



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00126/2018

**THE IMMIGRATION ACTS**

Heard at Royal Courts of Justice  
On 5 November 2018

Decision & Reasons Promulgated  
On 18 December 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AIVARS KLEINS  
(NO ANONYMITY ORDER MADE)

Respondent

**Representation:**

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer

For the Respondent: In person

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against the Secretary of State's decision to deport him to his EEA country of origin, Latvia in accordance with Regulations 23 and 27 of the Immigration (European Economic Area) Regulations 2016.
2. The First-tier Judge found as a fact that the claimant was not entitled to more than the basic level protection and therefore, although this does not appear to have been

taken into account in the decision, questions of rehabilitation, even had any taken place, would not assist the claimant.

3. The history is that in September 2011 the claimant was caught driving with excess alcohol. He gave a false name. He was not caught out until 2017, by which time he claimed to be living with a Ms [S], also a Latvian, and that they had two children together. It is quite right that Ms [S] does have two children, but the claimant's name does not appear on the birth certificates and the judge made no clear finding as to whether it was accepted that he is in fact the father of those children.
4. On 2 October 2017 the claimant was convicted of driving a motor vehicle with excess alcohol and resisting or obstructing arrest and fined £100 plus costs and victim surcharge and disqualified for twelve months.
5. On 28 September 2017 he was convicted of failure to surrender to custody and fined £50 and on 30 October 2017 the claimant was convicted of an act or series of acts with intention to pervert the course of justice and imprisoned for eight months. The act in question is the giving of a false name in 2011 and the continuing not to hand himself in and allow justice to take its course.
6. At paragraph 50 of the First-tier Tribunal decision, the sentencing judge's remarks are set out and in particular the sentencing judge said this:

*"You gave a false name thereby avoiding being taken before the magistrates and punished. No doubt you thought you had got away with it but subsequently it's come to the notice of the police that you committed this offence and you have not got away with it. You have been dealt with for the original offence by the magistrates but the serious nature of this sort of offence is that it strikes at the heart of the criminal justice system ... Had you not come to the attention of the police later you would no doubt have got away with it completely. I consider that an immediate custodial sentence is inevitable. I give you full credit for your early plea of guilty."*

7. The OASys Report is not before us and it seems that perhaps there was not one. The basic custody screening report indicated that the claimant presented an 11% risk of reoffending within two years. At paragraph 55 of the decision the judge says this:

"I accept there is little evidence of remorse or of any rehabilitative work having been undertaken. However, the [claimant] was not directed to take any such courses in prison or when released on licence. Probation have not been involved with him as his offending was not considered sufficiently serious. It is hard to see how the [claimant] could be described as a persistent offender as his convictions all stem from the same incident in 2011 and he is regarded as having a low risk of reconviction.

The original offence of driving with excess alcohol took place in 2011 and *the [claimant] has not offended since then apart from resisting arrest in 2017 for which he was fined by the magistrates.* The details of this matter are not described anywhere but the sentence would not appear to indicate a serious offence. There is nothing to suggest that the police officer would have been traumatised as is suggested in the refusal letter. I also take account that the level of alcohol in the [claimant]'s

blood put him at the lowest end of the sentencing guidelines and no similar offending has occurred in the five years since then.”

8. On that basis the First-tier Judge found as a fact that the claimant did not represent a present or sufficiently serious threat to justify deportation and that therefore the respondent’s decision was not in accordance with Regulations 23 and 27.
9. The judge then stated erroneously that it was not necessary to go on to consider Article 8 ECHR proportionality. Questions of Article 8 proportionality are not a matter for an EEA application in any event and need to be the subject of a separate application, but nothing turns on that.
10. The respondent argues that insufficient weight was given to the offence of resisting arrest in 2017, and that combined with the conduct in refusing for six years to disclose that he was the person caught with a motor vehicle and too much alcohol in his blood and also, although this was not argued this morning but it is in the grounds, the fact that it appears that Ms [S] is claiming benefits on the basis of his not being the father of the children, means that there is a material error of law in the decision of the First-tier Tribunal and that the outcome, had the judge given more weight to the claimant’s offending and in particular the second offence, might well have been different.
11. I accept that there are errors of reasoning in the decision of the First-tier Tribunal. This decision is set aside and will be remade in the First-tier Tribunal on a date to be fixed.

### Conclusions

There is a material error of law in this decision.

It will be set aside and remade in the First-tier Tribunal on a date to be fixed.

Signed *Judith AJC Gleeson*  
Upper Tribunal Judge Gleeson

Date: 14 December 2018