indicating that both her parents were in receipt of Disability Living Allowance.

4. A letter from Caroline Budu, a Specialist Nurse, dated 9 February 2016, confirmed that the Claimant had been diagnosed with Parkinson's disease in Lithuania when she was 17 years old and that she had been under the care of Consultant Neurologist Dr J Fearnley and Caroline Budu at the Royal London Hospital since 2005. The Claimant took a combination of medication every day to control the symptoms of her disease.

5. The Claimant first came to the adverse attention of the UK authorities on 5 March 2015 when she was cautioned for shoplifting. Over the period 17 June 2015 to 2 May 2016 she was convicted of 10 criminal offences. These included 3 convictions for failing to attend or remain for the duration of a follow-up assessment following a test for Class A drugs. On 24 June 2015 she was convicted of facilitating the acquisition of criminal property and received a community order. On the same occasion she was convicted of theft from a motor vehicle and was also sentenced to a community order. These community orders were later varied, on 11 February 2016, to a sentence of 6 weeks imprisonment suspended for 12 months, to run concurrently. On 10 September 2015 she was convicted of handling stolen goods and received a fine and a community order. This sentence was also varied on 11 February 2016 to a suspended imprisonment of 6 weeks, suspended for 12 months. She received a further conviction on 15 October 2015 for failing to comply with the requirements of a community order, and another conviction for failing to comply with a community order on 11 February 2016. On 2 May 2016 the Claimant was convicted of shoplifting and sentenced to 6 weeks imprisonment. On the same date she was convicted of having committed a further offence during the operational period of a suspended sentence order (that resulting from the original conviction of 11 September 2016)

and her suspended sentence was activated and she received a further sentence of 6 weeks imprisonment, to run consecutively.

6. On 16 May 2016 the Claimant was served with a notice that she was liable to deportation in accordance with the 2006 Regulations and requested to provide reasons as to why she should not be deported. No reasons were received from her and a deportation order was signed on 6 June 2016. The Appellant subsequently received evidence sent on behalf of the Claimant including a letter, dated 9 June 2016 from her parents and a letter dated 21 June 2016 from her ex-partner.

7. The Appellant noted the Claimant's claim to have worked as a self-employed cleaner who was paid cash in hand. No evidence however was provided in support of this assertion. The Appellant did not accept that the Claimant had resided in the UK in accordance with the 2006 Regulations for a continuous period of 5 years. She was therefore treated as an EEA national who had not attained a permanent right of residence. The Appellant did not accept that the Claimant had continuously resided in the UK for 10 years in accordance with the 2006 Regulations. This was because she failed to provide evidence of lawful residents for 10 years prior to her recent imprisonment and because she had failed to provide evidence that she had acquired a permanent right of residence.

8. Having regard to the Claimant's history of offending the Appellant concluded that she was a persistent offender. Although the details of her offending were not generally known the Appellant was of the view that crimes of dishonesty were not victimless and that they had a wider impact upon society. The Appellant noted that the Claimant received 3 convictions relating to Class A drugs and considered that drug offences had a serious detrimental impact on the health and well-being of those who became addicted to them and had adverse consequences for society. The fact that the Claimant failed to comply with court orders demonstrated a lack of regard for the law and indicated that she had not been deterred by previous convictions. She was consequently said to have a propensity to reoffend. There was said to be no evidence that the Claimant used her time in the UK constructively and there was no evidence that she had adequately addressed the reasons for her offending behaviour. The Appellant concluded that the Claimant posed a genuine, present and sufficiently serious threat to the public such as to justify her deportation on grounds of public policy.

9. The Appellant considered the proportionality of the Claimant's deportation, noting that she had been diagnosed with Parkinson's disease and that she took medication every day to control the symptoms. There were said to be no evidence that the Claimant had culturally integrated in the UK. The Appellant noted the letter from the Claimant's parents but concluded that she may have relatives and friends in Lithuania who could assist with her reintegration and that she had spent her formative, youth and adult years in Lithuania and

would be familiar with the culture and customs of that country. The Appellant was not satisfied that the Claimants son, born on 20 November 2005, was resident in the UK, or that the Claimant had a genuine and subsisting relationship with her son. There was no evidence before the Appellant that the Claimant had undertaken any rehabilitative work whilst in custody and there was no evidence of any significant integration into the community in the UK. The fact that her parents resided in the UK did not stop the Claimant from committing offences.

The decision of the First-tier Tribunal

10. There was no appearance by the Claimant at her appeal before the FTT. The case file indicates that she was granted temporary admission on 21 July 2016. The Claimant had not instructed any legal representative to represent her at her appeal hearing and there was no attendance by any family member or other person on her behalf. The Presenting Officer at the FTT hearing provided written submissions.

11. In his decision the judge set out the limited evidence, as described above, relating to the Claimant's immigration history, her family relationships, her state of health and her criminality. It was unclear to the judge whether the Claimant actually resided with her parents as the letter from the Specialist Nurse was addressed to the Claimant at a different address.

12. The judge found that the Claimant's assertion to have resided in the UK continuously since March 2005 was corroborated by the statements from her parents and was further corroborated by the letter from the Specialist Nurse. At [28] the judge found, on the balance of probabilities, that the Claimant had resided in the UK for a continuous period of at least 10 years prior to the decision to deport her. At [29] the judge reasoned, by reference to Regulation 21(4) of the 2006 Regulations, that the Claimant could not be removed except on imperative grounds of public security. The judge found that the Appellant's decision was not in accordance with the law as it was not in accordance with the 2006 Regulations.

13. The judge proceeded to consider, in the alternative, whether the Claimant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (with reference to Regulation 21(5) of the 2006 Regulations). The judge noted that the Claimant had not been charged with possession of or dealing in Class A drugs. The judge noted that the Claimant had been convicted of petty theft and handling stolen goods and breaching court orders and the terms of suspended prison sentences. The judge noted that the deportation had to comply the principle of proportionality and had to be based exclusively on the Claimant's personal conduct. At [47] the judge indicated that he had to "… decide whether the [Claimant's] conduct represents a genuine,

present and sufficiently serious threat affecting one of the fundamental interests of society."

14. At [49] the judge noted that the Claimant's criminal convictions spanned a period of less than a year but that she had not been convicted of any offences from 2005 until 2015. The judge found it likely that something had triggered her criminal offending. At [50] the judge concluded that the Appellant's offending fell into the category of "relatively minor ones". At [51] the judge stated,

> I am not prepared to conclude that the [Claimant] is a persistent offender. I have found she has resided in this country continuously for a period in excess of 10 years. Her criminal offending is confined to the last year of her residence. In those circumstances, I have come to the clear conclusion that her conduct does not represent a sufficiently serious threat affecting one of the fundamental interests of society. Without wishing to play down her offences, the [Claimant] is a nuisance rather than a hardened criminal. Her parents stated that what she had done was "wrong" and a "big shame". The evidence before did not lead me to conclude that she is an evil individual. It leads one to conclude she needs help. She is clearly very seriously ill, at least physically.

15. Having found that the Claimant did not constitute a genuine, present and sufficiently serious threat, the judge addressed the question of proportionality. After again summarising the limited evidence relating to the Claimant's residence in the UK and her family relationships, and noting the absence of any details of her social or cultural integration in the UK, the judge satisfied himself that the Claimant had no links with Lithuania and had not been there since 2005. The judge accepted that all of the Claimant's family were in the UK. Having considered all of the evidence the judge concluded that the Claimant's deportation would be disproportionate and that the public interest did not require it. The judge consequently allowed the appeal under the 2006 Regulations.

The Grounds of Appeal

16. The grounds content that the judge misdirected himself as to the issue of imperative grounds. In order to avail herself of the highest level of protection, the Claimant had to first demonstrate her entitlement to permanent residence. The judge failed to take into account the Supreme Court decision in *SSHD v Franco Vomero (Italy)* [2016] UKSC 49 (*FV(Italy)*) when determining whether the Claimant was entitled to the 'imperative grounds' level of protection. The grounds further contend that the judge's finding that the Appellant was not a persistent offender was irrational and not one rationally open to him on the evidence. It was further submitted that the judge failed to give appropriate weight to the Claimant's offending, which involved offences relating to drug use. The judge was not subsequently entitled to conclude that the Appellant did not constitute a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

17. Mr Staunton expanded upon the grounds in his oral submissions. The judge failed to consider the break in the Claimant's continuous residence caused by her imprisonment. The commission of 10 offences over a period of less than 12 months demonstrated persistence in offending and the judge could not rationally conclude that the Claimant was not a persistent offender. The fact that the Claimant had resided for a 10 year period in the UK without any convictions did not entitle the judge to conclude that the Appellant's offending was not persistent, and the nature of the offending was irrelevant to the question of whether she was a persistent offender.

18. Mr Hamid submitted that the judge was entitled to his conclusions. He referred me to a dictionary definition of persistent, meaning "continuing to exist and occur over a long time". The judge was aware that the Claimant had been resident in the UK since March 2005 and was entitled to take that period of time into account in determining the issue of persistence, which was, in turn, relevant to the question of whether she posed a genuine, present and sufficiently serious threat to the fundamental interests of society. The nature of her offending was also relevant to this fundamental issue, and the judge was entitled to conclude that the offending was very much towards the lower end of the spectrum.

Discussion

19. Mr Hamid did not seek to persuade me that the judge had not erred in his assessment of the Claimant's entitlement to the 'imperative grounds' level of protection. Regulation 21(4) of the 2006 regulations provides, so far as material:

> 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;

20. In *MG (prison – Article 28(3)(a) of Citizen's Directive) Portugal* [2014] UKUT 392 (IAC) the Upper Tribunal considered the judgement of the Court of Justice of the European Union in case C– 400/12 (*SSHD v MG*) with respect to the meaning of the "enhanced protection" provision. The CJEU case made clear that the 10 year period should be calculated by counting back from the date of the expulsion decision and that, in principle, periods of imprisonment interrupted the continuity of the period of residence. A period of imprisonment during those 10 years did not however necessarily prevent a person from qualifying for enhanced protection if that person was sufficiently integrated, even though, according to the same judgement, a period of imprisonment had a negative impact in so far as establishing integration was concerned.

21. In *Ahmed Warsame v SSHD* [2016] EWCA Civ 16 Counsel for the Secretary of State for the Home Department accepted that there is a "maybe" category of cases under *MG* where a person has resided in the host state during the ten years prior to imprisonment, depending on an overall assessment of whether integrating links have been broken, and that in such cases it might be relevant to determine, by way of overall assessment, the degree of integration in the host member state or the extent to which links with the original member state have been broken.

22. It is readily apparent from the judge's decision that he did not take into account the two sentences, each of 6 weeks imprisonment, which ran consecutively, and which, in principle, broke the Claimant's continuous 10 years residence for the purposes of Regulation 21(4). Given the break in continuous residence it was incumbent on the judge, in considering whether the Claimant was nevertheless entitled to the highest level of protection, to undertake a detailed assessment as to whether she fell into the 'maybe category' identified in *Warsame*. In my judgement the First-tier Tribunal decision does not contain an adequate analysis of whether the Claimant's integration was of a degree sufficient to attract the operation of the highest level of protection.

23. The Grounds of Appeal additionally argued that the Claimant was only entitled to the highest level of protection if she had first achieved permanent residence. A majority of the Supreme Court favoured the view that possession of a right of permanent residence was not needed in order to enjoy enhanced protection under Article 28(3)(a) of Directive 2004/38 (the equivalent of Regulation 21(4)(a) of the 2006 Regulations). However, as a minority regarded the position as being at least unclear, the Court referred this question to the CJEU. Given the indication of the majority of the Supreme Court, and the wording of the relevant Directive and the manner of its incorporation into the corresponding Regulation, I am satisfied that the Claimant does not need to achieve permanent residence in order to avail himself of the imperative level of protection.

24. There was no assessment by the judge as to whether the Claimant had attained a right of permanent residence. On the evidence before the judge there appears to be little cogent material upon which the judge could, in any event, have reached such a conclusion. Instead the judge considered, in the alternative, whether the Claimant's expulsion was justified even on the lowest level of protection by reference to Regulation 21(5) and (6).

25. The judge concluded that the Claimant was not a persistent offender despite having received 10 convictions in less than a year. In support of this conclusion the judge referred to the absence of any convictions from March 2005 to June 2015, and that her offences demonstrated that she was a 'nuisance' as opposed to a 'hardened criminal'. With

the greatest respect to the judge, and mindful of the very high test that must be met in order to find an error of law on the basis of irrationality, in my judgement the judge was not rationally entitled to conclude that the Claimant was not a persistent offender. It is clear that the Claimant committed a large number of criminal offences within a relatively short space of time. The fact that she had not received any convictions between March 2005 and June 2015 does not logically bear on the question whether the Claimant became a persistent offender. I draw support from the decision in *Chege (*"*is a persistent offender*"*)* [2016] UKUT 00187 (IAC). Although this decision relates to the definition of "persistent offender" in s.117D of the Nationality, Immigration and Asylum Act 2002, and is not an EEA decision, it is of assistance in determining whether the judge was entitled to conclude that the Appellant was not a persistent offender. The headnote in *Chege* indicates that a persistent offender is someone who keeps on breaking the law. That does not mean that the person has to keep on offending until the date of the relevant decision or that the continuity of the offending cannot be broken. A persistent offender is not a permanent status that can never be lost once it is acquired, but an individual can be regarded as a persistent offender even though they may not have offended for some time. The question whether a person fits that description will depend on the overall picture and pattern of their offending over their entire offending history. Each case will turn on its own facts. The Claimant's offending history covers a short space of time and her pattern of offending within that time is characterised by frequent and repeated offending. The offending occurred until the decision to expel her.

26. The nature and relative low-level of the Claimant's offending also does not logically bear on the question whether she is a persistent offender. In relying on the absence of any offending prior to the commencement of her offending history and the nature of her offending the judge has taken into account matters that do not rationally support his ultimate conclusion. In these circumstances I am satisfied that the judge was not entitled to conclude that the Appellant was anything other than a persistent offender.

27. The question whether an individual is a persistent offender is not however the test justifying expulsion under the 2006 Regulations. Even if the Claimant is a persistent offender it does not follow that she represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society. The fact that she is a persistent offender is a significant factor to take into account, but it is not determinative. The ultimate question as to whether she does represent the requisite threat will depend on a thorough assessment of the nature of her offending, the reasons for her offending and, in particular, an evaluation of whether she is likely to continue to offend. This is not an assessment that has been undertaken by the judge. At [51] the judge concludes that the Claimant "needs help" but this appears to be the extent of his assessment as to whether the Appellant will continue to commit, albeit relatively low level offences.

I am satisfied that a failure to adequately assess the likelihood of the Claimant continuing to offend given her history of offending, her lack of integrative links and her apparent abuse of drugs, constitutes a material error of law.

28. Nor am I satisfied that the judge's conclusions under regulation 21(6) are sustainable. The judge had very little evidence before him relating to the nature or quality of the Claimant's ties in the UK and the degree of her integration. At [54] the judge noted the absence of any evidence that the Claimant ever worked, and at [56] he notes the absence of any details of her social and cultural integration. In the same paragraph the judge speculates that the Claimant "no doubt… has friends" but there is no evidential basis for this observation. At [57] the judge accepts the assertions by the Claimant's parents that she has no relatives in Lithuania to whom she could turn but there is no consideration by the judge of the Claimant's previous integration within Lithuanian society including the fact that she is a Lithuanian national, that she lived there for the first 27 years of her life and gave birth to 2 children in Lithuania, and that she is still likely to be familiar with the language, the culture and the way of life.

Conclusion

29. For the reasons given above I am satisfied that the First-tier Tribunal judge did materially erred in law. Having canvassed the views of both representatives, I'm satisfied it is appropriate to remit the appeal back to the First-tier Tribunal for a full de novo hearing.

30. The First-tier Tribunal will have to consider whether, by overall assessment, the nature, quality and length of the Claimant's residence prior to her incarceration is sufficient to catapult her into the 'maybe category' identified in *MG*, with reference to *Warsame* (at [9] and [10]), such that she is entitled to the enhanced category of protection.

31. The First-tier Tribunal will also need to consider whether the Claimant had been residing in the UK in accordance with the EEA regulations, either as a qualified person in her own right, or as a result of being a dependent family member of a qualified person, since her arrival in the UK. This is relevant both to whether the Claimant is entitled to the highest form of protection (on imperative grounds), but also whether she is entitled to the medium level of protection (such that her removal can only be justified on serious grounds of public policy or public security) as a result of having obtained permanent residence. Relevant to this assessment is the existence of evidence that she and/or her parents were exercising free-movement rights since their arrival in the UK and whether the Claimant was ever dependent on her parents. The First-tier Tribunal will also need to consider any further evidence relating to the Claimant's propensity to reoffend.

Notice of Decision

The First-tier Tribunal contains a material error of law.
The matter will be remitted back to the First-tier Tribunal for a de novo hearing, to be heard by a judge other than judge of the First-tier Tribunal Malone.

No anonymity direction is made.

6 July 2017

Signed
Upper Tribunal Judge Blum