Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00264/2018**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 20th September 2018	**On 18th October 2018**

Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR GENADJIS AGAFONOVS
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer
For the Respondent: Mr S Winter, Advocate, instructed by Katani & Co, Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision by Judge of the First-tier Tribunal Kempton allowing an appeal by Mr Genadjis Agafonovs (hereinafter referred to as "the claimant") against deportation under the Immigration (European Economic Area) Regulations 2016.

2. The claimant was born on 12 October 1970 and is a citizen of Latvia. He came to the UK in November 2008 and was joined by his wife.

The couple have one son together, born in 2010. The claimant's wife has a child aged 17 from a previous relationship.

3. The claimant's most recent conviction is dated 15th September 2017 and was for threatening or abusive behaviour and breach of a condition not to approach a particular person, namely his wife. The claimant was sentenced to imprisonment for six months and after he served his sentence he was transferred to immigration detention, where he remains.

4. The Judge of the First-tier Tribunal found that the claimant has neither permanent residence under the EEA Regulations nor residence of ten years' duration. The Judge was not, however, satisfied that claimant is a genuine, present and sufficiently serious threat to the public in the UK to justify deportation.

5. The Secretary of State was given permission to appeal primarily on the basis that the judge arguably failed to give sufficiently clear and cogent reasons as to why the public interest in the deportation of the claimant was not made out.

6. At the hearing before us Mrs O'Brien addressed us on the Secretary of State's grounds of appeal. She submitted that the Judge of the First-tier Tribunal had not properly engaged with the claimant's past offending. The judge had disregarded past offences and minimised the most recent offences. She did not apply the considerations in Schedule 1 of the EEA Regulations and did not engage with any prospects of rehabilitation. The judge did not properly consider the public interest and the protection of the public.

7. For the claimant Mr Winter referred us to his section 24 response. This maintained that any alleged errors of law in the judge's decision amounted to no more than a disagreement with her findings. The judge was entitled to find that the Secretary of State had taken a disproportionate view of the claimant's earliest conviction, which was a conviction in 1998 for robbery committed in Russia. The judge was entitled to take into account the background to the offences and, in particular, the claimant's concern to maintain contact with his son. The judge explained in clear terms why the claimant won his appeal. Extensive reasons were not required where the decision as a whole made sense having regard to the material accepted. The findings made were reasonably open to the judge and there was no misdirection of law. The judge explained why the Russian conviction was not sufficient to justify deportation. The judge took into account the domestic violence, the limited evidence regarding the best interests of the child and accepted that the claimant had not established permanent residence.

Error of law

8. In our view the decision of the Judge of the First-tier Tribunal contains a number of errors, although Mr Winter may have some justification in arguing not all of these are material. At paragraph 25, in particular, the judge sets out several reasons for finding that the claimant is not a genuine, present and sufficiently serious threat to justify his deportation. One of these, to which the Secretary of State drew attention in the application for leave to appeal, is that the claimant's offences in the UK "are matters which have evolved generally in a domestic setting primarily through alcohol intake and a break down in the relationship between him and his partner."

9. As the Secretary of State pointed out, the claimant's criminal record specifies certain offences as subject to a domestic abuse aggravator or a child aggravator. While at paragraph 25 the Judge of the First-tier Tribunal states that she does not seek to minimise these offences that appears to be precisely what she has done. Indeed, although she records at paragraph 2 of her decision that the claimant was sentenced to 6 months' imprisonment in October 2017, she omitted to take account of a sentence of 80 days' imprisonment imposed in December 2016. Furthermore the judge appears to have taken no account of the number of occasions on which the claimant has been found guilty of breaching a court order. In 2012 the claimant was convicted of two counts of failing to comply with conditions of bail. In 2016 he was again convicted of failing to comply with conditions of bail. In 2017 he was convicted of failing to comply with a condition not to approach his former partner.

10. In our view the Judge of the First-tier Tribunal failed to have regard to the repeated conduct of the claimant in breaching court orders. The nearest the judge comes to commenting on this is to state at paragraph 23 that since he has been detained the claimant appears not to have breached the order to refrain from contacting his ex-partner. This hardly seems to us grounds for disregarding the claimant's previous breaches of court orders. In relation to this conduct of the claimant the judge erred in law by failing to have regard to relevant considerations and failing to give adequate reasons.

11. The Secretary of State further maintained that the Judge of the First-tier Tribunal erred in her approach to the claimant's 1998 conviction for robbery in Russia. At paragraph 25 the judge stated that the claimant "has tholed his assize in connection with the Russian robbery charge." She then stated that he has not committed any such offences again and that in the UK his conviction would be regarded as spent.

12. Before us Mr Winter acknowledged that a prison sentence exceeding 9 years would not be regarded as spent under the Rehabilitation of Offenders Act. The judge erred in stating that it

would. While the claimant has not again been convicted of robbery he does have a record in the UK of conduct involving violence. The judge does not adequately explain why the claimant's violent conduct in the UK is to be differentiated from his violent conduct in Russia. To attempt to do so by referring to the claimant's violent conduct in the UK as occurring "in a domestic setting" and arising from alcohol intake is simply not adequate, particularly when the judge also disregarded the claimant's breaches of bail conditions.

13. The judge also fell into error by referring to the claimant having "tholed his assize" on the Russian robbery charge. Not only was the claimant charged with robbery he was convicted. Any reference, if that is what was intended, to the claimant not being subject to double jeopardy in respect of this charge is not only incorrect but irrelevant.

14. We conclude that owing to the Judge of the First-tier Tribunal having made errors of law arising from inadequate reasoning and disregarding relevant matters her decision should be set aside and re-made.

Re-making the decision

15. We informed the parties that the decision was to be set aside and that we intended it should be re-made. Mr Winter suggested that the claimant, who was not present at the hearing, should have an opportunity to give oral evidence before the decision was re-made. It was pointed out to Mr Winter that no application had been made for oral evidence to be heard. We were not informed of any significant issue on which evidence was available which was not already before us.

16. Mr Winter addressed us on how the decision should be re-made. He submitted that there had been no repetition of the serious offence of robbery of which the claimant was convicted in 1998. The offence was not sufficient on its own to justify deportation. The claimant has been in employment in the UK and has a child here. He had attempted to obtain treatment for alcoholism and was taking anti-depressants.

17. In this appeal it is for the Secretary of State to show that the personal conduct of the claimant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent, in terms of regulation 27 of the EEA Regulations. The fundamental interests of society are defined in Schedule 1 and include protecting the public and combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27). Where an EEA national

has received a custodial sentence the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's presence in the UK represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society.

18. Further requirements of regulation 27 state that the deportation decision must comply with the principle of proportionality and must be based exclusively on the personal conduct of the person concerned. A person's previous criminal convictions will not in themselves justify the decision. Account must be taken of considerations such as age, state of health, family and economic situation, length of residence in the UK, social and cultural integration into the UK, and the extent of the person's links with his country of origin.

19. We note that the claimant has neither permanent residence in the UK nor ten years' residence. Reference has already been made to the various crimes or offences the claimant has committed, starting in Russia with the crime of robbery for which he was sentenced in 1998 to imprisonment for just over nine years. Since his arrival in the UK in 2008 he has offended on a number of occasions, starting with the offences of which he was convicted in 2012. These included offences involving domestic violence and breach of bail conditions. Further offences were committed in 2016 and 2017 involving domestic abuse and breach of bail conditions. In December 2016 the claimant was sentenced to 80 days' imprisonment for threatening or abusive behaviour. Similar offences in 2017, including breach of a restriction order imposed by a court, led to a sentence of imprisonment of six months.

20. The claimant has exhibited a pattern of violent conduct and disregard of court orders. It is not a mitigating factor that his offences in the UK appear to have taken place in his home and to have been directed against his partner. The claimant's offences show a persistent readiness to resort to violence, arguably rendered even more serious by being directed against the safety of a member of his family in her own home.

21. The claimant is of Latvian origin and has spent a comparatively small proportion of his life in the UK. The claimant has a child in the UK but, as the Judge of the First-tier Tribunal recognised, there is a lack of evidence relating to his child's best interests. The child lives with his mother, who is also of Latvian origin and from whom the claimant is estranged. Indeed the claimant is subject to a restriction order preventing him for contacting her. While in prison and in detention the claimant has endeavoured to keep in touch with his child by weekly or fortnightly telephone calls. Contact with the child by telephone could continue after the claimant is deported. The claimant has had some

employment in the UK but this does not seem to have been continuous. There is little evidence of cultural and social integration in the UK.

22. The question of whether there are reasonable prospects of rehabilitation is an important consideration in relation to proportionality, in terms of MC (Essa principles recast) Portugal [2015] UKUT 00520.

23. The claimant has blamed alcohol abuse for his readiness to resort to violence. He maintained in his evidence to the First-tier Tribunal that he was seeking help from a social worker in relation to this. There was, however, no evidence from the social worker and no medical evidence. The claimant maintained that he had undertaken a rehabilitation programme but this is not wholly supported by documentary evidence. A letter dated 28th August 2018 from HMP Addiewell indicates that the claimant was referred for alcohol counselling but failed to attend the last of four counselling sessions. He did not attend an alcohol awareness course he was offered and did not attend an appointment with the NHS addictions team at the prison. The First-tier Tribunal had before it a certificate showing that he had done some vocational training earlier this year while in immigration detention. Although the claimant appears to have been concerned to maintain contact with his son, there is little, if any, evidence of any reasonable prospects of rehabilitation were the appellant to remain in the UK.

24. Having regard, in particular, to the claimant's persistent offending we are satisfied that the claimant's personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The decision to deport him is proportionate, having regard to all the relevant circumstances.

Conclusions

25. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

26. The decision is set aside.

27. We re-make the decision by dismissing the appeal.

Anonymity

The Judge of the First-tier Tribunal made a direction for anonymity. We have not been asked to make such a direction and we are not satisfied that it would be in the interests of justice to do so.

Fee award (N.B. This is not part of the decision.)

No fee has been paid or is payable so no fee award can be made.

Deputy Upper Tribunal Judge Deans dated 12th October 2018