



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: DA/00524/2019

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons Promulgated

On the 15th December 2021

On the 31st March 2022

Before

UPPER TRIBUNAL JUDGE OWENS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VYGAUDAS GIMBICKAS

(ANONYMITY ORDER NOT MADE)

Respondent

Representation

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

For the Respondent: Ms Short, Counsel instructed by Turpin and Miller LLP,

DECISION AND REASONS

1. Mr Gimbickas is a national of Lithuania born on 6 May 1992. The Secretary of State appeals against the decision of First-tier Tribunal Judge Abdar sent on 3 August 2021 allowing Mr Gimbickas' appeal against a decision dated 16 October 2019 to deport him from the UK pursuant to Regulation 23 of the EEA Regulations 2016.

Permission to appeal to the Upper Tribunal was granted on 29 September 2021 by First-tier Tribunal Judge Grant.

Mr Gimbickas's Background

2. Mr Gimbickas entered the UK in 2015 to exercise his Treaty rights. He initially worked at a carwash in Peterborough and then worked for several other employers including Argos in 2016, prior to becoming self-employed in 2017. In January 2016 he was joined in the UK by his partner Ms Gerda Baronaite. She is also a Lithuanian national.
3. On 11 May 2019 Mr Gimbickas was involved in a street fight and on 13 May 2019 he pleaded guilty to two counts of ABH and was committed to the Crown Court for sentencing. Following this, the Secretary of State served him with a liability to deport Notice and on 16 October 2019 made the decision to deport him. The decision was certified, and Mr Gimbickas was removed to Lithuania on 25 November 2019. This is the decision under appeal.

The Respondent's Decision

5. The respondent decided that the removal of Mr Gimbickas was justified on the grounds of public policy in accordance with Regulation 23 and Regulation 27 of the EEA Regulations. The Secretary of State is satisfied that Mr Gimbickas poses a genuine, present and sufficiently serious threat to the interests of public policy if he were allowed to remain in the UK because of the seriousness of the offence and the risk of reoffending. It is considered that the decision to remove is proportionate.
6. Mr Gimbickas' position is that this was very much a "one-off" offence and out of character. He is remorseful and he is not at risk of reoffending. Further his partner remains in the UK, and it would not be proportionate to remove him.

The Decision of the First-tier Tribunal

7. Mr Gimbickas was outside the UK at the date of the hearing. It was agreed that Mr Gimbickas has the lowest level of protection. The judge heard evidence from Mr Gimbickas' partner. The judge accepted the evidence of Mr Gimbickas partner and decided that the appellant does not pose a genuine, present and sufficiently serious risk because he is genuinely contrite, and this is the only offence of this kind that he has committed. He accepted that Mr Gimbickas did not intend to repeat his mistake. The judge also found that the decision to remove Mr Gimbickas was disproportionate because his partner remains in the UK, is settled in the UK and has started her accountancy training. The judge allowed the appeal.

The Grounds of Appeal

Ground 1: The judge erred in the consideration of whether Mr Gimbickas poses a genuine, present and sufficiently serious threat to the fundamental interest in society in the following ways:

- a. The judge has failed to have adequate regard for the seriousness of the offence which is reflected in the length of sentence. The fact that Mr Gimbickas was drunk is not a mitigating factor.
- b. The fact that Mr Gimbickas does not have any other convictions for similar offences is not determinative of the threat. The judge does not consider what would happen if Mr Gimbickas finds himself in a similar situation in the future. The judge does not give adequate reasons for accepting his partner's evidence at face value. The evidence is self-serving.
- c. The judge has failed to consider the seriousness of the consequences of re-offending in line with Kamki [2017] EWCA Civ 1715. The potential consequences of re-offending are serious.
- d. No other reasons are given regarding Mr Gimbickas' age, state of health or other considerations.

Rule 24 Response

12. Mr Gimbickas opposes the Secretary of State's appeal and argues that the grounds of appeal do not disclose any error of law. They are "weak" reasons challenges which essentially disagree with the decision of the judge. The rule 24 response deals with each of the grounds in turn.

Legal Submissions

13. Mr Lindsay for the Secretary of State confirmed that the grounds amount to a reasons challenge. In response, Ms Short relied on her rule 24 response and skeleton argument and made brief legal submissions. The submissions are set out in the record of proceedings.

Discussion and Analysis

Ground 1 – Reasons challenge.

17. I firstly note that in the grounds of appeal the Secretary of State has misrepresented the wording of the regulation. The Secretary of State refers to [29] of the decision and submits that the judge has erred in consideration of whether Mr Gimbickas poses a "genuine and sufficiently serious threat". This is not the wording of [29] in which the judge uses the correct test, which is that the individual must pose a "genuine, present and sufficiently serious threat". This wording reflects the fact that under the regulation the analysis of the threat is not confined to the historic offence but must look at the current threat of reoffending.
18. In any event I am satisfied that the judge did have regard to the seriousness of the offence.
19. At [3] the judge states:

“On 11 May 2019 the appellant was involved in a street fight and on 13 May 2019 at Northamptonshire Magistrates Court the appellant pleaded guilty to two counts of ABH and was committed to the Crown Court for sentencing”

20. Further at [21] the judge sets out in some detail the index offence:

“On 11 May 2019 whilst out celebrating the appellant’s birthday the appellant committed the index offence of ABH. The sentencing judge, His Honour Judge Michael Fowler described the two counts of ABH of the appellant attacking two people as a serious episode of street violence and that the appellant attacked gratuitously. No weapons were used nevertheless it was a violent attack and caused the victims significant harm and having taken the aggravating features including the appellant’s earlier conviction for theft from employer and mitigation into account HHJ Fowler took the starting point to 21 months imprisonment. Thereafter HHJ Fowler deducted a third off for the appellant’s early plea and sentenced the appellant to 14 months imprisonment for each count to run concurrently”.

21. At [22] the judge states “the seriousness of the offences cannot be understated, least with reference to HHJ Fowler’s remarks and as reflected by the sentence of 14 months imprisonment for ABH for each of the two counts”.

22. The judge refers yet again to the seriousness of the offence when summing up and making his findings at [29], where he states “The appellant has committed a very serious offence which is irrefutable”.

23. The respondent’s submission that the judge did not adequately take into account the serious nature of the offence is not borne out by the decision. The judge was manifestly aware of the serious nature of the offence, gave it adequate weight and took it into account when undertaking the analysis of whether the relevant test was met. This submission is not made out.

24. The Secretary of State’s next submission is that the fact that Mr Gimbickas was not drunk does not mitigate the seriousness of the offence. This argument is in my view irrelevant because the judge manifestly does not treat the fact that he was drunk as a mitigating factor and this is not part of the judge’s reasoning. The judge sets out Mr Gimbickas’ evidence at [23] which was that the index offence was out of character, he was drunk at the time and that he was horrified at seeing his behaviour on the CCTV footage. At no point does the judge make a finding that this mitigated the seriousness of the offence. At [29] the judge reiterates that the offence was very serious. This submission is not sustainable.

25. The next complaint made by the Secretary of State is that the judge has not given adequate reasons for accepting Mr Gimbickas partner’s evidence and has not given adequate reasons for finding that the offence is out of character. It is submitted that the fact that the appellant has no other convictions for similar violent behaviour is not determinative that he does not pose a threat.

26. It is trite law that it is for a trial judge to examine the evidence of the witnesses and decide what weight to attribute to it. The judge had a witness statement before him from Ms Baronaite and had the benefit of hearing her give oral evidence because she attended the appeal. The judge records that she had known Mr Gimbickas from the

first year of university and that they have been in a long-term relationship since 2012. She is working as an independent contractor and is studying accountancy.

27. She clearly has a good knowledge of her partner as she has been with him for many years. Her evidence as recorded by the judge was that she was extremely shocked at her partner's arrest, in all the years they have been together she has never known Mr Gimbickas to behave in this way, he has appreciated the impact on his family, he will not behave like this again, the offence is out of character, and he is determined to set things right. There were no inconsistencies in her evidence and importantly the judge specifically records at [26] that although she was subject to cross examination her evidence as set out above was not challenged. The cross examination focused on her career in Lithuania and in the UK. The Secretary of State chose not to challenge this aspect of her evidence and the judge was entitled to find at [29] that her evidence was "unchallenged and reliable".
28. I dislike the term "self-serving evidence". The partner's evidence was a piece of evidence before the judge. Mr Gimbickas was entitled to call his fiancée as a character witness since she had knowledge of him and was in a relationship with him when the incident took place although not with him. It was for the judge to evaluate the quality of the evidence and decide what weight he gave to that evidence. I am satisfied that there was no error by the judge in the approach to Ms Baronaite's evidence. The judge gave adequate reasons for explaining what weight he gave to it and he was entitled to accept it for the reasons he gave. The grounds amount to a disagreement and do not identify an error of law.
29. The judge was manifestly entitled to find that the offence was out of character both from the evidence of Mr Gimbickas and his fiancée evidence and the fact that this is the only conviction that the appellant has of this nature, in the context of him only having one other conviction of theft. This finding is adequately reasoned.
30. Further I am satisfied that the judge when assessing the risk of reoffending gave a multi-factorial review of the relevant factors. The judge took into account that no weapons were used, nevertheless it was a violent attack that caused significant harm, the length of sentence, the subsequent behaviour of Mr Gimbickas including the time he spent in prison, the lack of further offending, his genuine remorse and contrition and his determination not to repeat his past mistakes.
31. The judge has manifestly not treated the fact that he has no other convictions for a similar violent behaviour as determinative but has looked at all the factors holistically in the round. Further the judge was entitled to take into account that this was the only such conviction and did not represent some kind of escalating offending.
32. I am satisfied that this is a disagreement with the weight that the judge gave to his evidence.
33. Finally it is asserted that the judge failed to have regard to Kamki [2017] EWCA Civ 1715. The respondent did not make any submissions in relation to Kamki at the hearing and raised this point for the first time in the grounds of appeal. This appears

to be an attempt in accordance with GH(Afghanistan) v SSHD [2005] EWCA Civ 1603 to relitigate the appeal.

34. The judge did not evaluate the level of harm were it to occur again, however it is clear that the judge was aware the harm was serious, and the judge's primary finding is that the harm will not happen again for all the reasons he gives. Even were it to be an error for the judge not to have considered the seriousness of the harm should it occur again, the judge's finding that the appellant does not pose a genuine, present and sufficiently serious threat was open to him on the "sea" of evidence before him and the failure to consider the Kamki point was not material to that finding because even had the judge taken how serious the harm would be if he reoffended, I am not persuaded that the judge would have come to any other conclusion.
41. Finally, I am not persuaded that the failure to take into account Mr Gimbickas' age or health in the proportionality assessment were material to the outcome of the appeal. Mr Gimbickas is 31 and healthy. It is not explained by the Secretary of State why these factors would have required Mr Gimbickas' deportation. In this appeal they were very much neutral factors and immaterial to the outcome of the appeal. Further and in any event since the judge had found that Mr Gimbickas did not form a genuine, present and sufficiently serious threat he did not need to go onto consider the proportionality of deportation in any event.
42. The judge has in my view taken into account all of the relevant factors including the seriousness and nature of the offence and has evaluated Mr Gimbickas's propensity to reoffend taking into account the seriousness of the offence, the harm it caused, that this was a single incident, his previous history of offending, his behaviour subsequent to the offence, his remorse and his background. The judge has given adequate and sustainable reasons for his findings. The judge was rationally entitled to form the view that Mr Gimbickas does not pose a genuine, present and sufficiently serious threat to the public and his deportation is not proportionate. The decision is manifestly sustainable.
43. I remind myself of the comments of Carnworth LJ in Mukarkar approved by the Supreme Court in MM (Lebanon) 2017 SC10 that;

"The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new... However on the facts of a particular case the decision of a specialist tribunal should be respected".

Conclusion

44. It follows that none of the Secretary of State's grounds of appeal are made out and the Secretary of State's appeal is dismissed.

Decision

45. The decision of the First-tier Tribunal allowing the appeal is upheld.

Direction Regarding Anonymity

46. The Judge made an anonymity direction confirming that no report of proceedings was to directly or indirectly identify the appellant or any member of his family. I am mindful of Guidance Note 2013 No 1 concerned with the issuing of an anonymity direction and I observe that the starting point for consideration of such a direction in this Chamber of the Upper Tribunal, as in all courts and tribunals, is open justice. The principle of open justice is fundamental to the common law. The rationale for this is to protect the rights of the parties and also to maintain public confidence in the administration of justice. Revelation of the identity of the parties is an important part of open justice: *Re: Guardian News & Media Ltd* [2010] UKSC 1; [2010] 2 AC 697.
47. Mr Gimbackas criminal trial was public, and I can identify no individual who would be prejudiced by him being identified in this appeal. I see no reason to denigrate from the principle of open justice.
48. I therefore set aside the anonymity direction of the Judge.

Signed

R J Owens

Date 24 March 2022

Upper Tribunal Judge Owens