Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00181/2019

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre
On: 22nd November 2019

Decision & Reasons Promulgated
On: 28th November 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Stepas Brazinskas
(no anonymity direction made)

Respondent

For the Appellant: Mrs Aboni, Senior Home Office Presenting Officer
For the Respondent: -

DECISION AND REASONS

1. The Respondent is a national of Lithuania born in 1985. On the 5th September 2019 the First-tier Tribunal (Judge Farrelly) allowed his appeal against deportation under the Immigration (European Economic Area) Regulations 2016. The Secretary of State now has permission to appeal against that decision.

2. The facts of this case are that the Respondent has lived in this country on and off since March 2013. His last date of entry was in March 2015. He lives with his partner and two children. All are nationals of Lithuania.

Since their arrival in the United Kingdom both the Respondent and his partner have exercised treaty rights. The Secretary of State wants to deport the Respondent because between 2016 and 2018 he has committed the following criminal offences:

i) Driving with excess alcohol

ii) Obstructing a police constable

iii) Driving otherwise than in accordance with a licence x 3

iv) Using a vehicle whilst uninsured x 3

v) Failing to surrender to custody at the appointed time

vi) Being drunk and disorderly

vii) Breaching conditions

3. The First-tier Tribunal had regard to the matters set out in Regulation 27. It noted the criminal convictions set out by the Secretary of State in her decision to deport and the evidence advanced by the Respondent in respect of his family life in the United Kingdom. It heard, and accepted, the Appellant's evidence that at the time of the offences he was abusing alcohol following the deaths of his parents. It further accepted that it would be in the best interests of the Respondent's children to remain in this country, since they experienced discrimination in Lithuania as a result of their "gypsy" heritage[1]. It found that the Respondent has a family life in the United Kingdom not just with his partner and their children but with other close family members such as his partner's parents and siblings. The Judge found that the Respondent would face difficulties in re-integrating in Lithuania in light of his ethnicity and lack of family support there. It concluded that whilst the offences were contrary to the public interest they were not "of the gravest" and balanced against the Respondent's circumstances and the best interests of his children, the Tribunal held that the appeal should be allowed.

4. The Secretary of State now appeals on the grounds that the Tribunal failed to have "adequate regard to the fact that the [Respondent] is a persistent offender", a matter identified in Schedule 1 of the Regulations as a matter contrary to the fundamental interests of society. It is submitted that the Tribunal should have considered the "combined effect and risk posed by the compounded behaviour".

5. The Respondent did not attend the hearing. Nor did his legal representatives, although I was informed by a member of staff at Rea Law that they had sent a letter to the Tribunal last week explaining that they would not be attending, and inviting me to uphold the decision of the First-tier Tribunal. Mrs Aboni had been instructed that the Respondent had failed to report as required to an immigration officer on the 17th

[1] I assume from the papers that it was the Respondent, and not Judge Farrelly, who had used that term. See the guidance in the Equal Treatment Bench Book: "Ask individuals how they would like to describe themselves. Some people from the Gypsy, Traveller and Roma communities find the term 'gypsy' offensive, whereas others are proud to use that term".

September 2019, but she had no information other than that. In light of the indication from the solicitors on record that they were content for me to proceed in the Respondent's absence, I heard Mrs Aboni's submissions and reserved my decision.

Discussion and Findings

6. The Secretary of State's case is that the First-tier Tribunal should have classified the Respondent as a 'persistent offender' and that if it had done so, this would have led it to place greater weight on the Respondent's offending than it apparently did in the course of reaching its decision.

7. The Secretary of State's grounds rely on the matters set out at paragraph 7 of Schedule 1 to the Regulations, which set out what matters may reflect the fundamental interests of society, and in particular sub-paragraph (h) thereof:

> **7.** For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—
>
> …
>
> (h) 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);

8. The Secretary of State further asks me to consider the guidance on who might be deemed to be a 'persistent offender' in Chege v Secretary of State for the Home Department [2016] UKUT 00187 (IAC) and Binbuga v Secretary of State for the Home Department [2019] EWCA Civ 551.

9. I begin by noting that the authorities to which I have been referred are concerned with the term 'persistent offender' within the meaning of the Immigration Rules. In the absence of any suggestion to the contrary, I proceed on the basis that the phrase must have the same meaning in the Regulations.

10. The *ratio* in Chege, approved by the Court of Appeal in both SC (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 929 and Binbuga, is found at paragraph 53:

> "Put simply, a "persistent offender" is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or up to a certain time before it, or that the continuity of the offending cannot be broken. Whilst we do not accept Mr Malik's primary submission that a "persistent offender" is a permanent status that can never be lost once it is acquired, we do accept his submission that an individual can be regarded as a "persistent offender" for the purpose of the Rules and the 2002 Act even though he may not have offended for some time. Someone can be fairly described as a person who keeps breaking the law even if he is not currently offending. The question whether he fits

> that description will depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts.

11. Applying that definition to the Respondent's case it can be seen that for a period between August 2016 and December 2018 the Respondent kept committing crimes. At the date of the First-tier Tribunal hearing he was therefore a 34-year man who had spent 16 months of his life persistently committing crime, the last conviction having been some 10 months before the hearing. Having satisfied itself as to those facts, it is true that the First-tier Tribunal did not go on to formally designate the Respondent as a 'persistent offender'.

12. If, in light of paragraph 7 of Schedule 1 of the Regulations, that can be said to be an error, I am not satisfied that in this case it can be said to be such that the decision should be set aside.

13. Let us suppose that the Tribunal had directed itself to recognise that the Appellant was a 'persistent offender'. It would have to recognise, in line with the Schedule, that it is in the fundamental interests of society that people don't keep committing crimes. It would then have had to go on to consider all of the remaining matters raised by Regulation 27, including whether the Respondent presents, at the date of hearing, *a genuine present and sufficiently serious threat* to those interests to justify deportation. It is evident from the rest of the findings made that this test was not made out. That is because the Judge heard and accepted the evidence that a particular set of circumstances arose in the 16 months in which the Respondent went on his spree of driving and drinking to excess, namely that he lost both his parents and he was abusing alcohol as a means to try and alleviate the symptoms of bereavement. Those were findings open to the Judge to make, in accordance with Chege: each case will turn on its own facts. Add to this the further findings on proportionality and the impact on the family and it becomes clear that even if the formal designation of 'persistent offender' had been made, this decision would have been the same. It cannot be said that the Tribunal overlooked the many offences that the Respondent committed, since it takes the trouble to set them all out. What it does is look at the "overall picture" before reaching a decision open to it applying the facts to the framework in Regulation 27.

Decisions

14. The determination of the First-tier Tribunal contains no error of law.

15. There is no order for anonymity.

Upper Tribunal Judge Bruce
22nd November 2019