



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00241/2015**

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 1 February 2016

Promulgated

On 12 February 2016

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MR NERIJUS DULINSKAS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Chakmakjian, Counsel instructed by Mondair Solicitors

For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is citizen of Lithuania and his date of birth is 5 June 1982. On 5 January 2012 the Secretary of State made a decision to deport the appellant under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") resulting from the appellant's conviction of robbery at Lincoln Crown Court on 17 June 2011. The appellant did not appeal against this conviction and he did not appeal against the decision of the Secretary of State. In fact it appears from the original decision

letter that he agreed to return to Lithuania and indicated that he wished to return to Lithuania on completion of his sentence.

2. The appellant made an application to revoke the order pursuant to Regulation 24A of the 2006 Regulations. This was refused in a decision of 19 May 2015. The appellant appealed against this decision and his appeal was dismissed by Judge of the First-tier Tribunal Parkes in a decision that was promulgated on 4 November 2015 following a hearing on 23 October 2015. Judge Kinnell granted permission to the appellant.
3. I heard oral submissions from parties and I had regard to the original skeleton argument that was before the First-tier Tribunal. Mr Kandola conceded that the judge did not engage with the evidence relating to permanent residence, in particular the payslips that were before him, but he submitted that this was not material. The appellant had not appealed against the earlier decision appellant is unable to relitigate this issue.
4. In my view the initial decision was made on the basis that the appellant in this case did not have permanent residence. At the hearing before Judge Parkes this issue was raised. The argument before Judge Parkes was that the original decision had been made on the wrong basis because the appellant did have permanent residence.
5. The judge did not consider the evidence relating to permanent residence and in my view paragraphs 9 and 15 do not adequately deal with the issue as raised by the appellant. I appreciate that the appellant did not appeal the original decision in 2012, but in order for the judge to properly determine Regulation 24A (whether there has been a material change in the circumstances that justified making the order), there needs to be consideration of the level of protection to which the appellant was entitled in order to determine proportionality in the context of Reg. 21(6). I note Mr Kandola's submissions in relation to *res judicata* but it is not applicable in this case. There has been no finding by a court.
6. The judge did not make a proper assessment under Article 8. The decision is inadequately reasoned. I note that directions had been made issued to the parties directing the respondent to file and serve evidence including the PSR but there was a failure to comply with these. It does not amount to an error of law that the judge proceeded with the hearing in the absence of that evidence (particularly in the absence of an application for an adjournment).
7. However, the judge materially erred for the reasons given above and for this reason the decision is set aside. The decision needs to be remade and in doing so a judge needs to determine the level of protection to which this appellant was entitled in order to consider the issue of proportionality under the Regulations and Article 8 and there must be consideration of the appellant's circumstances as they are now as opposed to the situation in 2012 in order to determine whether there has been a material change in the circumstances that justified the making of the order.

8. Both parties conceded that in the event of a material error of law such that the decision is set aside the matter should be remitted to the First-tier Tribunal and I accept this.

Notice of Decision

The appeal is allowed and the matter is remitted to the First-tier Tribunal.

Signed Joanna McWilliam

Date 8 February 2016

Upper Tribunal Judge McWilliam