



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00169/2013

**THE IMMIGRATION ACTS**

Heard at : Field House  
On : 19 February 2014

Decision Promulgated  
On : 26 February 2014

Before

MR JUSTICE JAY  
UPPER TRIBUNAL JUDGE KEBEDE

Between

MANTAS BAIBOKAS  
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A Burrett, instructed by Charles Simmons Solicitors  
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant's appeal comes before us following a hearing on 2 January 2014 at which errors of law were found in the decision of the First-tier Tribunal allowing his appeal against the respondent's decision to deport him from the United Kingdom

pursuant to regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

2. The appellant is a citizen of Lithuania, born on 16 October 1980. He claims to have entered the United Kingdom in 2001. He applied, on 19 June 2001, for leave to remain as a self-employed businessman under the EC Association Agreement, but his application was refused on 29 October 2001. From 1 May 2004 he was no longer subject to immigration control, as Lithuania joined the EEA. He first came to the adverse attention of the authorities on 21 August 2008 in relation to motoring offences.

3. On 15 February 2012 the appellant was convicted at Snaresbrook Crown Court of possessing a controlled drug with intent to supply, Class B, Amphetamine. On 26 March 2012 he was sentenced to 30 months' imprisonment. On 29 May 2012 he was notified of his liability to deportation. A decision was made on 17 December 2012 to make a deportation order by virtue of section 5(1) of the Immigration Act 1971 and under regulation 21 of the EEA Regulations, on the grounds that he posed a genuinely, present and sufficiently serious threat to the interests of public policy.

4. The respondent, in making that decision, considered that there was no evidence of the appellant's residence in the United Kingdom since 2001 and did not accept that he had been resident in accordance with the regulations for a continuous period of five years, and had thus acquired permanent residence, or that he had been resident for a continuous period of ten years. The respondent considered the circumstances of the offence for which the appellant had been convicted, namely the possession of a large amount of Class B controlled drugs, which had been found in his jet ski in his garage, and took account of the remarks of the sentencing judge and the low level of risk at which he was assessed in the NOMS 1 assessment. The respondent concluded that the appellant had a propensity to re-offend and that he represented a genuine present and sufficiently serious threat to the public. Consideration was also given to the appellant's family life with his wife and son, and to his son's medical condition, but the respondent concluded that his deportation would not be in breach of his Article 8 human rights.

5. The appellant's appeal against that decision was heard in the First-tier Tribunal on 13 September 2013, before a panel consisting of First-tier Tribunal Judge Mailer and Dr C J Winstanley. The panel heard from the appellant, his wife, his father, his sister and his brother-in-law and found their evidence to be credible. They found on the basis of the oral and documentary evidence before them that the appellant had been living continuously in the United Kingdom for at least ten years and that, as such, the respondent had to show that there were imperative grounds for deporting him. They found that no such grounds had been established and they accordingly allowed the appeal under the EEA Regulations, as well as under Article 8 of the ECHR.

6. The respondent sought permission to appeal to the Upper Tribunal on the following grounds: that the panel had erred by finding that the appellant had established ten years of lawful residence in the United Kingdom and that he had acquired a permanent right of residence in the United Kingdom and had thus applied the wrong test; and that they had

erred in concluding that the appellant's deportation would be disproportionate. Permission to appeal was granted on 14 November 2013.

7. At an error of law hearing on 2 January 2014 the First-tier Tribunal's determination was found to be materially flawed by reason of errors of law and was accordingly set aside. The full decision of the Upper Tribunal in that respect is annexed to this determination at Annex A, but can be summarised as follows.

8. The Tribunal's conclusion, that the appellant had been continuously resident in the United Kingdom for ten years, appeared to have been based purely upon his residence with no regard to the status of that residence and no regard to whether or not he was exercising Treaty rights throughout that period. Whilst giving weight to self-assessment tax calculations produced by the appellant, the Tribunal made no clear findings on the period in which it was accepted that that evidence reflected the exercise of Treaty rights. No consideration was given to the fact that Lithuania was not a member of the European Union until May 2004 and to the appellant's status prior to then. In the circumstances the Tribunal erred in concluding that, on the evidence before it, the appellant had demonstrated ten years' continuous legal residence in the United Kingdom. Accordingly its conclusion, that the relevant test was that under regulation 21(4), namely "imperative grounds of public security", was an unsustainable one. The Tribunal did not make any findings in the alternative in regard to regulations 21(3) and (5) and, in the absence of any proper findings as to the period in which the appellant was considered to have been exercising Treaty rights, those matters remained to be determined.

9. The appeal came before us for a resumed hearing on 19 February 2014 in order for fresh findings to be made in regard to the level of protection to be afforded to the appellant under the EEA Regulations and his ability to meet the requirements of those regulations. The appeal proceeded by way of submissions only.

3. It was Mr Melvin's case that there was nothing to show that the appellant had been exercising Treaty rights in the United Kingdom prior to 2008 and, since he had been convicted on 15 February 2012, he was unable to establish five years' residence in accordance with the EEA Regulations such as to entitle him to permanent residence. Accordingly he was only entitled to the lower level of protection under the Regulations. Mr Melvin relied on the principles in SSHD v M.G. Case C-400/12, Onuekwere v SSHD Case C-378/12 and Essa v SSHD (EEA: rehabilitation/integration) Netherlands [2013] UKUT 316 and submitted that the appellant had failed to show that he had integrated into the United Kingdom. There was little evidence of rehabilitation. With regard to the risk of re-offending, he relied upon the decision in Vasconcelos (risk - rehabilitation) Portugal [2013] UKUT 378 in submitting that the Tribunal was not bound by the risk assessment in the NOMS (National Offender Management Service) report. There was a real risk to the public of the appellant re-offending.

4. With regard to the period in which the appellant had been residing lawfully in the United Kingdom, Mr Burrett initially sought to rely upon the fact that he had made an application as a self-employed person in 2001 and had resided with and been dependent

upon his parents who were lawfully resident in the United Kingdom. However he acknowledged that the application had been refused, that there was no evidence of dependency upon his parents and that there was no evidence as to how he supported himself whilst living with his wife from 2004. He submitted that the appellant had been exercising Treaty rights for five years and, whilst he accepted that the evidence was somewhat convoluted, he asked us to note that the First-tier Tribunal had accepted backdated tax assessments as evidence of self-employment. With regard to proportionality, Mr Burrett submitted that the appellant had one child and another due in one month. His son attended appointments every three months at Moorfields Hospital for an eye condition. Although it was not the case that he had no ties to Lithuania, his real ties were in the United Kingdom since his parents, sister, wife and child were all here. His wife was an accountant and was exercising Treaty rights. The fact that she was doing so was a weighty factor in the balancing exercise.

5. In response, Mr Melvin submitted that there was little evidence of the appellant's wife's job and there was no evidence that she had applied for permanent residence. He could not benefit from being parasitic on his wife's status. The fact that she was exercising Treaty rights here with his son did not benefit him and they could choose to return to Lithuania with him if they wished.

### **Consideration and findings**

6. The starting point in this appeal is establishing the level of protection against expulsion to be afforded to the appellant under regulation 21 of the EEA Regulations. Whilst not conceding that the appellant could not meet the ten year period of lawful residence for the purposes of regulation 21(4), or the five year period for the purposes of regulation 21(3), Mr Burrett did not pursue either claim with any real conviction. We consider that he was right not to do so. He acknowledged the absence of any evidence to support a claim that the appellant was lawfully resident in the United Kingdom as a dependant of his parents prior to moving in with his wife in 2004 and he also acknowledged the problems with the evidence as to the source of his income thereafter.

7. The appellant claims to have been exercising Treaty rights as a self-employed person since 2003, but the only evidence he had been able to produce before the First-tier Tribunal consisted of various self-assessment tax documents dated 11 January 2008, which had been backdated to show tax calculations for the tax years from 2002-03. There were also various bank statements produced showing receipts of cash payments which Mr Burrett informed us indicated evidence of work undertaken. However he acknowledged that the self-assessment tax documents indicated zero income until 2008 - we note the document at page 19 of a bundle "C" before the First-tier Tribunal which shows the first indication of taxed income in a self-assessment document dated 20 August 2008 for the tax year 2007/08. We also noted from the documents at pages 456 to 459 that he did not receive a national insurance number until the end of February 2007. Mr Burrett relied upon several fixed penalty payments in the self-assessment statement at page 423 of the large appeal bundle as showing that the tax authorities accepted the appellant as being self-employed. However, as we indicated to him, the strong implication of the documents when taken

together was that the appellant was working on the black-market, receiving cash in hand without paying tax, until the tax authorities caught up with him and he decided to start paying tax on the income received. Mr Burrett accepted that such evidence could not be considered as economic activity for the purposes of the exercise of Treaty rights under the EEA Regulations. Accordingly, for the purposes of the EEA Regulations, the appellant became economically active only in the tax year 2007/2008. It is not clear from the documentary evidence when in the latter part of 2007 or the early part of 2008 that was.

8. Neither do we have clear evidence of when the appellant ceased working as a result of his criminal offences. The PNC record at page 276 of the appeal bundle indicates that he was remanded on police bail on 1 April 2011 following his arrest and was remanded on bail following the commencement of his trial on 4 October 2011. It is not clear if he was held in custody prior to his conviction, but in any event he remained incarcerated following his conviction on 15 February 2012. It is plain, therefore, on any understanding of the evidence, that he could not have established five years of continuous lawful residence exercising Treaty rights prior to his incarceration and was not entitled to permanent residence.

9. We proceed, therefore, on the basis that the appellant is entitled only to the lower level of protection afforded under the EEA Regulations. Accordingly, his expulsion can be justified only on the general grounds of public policy, public security or public health, the relevant test for which is to be found in regulation 21(5), as follows:

“21(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles –

- (a) the decision must comply with the principle of proportionality;
- (b) the decision must be based exclusively on the personal conduct of the person concerned;
- (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
- (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
- (e) a person’s previous criminal convictions do not in themselves justify the decision.”

10. In the case of Essa the Upper Tribunal made the following observation at paragraph 32:

“... for any deportation of an EEA national or family member of such national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending.”

11. In line with that observation, we turn to the question of propensity to re-offend or risk of re-offending. The most relevant evidence addressing that question is the NOMS 1 assessment, which is included in the respondent’s appeal bundle at Annex H. The

assessment is unfortunately undated, but would have been completed at some stage during the appellant's incarceration and subsequent to the OASys report which, we observe from page H5, was completed on 30 July 2012. We note that the appellant's Offender Manager assessed the level of risk of serious harm as low and considered the risk to be only to illicit drugs users. The Offender Manager noted that the appellant had one previous conviction for driving with excess alcohol and using a vehicle with no test certificate in 2008. He denied involvement with the index offence in which 7kg of amphetamine sulphate was found in a jet ski in his garage, although his fingerprints were found on the tape wrapped around the concealed package of drugs. The drugs appeared to have been purely for financial gain and no issues of drugs or alcohol were identified on the appellant's part. The Offender Manager assessed the likelihood of re-conviction as low.

12. The respondent did not agree with the conclusions reached by the Offending Manager and concluded that the appellant had a propensity to re-offend. That conclusion was based on the fact that the appellant had denied involvement in the offence despite there being evidence to the contrary and on the comments made by the Crown Court judge who sentenced him. The judge's comments are set out in some detail in the reasons for deportation letter and the respondent relies in particular upon the judge's conclusion that he played a significant role in the storing and possession of the drugs and that his status was higher than street level.

13. We have had regard to the findings of the Upper Tribunal in Vasconcelos (risk-rehabilitation) [2013] UKUT 00378, that "In assessing whether an EEA national represents a current threat to public policy by reason of a risk of resumption of opportunistic offending, the Tribunal should consider any statistical assessment of re-offending provided by NOMS but is not bound by such data if the overall assessment of the evidence supports the conclusion of continued risk". That finding was relied upon in particular by Mr Melvin who asked us to place limited weight upon the conclusions of the Offender Manager. However we find no reason, in the appellant's case, to depart from those conclusions or to consider that the Offender Manager was not aware of the statements made by the sentencing judge. We take note of the positive efforts made by the appellant during his incarceration to improve his skills and his career prospects and the positive comments made by the relevant officials in the documents at pages 73 to 115 and 121 to 144 of the appeal bundle. We also take note of the appellant's progress since his release from prison in June 2013, as referred to in the summary of his evidence before the First-tier Tribunal at paragraphs 41 to 43 of its determination, none of which has been challenged by the respondent. We find that these are all relevant to the question of risk and demonstrate positive efforts made by the appellant in terms of rehabilitation, a matter considered by the Upper Tribunal in Essa to be of particular relevance.

14. Accordingly, having had careful regard to the nature and seriousness of the appellant's criminal offence, as reflected by the sentence imposed, and the comments of the sentencing judge, we conclude that the evidence before us, as referred to above, nevertheless leads us to conclude that the appellant does not represent a genuine, present and sufficiently serious threat to the interests of society.

15. We also take account, in assessing proportionality, of the significant matter of the appellant's ties to the United Kingdom. Whilst we note, as stated in Essa, that the question of integration arises to a lesser extent in cases where permanent residence has not been established, it is clear that integration is nevertheless a relevant factor. In the appellant's case, he has lived in the United Kingdom for over twelve years, albeit that only a limited number of those years involved the exercise of Treaty rights. His parents and sibling live in the United Kingdom and, whilst he retains ties to Lithuania, they are limited in terms of close family. His wife is an EEA national exercising Treaty rights, having worked and studied here for periods of time and is currently employed as an accountant. The voluminous amount of documentary evidence before us contains some evidence to support that claim (pages F59 to F70 and F130 to F142 of the respondent's appeal bundle and pages 708 to 722 of the appellant's appeal bundle) and we note that the First-tier Tribunal accepted the evidence before them in that regard. Their son is also entitled to remain here as her dependant, as will be their new baby. None of these factors are specifically challenged by the respondent. Accordingly, whilst independently exercising Treaty rights and not being dependent upon the appellant, his wife and child would not be required to leave the United Kingdom if he were deported, the maintenance of family between them in the event of his deportation would necessarily entail an interference with their ability to exercise those rights. It was Mr Melvin's submission that that was not a relevant or material factor since the family have the choice whether to be separated or to remain together by all returning to Lithuania. However we do not agree. The fact that the appellant's wife and son are EEA nationals exercising Treaty rights and that his deportation may lead (albeit indirectly) to an interference with the exercise of those rights is, in our view, a weighty factor in the appellant's favour.

16. In all of these circumstances, we conclude that the appellant's deportation would be disproportionate and, having taken account of the considerations in regulation 21(6), we conclude that the appellant's expulsion cannot be justified on the grounds of public policy and would be in breach of the EEA Regulations. Having reached that conclusion we consider it to be an unnecessary exercise to make separate findings on Article 8 of the ECHR.

## DECISION

17. The making of the decision of the First-tier Tribunal involved an error on a point of law and the decision has accordingly been set aside. In re-making the decision, however, we reach the same decision as the First-tier Tribunal (albeit for different reasons) and we allow the appeal under the EEA Regulations.

Signed  
Upper Tribunal Judge Kebede

Date

**APPENDIX A**



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: DA/00169/2013

**THE IMMIGRATION ACTS**

**Heard at : Field House  
On : 2 January 2014**

**Decision Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**MANTAS BAIBOKAS  
(NO ANONYMITY ORDER MADE)**

**Respondent**

**Representation:**

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer  
For the Respondent: Ms A Nizami, instructed by Charles Simmons Solicitors

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Baibokas's appeal against a decision to deport him from the United Kingdom pursuant to regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). For the purposes of



this decision, I shall refer to the Secretary of State as the respondent and Mr Baibokas as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

2. The appellant is a citizen of Lithuania, born on 16 October 1980. He claims to have entered the United Kingdom in 2001. He applied, on 19 June 2001, for leave to remain as a self-employed businessman under the EC Association Agreement, but his application was refused on 29 October 2001. From 1 May 2004 he was no longer subject to immigration control, as Lithuania joined the EEA. He first came to the adverse attention of the authorities on 21 August 2008.

3. On 15 February 2012 the appellant was convicted at Snaresbrook Crown Court of possessing a controlled drug with intent to supply, Class B, Amphetamine. On 26 March 2012 he was sentenced to 30 months' imprisonment. On 29 May 2012 he was notified of his liability to deportation. A decision was made on 17 December 2012 to make a deportation order by virtue of section 5(1) of the Immigration Act 1971 and under regulation 21 of the EEA Regulations, on the grounds that he posed a genuinely, present and sufficiently serious threat to the interests of public policy.

4. The respondent, in making that decision, considered that there was no evidence of the appellant's residence in the United Kingdom since 2001 and did not accept that he had been resident in accordance with the regulations for a continuous period of five years, and had thus acquired permanent residence, or that he had been resident for a continuous period of ten years. The respondent considered the circumstances of the offence for which the appellant had been convicted, namely the possession of a large amount of Class B controlled drugs, which had been found in his jet ski in his garage, and took account of the remarks of the sentencing judge and the low level of risk at which he was assessed in the NOMS 1 assessment. The respondent concluded that the appellant had a propensity to re-offend and that he represented a genuine present and sufficiently serious threat to the public. Consideration was also given to the appellant's family life with his wife and son, and to his son's medical condition, but the respondent concluded that his deportation would not be in breach of his Article 8 human rights.

5. The appellant's appeal against that decision was heard in the First-tier Tribunal on 13 September 2013, before a panel consisting of First-tier Tribunal Judge Mailer and Dr C J Winstanley. The panel heard from the appellant, his wife, his father, his sister and his brother-in-law and found their evidence to be credible. They found on the basis of the oral and documentary evidence before them that the appellant had been living continuously in the United Kingdom for at least ten years and that, as such, the respondent had to show that there were imperative grounds for deporting him. They found that no such grounds had been established and they accordingly allowed the appeal under the EEA Regulations, as well as under Article 8 of the ECHR.

6. The respondent sought permission to appeal to the Upper Tribunal on the following grounds: that the panel had erred by finding that the appellant had established ten years of lawful residence in the United Kingdom and that he had acquired a permanent right of

residence in the United Kingdom and had thus applied the wrong test; and that they had erred in concluding that the appellant's deportation would be disproportionate.

7. Permission to appeal was initially refused, but was subsequently granted on 14 November 2013.

8. The appeal came before me on 2 January 2014. The appellant was present but matters proceeded on the basis of submissions as to the error of law. I heard submissions from Ms Nizami and Mr Melvin and reached the conclusion that the Tribunal had made material errors of law, for the following reasons.

9. Ms Nizami, in her skeleton argument, accepted that the appellant's residence in the United Kingdom had to be lawful, both for the purposes of five years' and ten years' continuous residence. That was indeed the finding of the Court of Appeal in HR (Portugal) v Secretary of State for the Home Office [2009] EWCA Civ 371, as approved in Secretary of State for the Home Department v FV (Italy) [2012] EWCA Civ 1199. However, the Tribunal's conclusion, that the appellant had been continuously resident in the United Kingdom for ten years, appeared to have been based purely upon his residence with no regard to the status of that residence and no regard to whether or not he was exercising treaty rights throughout that period. Although the Tribunal appeared, at paragraphs 158 and 159 of its determination, to give some weight to the self-assessment tax calculations produced by the appellant, it made no clear findings on the period to which it was accepted that he had been exercising treaty rights. In particular, no consideration was given to the fact that Lithuania was not a member of the European Union until May 2004 and to the appellant's status prior to then. Ms Nizami submitted that prior to that date he was a family member of his parents who satisfied the conditions of Article 7(1) of Directive 2004/18 and accordingly his period of residence prior to Lithuania acceding to the European Union could be taken into account. However that was not an argument made before the Tribunal or supported by relevant documentary evidence.

10. In the circumstances the Tribunal plainly erred in concluding that, on the evidence before it, the appellant had demonstrated ten years' continuous legal residence in the United Kingdom. Accordingly its conclusion, that the relevant test was that under regulation 21(4), namely "imperative grounds of public security", was an unsustainable one. Furthermore, in the absence of any proper findings made by the Tribunal as to the period in which the appellant was considered to have been exercising treaty rights, it is clear that there is no basis upon which its decision can properly be taken as being that the appellant had established a right to permanent residence in the UK for the purposes of regulation 21(3). The Tribunal did not make any findings in the alternative in that regard. Neither did it make any alternative findings under regulation 21(5), which would have necessitated a consideration of proportionality and whether the appellant's conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It seems to me that such considerations cannot be read into the Tribunal's decision on the findings made and, as Mr Melvin submitted, any findings that the Tribunal did make in relation to proportionality, in the context of Article

8, have to be viewed as being infected by the error of law in relation to the appellant's ability to meet the requirements of the EEA Regulations.

11. Accordingly, I find that errors of law have been established and that the First-tier Tribunal's determination cannot stand and must be set aside, for fresh findings to be made in regard to the appellant's ability to meet the requirements of the EEA regulations as well as the United Kingdom's obligations under Article 8 of the ECHR. It will be for the appellant to demonstrate the period of time in which he has been exercising treaty rights in the United Kingdom in order to establish which level of protection is available to him. As I have already mentioned above, I do not consider paragraphs 158 to 159 of the Tribunal's determination to constitute proper and sustainable findings on the period during which he was exercising treaty rights, in particular given the nature of the evidence before the Tribunal, and that is a matter upon which it remains for findings to be made. The appellant is put on notice that his claim to have been exercising treaty rights will need to be supported by satisfactory documentary evidence. Furthermore, as Mr Melvin submitted, it remains for full and proper findings to be made on the questions of rehabilitation and integration, with reference in particular to the decisions in Essa v SSHD (EEA: rehabilitation/integration) Netherlands [2013] UKUT 316 and Nnamdi Onuekwere v SSHD [2013] EUECJ C-378/12

12. I make the following directions for the resumed hearing.

### Directions

(a) No later than fourteen days before the date of the next hearing, any additional documentary evidence relied upon by either party is to be filed with this Tribunal and served on the opposing party.

(b) Since the First-Tier Tribunal's determination contains a detailed summary of the oral evidence of the witnesses it is not considered that further oral evidence will be necessary, other than to provide an up-date of the appellant's circumstances where appropriate. In respect of any witness who is to be called to give oral evidence, however, a witness statement should be drawn in sufficient detail to stand as evidence in chief.

(c) The appellant's representatives are to advise the Tribunal if an interpreter is required, otherwise no interpreter will be booked for the hearing.

Signed  
Upper Tribunal Judge Kebede