Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00479/2016

THE IMMIGRATION ACTS

Heard at Birmingham Magistrates Court	**Decision & Reasons promulgated**
on 25 October 2017	**on 26 October 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

JANIS KUZNECOVS
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr Mills – Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge E.M M Smith promulgated on 25 July 2017 in which the Judge dismissed the appellant's appeal against the order for his deportation

from the United Kingdom in accordance with Regulation 19(3)(b) and 21 of the Immigration (European Economic Area) Regulations 2006, dated 14 September 2016.

Error of law finding

2. The appellant is a citizen of Latvia born on 5 March 1952.
3. The Judge records that the appellant is separated from his wife who it is believed lives in Latvia and has a daughter who he believes resides in the United Kingdom having attended University here.
4. The Judge records that the appellant arrived in the UK in May 2007 and has lived in Scotland since. He has had another relationship whilst in the UK but is currently single.
5. In Latvia, the appellant committed criminal offences including on 14 January 2003 a firearms offence for which the appellant claimed to have received a suspended sentence which he breached by committing further firearms offences, resulting in 14 months imprisonment on 16 December 2003. On 8 August 2007, for an offence of affray and further firearms offences, the appellant was sentenced to two years imprisonment conditional with probation for two years.
6. It is not disputed the appellant has worked in the United Kingdom
7. On 6 October 2009, the appellant was sentenced to 9 months imprisonment in the UK for assault and other breaches of court orders. In April 2012, the appellant was fined for a shoplifting offence.
8. The Judge noted the Presenting Officer accepted that the appellant had acquired five years residence in the United Kingdom and that the decision to deport must be assessed in accordance with Regulation 21(3) on serious grounds of public policy and security.
9. In [29] the Judge finds:

> 29. There is an absence of any detail provided by the respondent in relation to the offences in Latvia and very limited detail of the offences in the UK but the respondent asserts it is the combination of the two sets of offences that causes deportation to be considered. As I have indicated Mr Malcolm accepts that the UK offences taken on their own do not represent conduct that justifies deportation but assessed against prior and serious offending with firearms, regardless of how the appellant paints it, does represent a serious risk of further offending and over the past 14 years he has not shown himself to be rehabilitated so there is a risk of continuing reoffending. The appellant's history presents a bleak future. It is, therefore, proportionate to remove this appellant.

10. The appellant sought permission to appeal which is granted by another judge of the First-tier Tribunal; the operative part of the grant been in the following terms:

> 4. The appellant is underrepresented and I have read the decision carefully for any obvious arguable error. The Judge accepted that the appellant had established five years residence as a worker. The Judges further findings are limited to one paragraph, paragraph 29, in which it accepted that there is little detail of the offences before the Tribunal. The Judge

> gives little reason for finding that the appellant presents a risk of reoffending, save for his previous convictions, and failed to consider that a person's previous criminal convictions do not in themselves justify expulsion. I find an obvious error arising on the face of the decision and permission is granted on these grounds.

11. The respondent opposes the appellant's application in a Rule 24 response of the 13 September 2017 on the basis the alleged error identified in the grant of permission, that previous convictions do not justify expulsion, is not made out. The core of the respondent's position is set out in the reply in the following terms:

> 4. At paragraph 28 the FTIJ correctly notes the requirements under regulation 21(6) that the appellant is a genuine, present and sufficiently serious threat to a fundamental interest of society. At paragraph 29 the FTIJ takes into account the entire history of offending over 14 years and fines in the absence of any evidence of rehabilitation there is a continuing risk of offending. It is submitted, in light of the period over which the offending occurred and the absence of evidence of rehabilitation it was open to the FTIJ to find that the risk of offending continued.

Error of law

12. In *BF (Portugal) v SSHD (2009) EWCA Civ 923* the appellant, a citizen of Portugal, arrived in the UK in 199 and had acquired permanent residence. He was convicted of battery against his partner and sentenced to 42 months imprisonment. He could only be removed on serious grounds of public policy or public security. The Tribunal first had to determine the claimant's relevant personal conduct; secondly whether the conduct represented a genuine present and sufficiently serious threat; thirdly whether that threat affected one of the fundamental interests of society; and fourthly whether deportation would be disproportionate in all the circumstances. The Tribunal noted the evidence that the claimant had a high propensity to re-offend against the same victim and any new partner, but went on to find that the SSHD had failed to prove that there were serious grounds of public policy or security which made deportation proportionate. In remitting the appeal, the Court of Appeal said the Tribunal should have reached a conclusion as to whether the threat, which was clearly present at the time of the offence, was still present at the hearing. The Tribunal had to decide whether there was a present serious threat and if so the extent of that threat.
13. The Judge identifies the applicant's personal conduct by reference to his offending, both in Latvia and in the United Kingdom.
14. In relation to whether the conduct represents a genuine present and sufficiently serious threat; the Judge was required to identify the nature of that threat and to make clear findings supported by adequate reasons upon whether such established serious grounds of public policy or public security which made deportation proportionate, and whether the threat which was clearly present at the time of the previous offending was still present at the date of hearing. The Judge

fails to deal with this issue on the face of the determination. The offences committed in Latvia are dated 2003 and 2006. The offences in the UK 2009 and 2012. Date of hearing was 21 July 2017.

15. A person cannot be deported under EU law on the basis of past convictions. In this way deporting an EU national differs from domestic arrangements.
16. It is accepted that a pattern of behaviour may warrant refusal as illustrated in the case of *Batista v SSHD [2010] EWCA Civ 896* in which the issue was whether there were serious grounds of public policy for expulsion. The appellant had numerous convictions culminating in a sentence of 8 years for GBH. The Court of Appeal held that the Tribunal was entitled to conclude that the appellant's record showed a propensity to renewed violence such as to satisfy the relevant test.
17. The current version of the Regulations reflects this proposition in that 2016 regulations schedule 1 paragraph 3 state that where an EEA national/family member has received a custodial sentence or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the UK represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society.
18. The public policy ground for removal is an exception to the fundamental principle of the free exercise of EU rights and, as such, has to be construed restrictively. In *R v Bouchereau 1978 QB 732 (ECJ) 760* it was said that the presence or conduct of the individual should constitute a genuine and sufficiently serious threat to public policy.
19. In *SSHD v Straszewski; and Kersys [2015] EWCA Civ 1245* the Court of Appeal noted that Regulation 21(5) provided that a decision to remove an EEA national with a permanent right of residence must be based exclusively on the personal conduct of the person concerned and matters that did not directly relate to the particular case or which related to considerations of general prevention did not justify a removal decision.
20. The Judge arguably fails to provide adequate reasoning in the decision by reference to a properly structured factual analysis of how the requirements of the regulations are met. The determination under challenge is full of law but arguably fails to properly set out the facts against which the proper legal test should be determined, supported by adequate reasons.
21. The Judge at [28] refers to regulation 21[6] setting out the requirements to be taken into account. This is factually correct but it is not clear in the decision and reasons section of the decision as to how the Judge undertook this exercise and how the factual findings made in relation to the items to be considered under regulation 21[6] have been factored into the proportionality assessment. Rehabilitation is one aspect of the matter and the statement at [28] that the regulation 21[6] factors have been taken into account, and then setting out the decision of the Upper Tribunal in *MC (Essa principles*

recast) Portugal [2015] UKUT 00520 does not enable a reader of the determination to establish how the issue of proportionality or rehabilitation arose and the relationship between that and the requirement for there to be an evaluation of the likelihood that the person concerned will offend again and what the consequences are likely to be if he does, which was arguably not undertaken.

22. The Judge in [29] notes the respondents asserts it is a combination of the two sets of offences that caused deportation to be considered. Mr Mills indicated the appellant had been arrested and charged with further offending, which may have involved the use of violence, but the evidence provided indicates the verdict of the court in Scotland was that of 'not proven' in relation to these aspects meaning the appellant has no conviction for any further offences. The Judge's opinion that previous offending itself illustrates serious risk of further offending is not adequately reasoned in the determination under challenge.
23. It is also of note that the respondent's decision, relied upon by the Presenting Officer before the Judge, refers to the reason for deportation being that as a result of the appellants criminality his deportation is considered to be justified on grounds public policy and/or public security. The finding of the Judge that the appellant had acquired a right of permanent residence indicated a higher threshold is applicable, that of serious grounds of public policy and/or public security. The decision must be assessed in relation to the proper applicable test.
24. Whatever may have been in the Judge's mind the difficulty within this decision is that a person reading it cannot be satisfied that the Judge has addressed the proper issues or, if they did, adequate reasoning has been given to informed the writer of the material findings on key points.
25. The determination shall be set aside and remitted to the First-tier Tribunal initially sitting at Stoke/Nottingham for that Tribunal to determine the secure court available to rehear the appeal in light of the fact the appellant remains in immigration detention at Morton Hall IRC. Extensive fact-finding exercise needs to be conducted during the approach relevant for assessing the merits a deportation appeal.
26. It was not possible to go on a remake the decision before the Upper Tribunal for the appellant, despite having lived in the United Kingdom since 2007 and to have formed a life for himself in Scotland, claimed not to be able to understand English and what was being said to him in court. A Latvian interpreter booked by the Upper Tribunal appears to have experienced difficulties as a result of an issue surrounding paperwork in his or her possession when arriving at the court and was not available. As any Resumed hearing would require the presence of an interpreter no further progress could be made.
27. The Upper Tribunal made the decision to set aside the determination without the appellant having the benefit of the interpreter present as the decision is wholly in the appellant's favour as it is his challenge to the decision of the First-tier Tribunal. No procedural irregularity

sufficient to amount to an error of law or unfairness therefore exists in proceeding in the above scenario and in setting aside the decision.

28. Mr Mills also indicated there was further evidence that the respondent wished to put before the tribunal on the next occasion relating to the appellant's behaviour demonstrating is not a reformed character as he alleges. This information may relate to the Scottish proceedings but also, more recently, to reports regarding the appellant's conduct whilst in immigration detention.

Decision

29. **The Immigration Judge materially erred in law. I set aside the decision of the original First-tier Tribunal Judge. I remit the decision to the First-tier Tribunal sitting at Stoke/Nottingham to be heard by another judge nominated by the Resident Judge responsible for this hearing centre other than Judge E.M.M. Smith. Further case management directions shall also be given by the First-tier Tribunal once the secure venue has been identified.**

Anonymity.

30. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Signed……
Judge of the Upper Tribunal Hanson

Dated the 25 October 2017