



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

Appeal Number: DA/00136/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 9 December 2021**

**Decision & Reasons Promulgated
On 01 April 2022**

Before

**UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE SILLS**

Between

**ALMANTUS AKUTAITIS
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. M Spencer, Counsel, instructed by The Aire Centre
For the Respondent: Mr. T Lindsay, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals a decision made by the respondent that pursuant to regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations') it is justified on the grounds of public policy to deport the appellant to Lithuania. The decision is dated 8 February 2018.
2. The appellant appeals under regulation 36 of the 2016 Regulations.

3. The First-tier Tribunal (Judge Howard) allowed the appellant's appeal by a decision dated 25 September 2019. The respondent was granted permission to appeal by Judge Saffer on 31 October 2019. By a decision dated 4 March 2020 the Upper Tribunal (Chamberlain J and UTJ O'Callaghan) allowed the respondent's appeal to the extent that the decision of the First-tier Tribunal was set aside, and it would be remade by this Tribunal. No findings of fact were preserved.
4. The resumed hearing was heard by the panel on 9 December 2021. The parties were permitted to file post-hearing written submissions. The Tribunal subsequently received written submissions authored by Mr. Spencer, dated 15 December 2021, and Mr. Lindsay, dated 26 January 2022.

Background

5. The appellant is a national of Lithuania and is aged 38. He asserts that he entered the United Kingdom in or around 2000 to join his mother and brother.
6. He worked in construction until suffering an industrial accident in 2003.
7. The appellant accepts that at various times he had a drug addiction and drank alcohol to excess.

Criminal convictions

8. The appellant has 13 convictions in the United Kingdom concerned with 36 offences, mainly for theft (shoplifting) for which he was initially sentenced to conditional discharge and fines but subsequently received sentences ranging from 14 days to 30 weeks' imprisonment.
9. In 2012 he received a 12 months' custodial sentence, suspended for 18 months, for a dwelling house burglary.
10. In 2019 he received an 8 weeks' sentence of imprisonment for theft (shoplifting), the offence having been committed in June 2017.
11. The respondent accepts that the appellant has committed no further criminal offences since 20 June 2017.

Decision to deport

12. The respondent's decision to deport the appellant relies upon his propensity to reoffend. The respondent concluded that the appellant represents a present and sufficiently serious threat to the public to justify his deportation on grounds of public policy.
13. Consequent to the issuing of a certificate under regulation 33 of the 2016 Regulations the appellant was removed to Lithuania on 14 April 2018. The appellant asserts that he was subject to threats in Lithuania and

clandestinely returned to the United Kingdom in May/June 2018. He continues to reside in this country.

Health

14. The appellant is engaging with health care in respect of his drug and alcohol problems. He is engaged in a course of Methadone treatment. He undertook a substance misuse programme and a substance recovery programme in prison.
15. He has several health concerns arising from his drug addiction.
16. The respondent accepts that following his release from prison the appellant has cared for his mother, who has permanent residence, and he is in receipt of carers allowance. The respondent further accepts that the appellant's mother is likely to require significant ongoing personal care and assistance.

Law

17. It was accepted by the parties that the appellant continues to benefit from the transitional arrangements concerned with the 2016 Regulations.
18. The Citizens' Rights Directive (Directive 2004/38), as transposed into domestic law by the 2016 Regulations, provides additional protections against expulsion where an EEA national has residence in a host state. By virtue of regulation 23(6) an EEA national who has entered the United Kingdom may be removed if the respondent has decided that such removal is justified on the grounds of public policy, public security or public health in accordance with regulation 27.
19. The present hierarchy of levels of protection, based on criteria of increasing stringency, is identifiable as:
 - 1) a general criterion that removal may be justified 'on the grounds of public policy, public security or public health';
 - 2) a more specific criterion, applicable to those with permanent rights of residence, that they may not be removed 'except on serious grounds of public policy or public security';
 - 3) the most stringent criterion, applicable to a person 'who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision', who may not be removed except on 'imperative grounds of public security'
20. Regulation 27(5)(c) requires that the decision to expel the appellant must be based exclusively on his personal conduct and such conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

21. The onus is placed on the respondent to establish such serious threat and the standard to be applied is the civil standard: *Arranz (EEA Regulations-deportation - test)* [2017] UKUT 00294 (IAC) at [81].
22. We must be satisfied that the appellant is a present threat to the interests of society, and so his past record is not in itself sufficient: *B (Netherlands) v. Secretary of State for the Home Department* [2008] EWCA Civ 806, [2009] QB 536, at [16].
23. When considering whether serious grounds exist, focus is to be placed upon the propensity of the individual to re-offend rather than issues of deterrence or public revulsion, which have no part to play in assessment: *Secretary of State for the Home Department v. Straszewski* [2015] EWCA Civ 1245, [2016] 1 W.L.R. 1173.
24. Consideration of proportionality is only undertaken if the serious threat test has been made out. It is a holistic balancing exercise. The prospects of continuing successful rehabilitation can be relevant to proportionality.
25. Evidence as to risk and proportionality is to be considered at the date of hearing, not at the date of the expulsion decision: *MG (Prison: Article 28(3) (a) of Citizens Directive: Portugal)* [2014] UKUT 392 (IAC), [2015] Imm. A.R. 128.

Decision

26. Before us, the respondent confirmed her position to be that the appellant can only benefit from the lowest level of protection under the 2016 Regulations because (i) his periods of imprisonment from 2008, and (ii) limited evidence of any consistent employment mean that he cannot establish that he enjoys permanent residence.
27. The appellant conceded before us that he did not enjoy permanent residence. We raised with Mr. Spencer that this concession may have been made too lightly, being aware of the of the judgment of the Grand Chamber of the CJEU in Joined Cases C-424/10 and C-425-10 *Ziolkowski and Szeja v. Land Berlin* EU:C:2011:866 [2012] Imm. A.R. 421. The Grand Chamber confirmed that periods of residence completed by a national of a non-Member State in the territory of a Member State before the accession of the non-Member State to the European Union should, in the absence of specific provisions in the Act of Accession, be taken into account for the purpose of the acquisition of the right of permanent residence. We observed at the hearing that Lithuania acceded to the European Union on 1 May 2004 and so the appellant's residence in the United Kingdom from a date in 2000 to accession could potentially be taken into account.
28. We received helpful written submissions from Mr. Spencer and Mr. Lindsay. Mr. Spencer detailed that the appellant wished to withdraw his concession as to permanent residence, observing that the appellant secured such status in 2005, and in any event before 15 September 2008 when he was

sentenced to 14 days imprisonment. Mr. Lindsay opposed the late withdrawal of the concession.

29. We conclude below that the appellant's personal conduct does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and so we are not required to consider whether the appellant enjoys permanent residence. However, we are content to observe that the appellant's concession may have been too lightly made, but further evidence as to his lawful status from 2000 would be required to establish that he enjoys permanent residence.
30. Turning to the assessment of risk, Mr. Lindsay submitted that the appellant has failed to demonstrate over a substantial period that he will not relapse and return to the use of illegal drugs. Consequently, it is contended that there is a clear likelihood of further acquisitive offending and so the appellant presents a present and sufficiently serious threat.
31. It is appropriate that we detail Mr. Lindsay's acceptance, properly made, that there has been a significant period during which the appellant has not committed an offence, but he relied upon there being no requirement that a present and sufficiently serious threat be imminent. We were asked to acknowledge that a margin of appreciation exists and so the respondent's view should be given due weight. The public has an interest in the protection of national borders.
32. We have considered the appellant's evidence before us and note his candid acceptance that he took heroin in the early summer of 2021, during lockdown. We accept that it was for a brief period when he was required to move during the pandemic to a property housing drug users. We accept that he used learned skills to quickly turn away from the position he had found himself in and to address his relapse. Having heard the appellant give evidence, in a manner we found to be honest and thoughtful, we accept that the appellant genuinely wishes to continue with a life free of drugs and is capable of living each day without the thought of taking drugs. He is benefiting from taking Methadone and undergoing rehabilitation.
33. He explained that he wishes to take an opioid antagonist, also known as an opiate blocker. He has made enquiries with a clinic in Lithuania and has identified that he can secure two injections in one day at the premises, enabling him to return straight away to the United Kingdom.
34. We conclude that the appellant is clearly, and genuinely, seeking to establish a life away from the use of illegal drugs and the heavy use of alcohol. He has put in place relevant and helpful strategies that are presently proving successful. He is considering additional steps to further aid his addiction-free lifestyle. We accept that his mother is a stabilising influence in his life. He clearly has great affection for her and appreciates the emotional harm she suffered through his previous lifestyle choice and subsequent addictions. He obtains personal and emotional benefit through

his care for her and the nature of such care has secured him carer's allowance.

35. The appellant's significant disengagement from criminal behaviour for approaching five years strongly suggests a pro-social lifestyle. We note his brief relapse in the early summer of 2021, but we observe his candid acceptance of his relapse, which was not known to the respondent. We further note his ability to apply coping mechanisms and skills to ensure that his relapse was minimal. We detail our serious concern as to the appellant's return to this country having been removed in 2018. However, the respondent did not challenge the appellant's reasons for returning, in part concerned with a subjective fear of harm consequent to receiving threats in Lithuania and in part concern as to his mother's welfare. Though a serious breach of the law, we conclude that the individual action that took place in 2018 does not detract from his present pro-social lifestyle.
36. As for his offending, we accept that it was persistent. Though serious, it primarily related to acquisitive crime and not violence. We find that his criminal offending was rooted in his then existing substance addiction, which he has taken steps to address over recent years. He has adopted a pro-social lifestyle for several years. We accept that he remains motivated to continue being pro-social. His mother is a stabilising influence, and his concern to provide care to her strongly underpins his efforts to address his addictions. In such circumstances, and being mindful of the relevant test, we conclude that the respondent cannot meet the burden placed upon her. The threat posed by the appellant cannot properly be considered to be either 'sufficiently serious' or 'present'.
37. Consequent to finding in favour of the appellant as to serious threat, we are not required to consider proportionality. However, we are content to detail that on the facts presented the appellant's deportation would be disproportionate, having regard to the concept of proportionality as defined in European Union law: *R (Lumsdon and Others) v. Legal Services Board* [2015] UKSC 41, [2016] A.C. 697.
38. A decision to deport must be appropriate for securing the objective sought and must not go beyond what is necessary in order to obtain it: Case 55/94 *Gebhardt v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* EU:C:1995:411 [1996] 1 C.M.L.R. 603.
39. We note the appellant's mental and physical health concerns and the personal benefit he secures from being close to his mother, who herself is in poor health. We accept that he is a protective factor for his mother, and acts as her carer. We observe that but for a short period in 2018, the appellant has resided in this country since 2000. We further accept that his deportation would prejudice his rehabilitation from offending: *Essa v. Upper Tribunal (IAC)* [2012] EWCA Civ 1718, [2013] Imm. A.R. 644. When considering proportionality, we conclude that the objective of protecting the public can be addressed by permitting the appellant to remain in this

country and complete his rehabilitation. To deport the appellant would impose an excessive burden not only upon him, but also upon his mother.

Notice of Decision

40. By means of a decision sent to the parties on 4 March 2020 this Tribunal set aside the decision of the First-tier Tribunal promulgated on 25 September 2019 pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.
41. The decision is remade.
42. The appeal is allowed.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 28 March 2022