**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00505/2017

**THE IMMIGRATION ACTS**

**Heard at Field House** **Decision & Reasons Promulgated**
**On 24th August 2018** **On 24th October 2018**

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**
Appellant

**And**

**EDVINAS LUCINSKIS**
**(ANONYMITY DIRECTION NOT MADE)**
Respondent

**Representation:**
For the Appellant: Mr T Lindsay, Home Office Presenting Officer
For the Respondent: Ms S Walker of Counsel instructed by Atlas Law Solicitors

**DECISION AND REASONS**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Juss promulgated on 20 February 2018, in which Mr Lucinskis' appeal against the decision to deport him dated 23 August 2017 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Lucinskis as the Appellant and the Secretary of State as the Respondent.

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2. I found an error of law in Judge Juss' decision promulgated on 20 February 2018 following the first hearing of this appeal on 15 May 2018. The background to this appeal is set out in the error of law decision contained in the annex and will not be repeated here save where reference to the background facts is needed. This decision is the re-making of the appeal.

3. In my error of law decision promulgated on 2 July 2018, the First-tier Tribunal's decision was set aside, with the preserved finding that the Applicant had not acquired permanent residence in the United Kingdom, a point which neither party had sought permission to appeal on and on which no submissions were made during the error of law hearing on 15 May 2018. The parties were directed to file and serve any further evidence to be relied upon no later than 14 and 21 days before the relisted hearing respectively in respect of any of the live issues in the appeal.

4. At the hearing on 24 August 2018, the Appellant sought to submit a skeleton argument and further documentation, primarily directed towards the issue of whether the Applicant had a permanent right of residence in the United Kingdom. However, as was clear from my previous decision, there was a preserved finding of fact that the Applicant did not have permanent residence. The Appellant had not sought permission to cross-appeal this finding nor in fact had any mention been made of this point prior to the day of the re-making hearing. Further, the directions for filing of any further documents had not been complied with. There was no good explanation for the matter not being raised previously nor any formal application for permission to appeal being made and I declined to allow the point to be argued, with the preserved finding of fact as previously indicated.

**The appeal**

*Applicable law*

5. Pursuant to regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 (the "EEA Regulations"), the Respondent may deport an EEA national where that person's removal is justified on the grounds of public policy, public security or public health. Any such deportation must be in accordance with regulation 27 which provides as follows:

> *(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.*
> *(2) A relevant decision may not be taken to serve economic ends.*
> *(3) …*
> *(4) …*
> *(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a*

*relevant decision is taken on grounds of public policy or public security it must also 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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;*

*(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;*

*(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.*

*(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of heath, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.*

*(7) …*

*(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc).*

6. Further to regulation 27(8), Schedule 1 provides as follows:

***Considerations of public policy and public security***

*1. The EU Treaties do not impose a uniform scale of public policy or public security values; Member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.*

***Application of paragraph 1 to the United Kingdom***

*2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.*

*3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society.*

*4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as –*
   *(a) the commission of a criminal offence;*
   *(b) an act otherwise affecting the fundamental interests of society;*
   *(c) the EEA national or family member of an EEA national was in custody.*

*5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.*

*6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including –*
   *(a) entering, attempting to enter or assisting another person to enter or to attempt to enter, a marriage, civil partnership or durable partnership of convenience; or*
   *(b) fraudulently obtaining or attempting to obtain, or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.*

***The fundamental interests of society***

*7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include –*
   *(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;*
   *(b) maintaining public order;*
   *(c) preventing social harm;*
   *(d) preventing the evasion of taxes and duties;*
   *(e) protecting public services;*
   *(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintain public confidence in the ability of the relevant authorities to take such action;*
   *(g) tackling offence likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 8391) of the Treat on the Functioning of the European Union);*
   *(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);*
   *(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;*
   *(j) protecting the public;*
   *(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);*

(l) *countering terrorism and extremism and protecting shared values.*

*Explanation for the refusal*

7. In the decision letter dated 23 August 2017, the Respondent sets out the Appellant's immigration and criminal history as follows. The Appellant claims to have entered the United Kingdom in 2010 but there is no record of his entry and officials were only aware of his presence in the United Kingdom when he received a caution on 17 June 2012 for battery.

8. On 29 April 2014, the Appellant was convicted of assault occasioning actual bodily harm and sentenced to a 10 month referral order (which was revoked on 31 March 2015) and ordered to pay compensation.

9. On 31 March 2015, the Appellant was convicted of battery and sentenced to a 6 month referral order and ordered to pay compensation. On the same date, he was convicted of harassment to which he was sentenced to a 6 month referral order to run concurrently, to pay costs and a victim surcharge.

10. On 4 August 2015, the Appellant was convicted of theft (shoplifting) and sentenced to a 6 month conditional discharge and ordered to pay costs and a victim surcharge. This was later varied to a community order with 50 hours unpaid work.

11. On 4 February 2016, the Appellant was convicted of theft (shoplifting) and sentenced to a community order with unpaid work and ordered to pay a victim surcharge. He was also convicted on that date for breach of a conditional discharge.

12. On 31 March 2016, the Appellant was convicted of theft (shoplifting) and sentenced to a community order with 80 hours unpaid work, ordered to pay a victim surcharge and costs.

13. On 19 August 2016, the Appellant was convicted of wounding/inflicting grievous bodily harm and sentenced to 20 months' imprisonment in a young offenders institute and ordered to pay a victim surcharge. On the same date he was also convicted of battery and sentenced to 4 months' imprisonment to run concurrently.

14. The Respondent did not accept that the Appellant had been resident in the United Kingdom in accordance with the EEA Regulations for a continuous period of five years and therefore made the decision to deport on grounds of public policy only.

15. In consideration of regulation 27(5) and Schedule 1 of the EEA Regulations, the Respondent noted that the Appellant had been convicted of 11 offences on 6 occasions, including whilst on referral orders from previous convictions and that the offences included unprovoked violence and had escalated in severity. In particular, regard was had to the sentencing remarks for the last offence and it was decided that the

Appellant's behaviour was contrary to the six of the fundamental interests of society set out in Schedule 1 to the EEA Regulations. The Appellant was considered to be of a high risk of offending, was a persistent offender and posed a significant risk to the general public such that overall he represented a genuine and sufficiently serious threat to society.

16. The Respondent considered the Appellant's deportation to be proportionate having had regard to his age, that he was 19 years old; that he had not been resident in the United Kingdom for five years and had not adapted or integrated into life in the United Kingdom. The Appellant speaks the language of his home country and could be assisted by his parents on return to Lithuania, using skills and education to obtain employment or pursue further studies on return.

17. With regards to rehabilitation, the Respondent had no evidence of any rehabilitative work undertaken by the Appellant whilst in custody and considered that his family would be unlikely to provide such support given they were unable to prevent past offending.

18. The Respondent gave separate consideration to the Appellant's right to respect for private and family life under Article 8 of the European Convention on Human Rights, through the prism of paragraphs 398 to 399A of the Immigration Rules and sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002. The Appellant has no partner or children in the United Kingdom (no evidence of any named partner being submitted) and nor did he meet the private life exceptions to deportation. The Respondent did not find any very compelling circumstances to outweigh the public interest in deportation.

19. The Appellant had also claimed that his deportation would breach Article 3 of the European Convention on Human Rights but the Respondent did not accept he would be destitute or homeless on return.

20. Finally, the Appellant's appeal was certified under regulation 33 of the EEA Regulations such that he could be removed pending final determination of his appeal and he was so deported from the United Kingdom in 2017. The Appellant either did not request readmission for the purposes of his appeal under regulation 41 of the EEA Regulations, or this was not approved by the Respondent and he did not appear at the oral hearing.

*The Appeal*

21. The Appellant initially appealed on the basis that he had acquired a permanent right of residence in the United Kingdom and was thus subject to the higher public policy threshold in regulation 27(2) of the EEA Regulation and in any event, on the basis that he did not pose a genuine, present or sufficiently serious threat in the United Kingdom.

*The Written Statements*

22. In his written statement dated 14 September 2017, the Appellant states that he came to the United Kingdom with his immediate family in August 2010 and his parents have been working in the United Kingdom ever since (save for periods of maternity leave and ill-health). The Appellant's younger sister is in school in the United Kingdom and his brother is studying at college. The Appellant has no family remaining in Lithuania.

23. The Appellant claimed to have integrated socially and culturally into the United Kingdom, receiving education and medical treatment here as well as being in a relationship and developing friendships. He stated that there would be very significant obstacles to him returning to Lithuania, where he would have no one to support him financially or emotionally and where he has no accommodation.

24. In a separate written statement dated 18 August 2017, the Appellant stated that he was now residing in Lithuania without any income or accommodation. He had some help from social stations for food but it was sometimes hard as he wasn't registered in Lithuania. As to accommodation, he stayed with friends who helped him with a little bit of money but also stayed at the railway station overnight sometimes. The Appellant's mother sent him a cheap mobile phone after which he could contact people. The Appellant is unable to find employment as he is registered as living in the United Kingdom. The Appellant misses his family and wants to help them particularly because of his father's illness.

25. Irina Lucinskaja, the Appellant's mother, in her written statement signed and dated 18 August 2017, describes her family history in the United Kingdom. She stated that the Appellant had been removed to Lithuania but he had no employment and did not speak the language there. She was unable to send him money as he could not open a bank account and he is now homeless.

*The Oral Evidence*

26. Ms Irina Lucinskaja, the Appellant's mother, attended the oral hearing, adopted her written statement and gave oral evidence through a Court appointed interpreter. She stated that she had arrived in the United Kingdom with her partner and two children (one of whom is the Appellant) in 2010 and that she has been working as a cleaner for six years.

27. The Appellant is currently residing in Lithuania, but his mother is not sending him any money as she can not afford to do so and instead is only able to send him some presents, like clothes. The Appellant was working on a construction site the week before the hearing but was only being offered temporary jobs for a week at a time as he can not be offered anything permanent or full-time without registration in Lithuania.

28. The Appellant and his family declared that they were leaving Lithuania in 2012 so their registrations ended. To re-register, you need to have a residential address and the Appellant does not have one, a person has to

agree to you using the address and no one will because they would be liable for additional taxes. The Appellant has been staying with friends and acquaintances that he had previously been to school with but his mother does not know his address as they won't allow the Appellant to disclose it to anyone.

29. In cross-examination, the Appellant's mother stated that there is no family remaining in Lithuania so he is only supported temporarily by old acquaintances who let him stay for a week or a month. The Appellant's mother sends presents to the Appellant via a van service to a local post office where he can collect them. The Appellant's mother can not send money to the Appellant as he does not have a bank account or registration in Lithuania and she could not afford to do so anyway. Registration is required to do anything by law in Lithuania.

30. The Appellant and his mother communicate via messenger when he has the money to top up his internet and she tries to call him when possible. The Appellant's mother was asked if the Appellant can pay for essentials like food if he is able to pay for internet, to which she said that of course he eats but is looking thin and buys the cheapest internet or uses wifi when he can.

31. The Appellant's mother confirmed that she thought her son had committed crime in the United Kingdom because he was associating with bad people and that she is sure he has not committed any crimes following his deportation to Lithuania. She thought this was because he had grown up and understands now how not to get into trouble rather than because it was easier for him to do so in Lithuania.

32. In the absence of any documentary evidence about the registration system in Lithuania, I asked further questions of the witness. She stated that she did not know if there is a legal requirement for registration. In terms of accommodation, if you are renting, you need your landlord's permission or ask them to register you but if you own your own property, you can stay without any registration. In terms of work, you can be registered on a temporary basis for work, perhaps for one or two weeks. Without registration, you are not able to use public medical services. The Appellant's mother was not sure what state support may be available for accommodation, she thought there were some hostels but they were used by people with problems and alcoholics.

33. The Appellant had been working a week at a time in different places and had been paying friends for accommodation and buying food.

*Closing submissions*

34. On behalf of the Appellant, it was submitted that the following factors weighed heavily in the balance for the assessment of proportionality. First, the Appellant's age and that his offences were primarily committed as a minor between the ages of 15 and 18; and that he was given

relatively low sentences including referral orders, a conditional discharge and community orders with only one custodial sentence for the last conviction. It was submitted that these sentences suggested low level offending and although the sentencing remarks for the last offence, with reference to the pre-sentence report, showed a high risk of reoffending, this would need to be reassessed over time and two years have since passed.

35. The Appellant has had a good record since being in custody and also in immigration detention and it was submitted that he has taken on board interventions which would have been put in place in custody such that he no longer poses a threat to the United Kingdom.

36. All of the Appellant's family live in the United Kingdom and he has no family support in Lithuania, only relying on old friends. His economic situation is poor and he has not been able to find permanent accommodation or employment. The Appellant has made little progress building a life for himself in Lithuania because of his lack of registration there. Although the Appellant does not claim to have spent most of his life in the United Kingdom, he has spent a significant part of it here between the ages of 12 and 18; during which time he has completed his education and become socially and culturally integrated, speaking English fluently.

37. In relation to Article 8 (as expressed in the Immigration Rules in the context of deportation cases) and the factors in section 117 of the Nationality, Immigration and Asylum Act, it was accepted on behalf of the Appellant that he could not meet either of the express exceptions to deportation despite the family life he has with his parents and siblings but in any event it was submitted that his deportation would be a disproportionate interference with his right to respect for private and family life relying on the same factors as set out above in relation to the EEA Regulations.

38. On behalf of the Respondent, concerns were raised about the submissions that the Appellant's offending was of a low level reflected by the sentencing as this was wholly inconsistent with the sentencing remarks for the last offence and a referral order would have been made solely on the grounds of the Appellant's age rather than by reference to the seriousness of the offence. The index offence was tried in a Crown Court as the Appellant was 18 at the time of the offence.

39. It was submitted that the suggestion that the Appellant's risk of reoffending had decreased was pure speculation with no reliable evidence to support it. The threat posed by the Appellant was clearly demonstrated by the sentencing remarks and the Appellant's history of being a repeat violent offender, with unprovoked attacks of increasing seriousness, from actual bodily harm in 2014, to an attack on a former partner in 2015 and grievous bodily harm and assault in 2016 for which the Appellant showed no remorse. The fact that the Appellant has not offended since does not carry any significant weight given the ongoing deportation proceedings.

Further, it was submitted that if the Appellant had not offended in Lithuania, it shows that he has achieved some level of rehabilitation there which he had not been able to do in the United Kingdom. However, the issue of rehabilitation was less weighty in the absence of permanent residence in the United Kingdom. Overall it was submitted that the Respondent had shown that the Appellant posed a genuine and present threat to more than one of the fundamental interests of the United Kingdom.

40. As regards to proportionality, it as submitted that there was no up to date evidence from the Appellant himself although he continued to be legally represented and therefore presumably in touch with his solicitors to give instructions for the appeal. The only evidence available as to his current circumstances was from the Appellant's mother as a second hand account and it was submitted that she exaggerated her evidence to try to help her son.

41. There is no evidence before the Upper Tribunal as to any registration requirement in Lithuania or why the Appellant could not register, could not open a bank account, could not obtain accommodation or employment. The Appellant has now been living in Lithuania for around a year, paying rent for accommodation and working regularly even if in a series of temporary jobs. There is no reason as to why he could not now, or in due course, register in Lithuania and obtain more permanent accommodation and employment (even if registration is required to achieve this). Further, on the balance of probabilities, the Appellant can be supported by his family in the United Kingdom and has found support from family/friends in Lithuania to date. There is also a lack of evidence to suggest that the Appellant has not been able to access any social assistance in Lithuania.

42. The Respondent remained of the view that the Appellant had not integrated into the United Kingdom given the escalation of his offences for at least half of his time in the United Kingdom which his family were unable to control or help prevent.

43. The Appellant is an adult, living independently in Lithuania, who speaks fluent Lithuanian and Russian. Although he has close family in the United Kingdom, that is not sufficient to show his deportation is disproportionate.

**Findings and reasons**

44. The Respondent can only deport the Appellant on the grounds of public policy or public security in accordance with Regulation 23 of the EEA Regulations. In accordance with those provisions set out above, I consider first the personal conduct of this Appellant and whether his personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests in society. Although the Appellant's conviction or criminal history does not itself justify a decision to deport, that is an appropriate place to start.

45. The Appellant's criminal history is set out in detail above, which includes violent offences of an increasingly serious nature and offences committed whilst subject to orders from a previous offence. The Sentencing Remarks in relation to the last offence are informative both as to the seriousness of that offence and the Appellant's past history but also as to the assessment of future risk (at that point in time). These include as follows:

> *"… Your previous convictions are very worrying in my view. You have five convictions covering nine offences. In 2012 you were reprimanded for an offence of battery, first offence of violence. In April 2014 for an offence of actual bodily harm, because of your age you were given a Referral Order. But the facts of that case bear quite a lot of similarity to your behaviour on this occasion. You attacked brutally a fellow pupil at school damaging his knee seriously; and then a year later you were back in front of the Courts in March 2015 for yet another violent offence and again, because of your age, a Referral Order was passed. On this occasion, you attacked your former partner and hurt her. Since March 2015, you have been convicted of various shoplifting offences, but it is the previous violence offences which are of great concern to this Court.*
>
> *I can set out the facts fairly briefly. On this particular day, two brothers were out for the day enjoying themselves on a bicycle and they had spent the day cycling. On their way home when they met you coming in the opposite direction. You had some sort of music on, blaring out from a loudspeaker and the older of the two brothers, Matthew, sang along with it. For no apparent reason, you lost it, you lost your temper. You kicked out at his bike, causing him to fall over and then as he was getting out, you punched him three times in the chest. Fortunately for Matthew you didn't cause any injuries and that is the offence of common assault.*
>
> *But Matthew's young brother, who was 16, so two years younger than you, came bravely to his brother's assistance and for that you kicked him, you punched him with sufficient force to his chest to rupture his spleen. He was in a great deal of discomfort and pain, unable to cycle home, he had to push his bike home. When he got home he complained to his mum that he was feeling very unwell. She thought it might just be a stitch, because he was too frightened to say what had actually happened for some time. It is a factor, I think, is perhaps not insignificant.*
>
> *Shortly afterwards, while sitting with his mum on the settee he had a fit, he started shaking, he lost vision, which must have been a terrifying thing for a 16 year old to have to go through and then he was admitted to the Queen Elizabeth hospital in Kings Lynn, where he was diagnosed with having a ruptured spleen and two broken ribs. The injuries were such that he had to remain in hospital for some six nights.*
>
> *And you were arrested because you were in the same school as certainly the elder brother Matthew who was able to identify you; and to your credit you made admissions to the Police that you – and you say you just lost your temper, which is something, I'm afraid, has happened in the past.*
>
> *I've been read effectively a victim personal statement from the brothers' mother and particularly the younger one, Christopher; who suffered the ruptured spleen. Fourth months later he was still in discomfort and the*

*injuries were still mending and this attack has had a serious effect on his life. As a 16 year old he's been unable to take part in any sport and that will be for some time. It's also psychologically undermined his confidence. He is now very unconfident about going out and fears being out alone because of what you did to him.*

*…*

*I turn now to the pre-sentence report. … They have come to the conclusion that you do pose a high risk of serious harm to the public and with that conclusion I agree. It seems that you are prone to lose your tempter and last out and harm people and cause serious injury to people.*

*…*

*The pre-sentence report writer failed to see any remorse. I'm urged by your Counsel, Mr Polak, that you are remorseful and indeed, it is true in your interview you did seem to express remorse to the Police Officers."*

46. Although I bear in mind that those remarks are now over two years old, as is the pre-sentence report; there is no further report or assessment of the risk posed by the Appellant before me to update the position. There is also nothing before me to show any rehabilitation work or interventions in custody completed by the Appellant. There is no statement from the Appellant dealing with his reasons as to why he claims not to be of any continuing or future risk. I note that the Appellant's mother stated her view that the Appellant got into trouble because he was in the wrong group of friends, but I note that the Appellant's offences were committed alone and not as part of a group, so a change in social circles carries little if any weight.

47. The submissions on behalf of the Appellant that he does not continue to pose a serious or significant risk in the future are not supported by any evidence, not even any recent statement from the Appellant expressing why he would not offend further. The Appellant's mother's statement that she thought the Appellant had grown up and now understands the seriousness of his actions does little to counter the previously found risk of reoffending, nor is it persuasive that anything has changed.

48. Taking into account the above factors as well as the Appellant's criminal history of increasingly serious violent offences and, in his favour, that there is no evidence of any offending since he has been in Lithuania; I find that he does pose a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society in the United Kingdom.

49. The final issue to consider is whether the Appellant's deportation would be proportionate bearing in mind the specific factors set out above in Regulation 23 and Schedule 1 of the EEA Regulations. I find it is for the following reasons.

50. The Appellant is a single adult male, now 21 years of age, who is in good health. He claims to have been in the United Kingdom since 2010 but it has only been accepted that he has been here since 2012. The Appellant has spent most of his formative teenage years in the United Kingdom but has spent the majority of his life in Lithuania and where he still has friends and acquaintances (of sufficient quality that they have assisted him on return), even if his immediate family is in the United Kingdom. The Appellant speaks fluent Lithuanian, Russian and English and could use his education and experience to obtain employment, as he has done since removal. I find that even before deportation he had continued social, linguistic and cultural ties to Lithuania and these have been further strengthened on his return.

51. Since his return to Lithuania around a year ago, I find that the Appellant has been able to reintegrate and to a reasonable extent re-establish himself there. Although his initial statement shortly after arrival described the difficult circumstances he found himself in without his family and immediate support, he has since found employment and accommodation (albeit both of a temporary nature) and is able to support himself financially (paying rent for accommodation, buying usual essentials and paying for internet/phone), albeit with some assistance from friends and some gifts from his family in the United Kingdom. There is no recent written statement from the Appellant and nothing to suggest that he sought permission to return to the United Kingdom to appear at his appeal hearing. It would be reasonable to expect at least an updated written statement setting out his current position, particularly if it continued to be as difficult as originally claimed and as difficult as his mother continued to suggest. As it is, there is only very limited second hand evidence before me of the current situation.

52. I found the Appellant’s mother’s evidence to be exaggerated as to the difficulties faced by the Appellant in Lithuania taking into account the matters immediately above and the lack of any supporting evidence as to why the Appellant needed to be registered to further integrate and establish himself there or as to why he had not or could not be registered now or in the future. In her evidence she was reluctant to admit that the Appellant had been working and supporting himself, even if in difficult circumstances and with only temporary work.

53. There is nothing before me to suggest that the Appellant will not be able to register himself in Lithuania (even if that is a pre-requisite to permanent accommodation, employment or for such things as opening a bank account on which there was nothing beyond the evidence given in oral testimony) and in any event continue to integrate and establish himself further in Lithuania, continuing the progress he has already made in this regard, using his skills, education and experience to do so and continue with the social relationships he has already re-established from when he lived in Lithuania as a child.

54. Further, there is nothing to suggest that the Appellant could not pursue rehabilitation in Lithuania, nor that that would be more detrimental compared to rehabilitation in the United Kingdom. The Appellant retains the support of his family in the United Kingdom, albeit they do not have the same face-to-face contact as before and so far it seems that he has been able to refrain from any further offending in Lithuania – something which he did not achieve whilst in the United Kingdom, although the threat of and continuing deportation proceedings may have assisted the Appellant in this regard.

55. The Appellant completed his secondary education in the United Kingdom and his immediate family are resident here, including his parents, adult brother and younger sister. I accept that he has at least to some extent socially and culturally integrated into the United Kingdom given the length of his residence and education here, but there is little if any evidence of any significant or wider integration. I also attach some weight to the Respondent's view, which is also in accordance with Schedule 1to the EEA Regulations, that the Appellant's offending history over a number of years shows a lack of integration into the United Kingdom due to the lack of respect for its laws and personal well-being of individuals living here, particularly given the nature of the offences committed.

56. In all of the circumstances, I find that the Respondent has established that there are grounds of public policy to justify the Appellant's deportation from the Untied Kingdom; which is a proportionate decision having taken into account the genuine and present risk he poses to fundamental interests of society in the United Kingdom even taking into account his length of residence, relatively young age (including the relatively young age at which most of his offences were committed, albeit the most serious one committed as an adult) and that his immediate family are in the United Kingdom. I therefore dismiss the appeal under the EEA Regulations.

57. In the alternative, it is accepted on behalf of the Appellant that he can not meet any of the exceptions to deportation on human rights grounds set out either in section 117C of the Nationality, Immigration and Asylum Act 2002 or in the Immigration Rules and it would therefore it would only be if there are very compelling circumstances over and above the exceptions to outweigh the significant public interest in deportation in this case that the Appellant could succeed on this alternative basis.

58. The Appellant has not identified any further relevant circumstances and no separate substantive submissions were made on his behalf to suggest that there was anything further or different to that already set out above which could be taken into account in the Appellant's favour. In circumstances where the Appellant does not meet either of the exceptions to deportation and has not identified any further very compelling circumstances, it is clear that the public interest in deportation is not outweighed in this case. In more traditional Article 8 terms, the

Appellant's deportation would not be a disproportionate interference with his right to respect for private and family life.

**Notice of Decision**

For the reasons given in my decision promulgated on 2 July 2018, the making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it was necessary to set aside the decision.

The decision of the First-tier Tribunal is set aside and re-made as follows:

Appeal dismissed under the Immigration (European Economic Area) Regulations 2006.

Appeal dismissed on human rights grounds.

No anonymity direction is made.

Signed Date 19th October 2018

Upper Tribunal Judge Jackson

**ANNEX**

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00505/2017

**THE IMMIGRATION ACTS**

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| **Heard at Field House** | **Decision & Reasons Promulgated** |
| **On 15th May 2018** | **On 24th October 2018** |

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**EDVINAS LUCINSKIS**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr J Gajjar of Counsel, instructed by Atlas Law Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Juss promulgated on 20 February 2018, in which Mr Lucinskis' appeal against the decision to deport him dated 23 August 2017 was allowed. For ease I continue to refer to the parties as they were before the

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First-tier Tribunal, with Mr Lucinskis as the Appellant and the Secretary of State as the Respondent.

2. The Appellant is a national of Lithuania, born on 6 September 1997, who claims to have arrived in the United Kingdom in 2010 with his parents and sibling. The Appellant has a number of criminal convictions in the United Kingdom, starting on 29 April 2014 when he was convicted of burglary and theft of a dwelling and of assault occasioning actual bodily harm for which he was sentenced to concurrent 10- month referral orders. Those referral orders were revoked on 31 March 2015 when the Appellant was convicted of battery and of pursuing a course of conduct which amounted to harassment, for which he was sentenced to concurrent six-month referral orders.

3. On 4 August 2015, the Appellant was convicted of theft and was sentenced to a conditional discharge of six months, subsequently varied on 4 February 2016 to a community order including 50 hours unpaid work. On 4 February 2016, the Appellant was convicted of theft and sentenced to a community order until 3 January 2017 with an unpaid work requirement. He was also convicted of breaching a conditional discharge on the same date with no additional sentence imposed. There were further convictions for theft on 31 March 2016 for which he was sentenced to a community order with an unpaid work requirement of 18 hours.

4. On 19 August 2016, the Appellant was convicted of wounding/inflicting grievous bodily harm which was sentenced to 20 months' imprisonment in a young offenders institute. On the same date he was convicted of battery for which he was sentenced to 4 months in prison to run concurrently. Orders for costs and victim surcharges were made in relation to most of these offences.

5. On 31 August 2016, the Respondent served the Appellant with a liability to deportation notice, to which he responded on 5 September 2016 and 13 July 2017.

6. The Respondent made a decision to deport the Appellant on 23 August 2017 for the following reasons. First, it was not accepted that the Appellant had been resident in the United Kingdom in accordance with the EEA Regulations for a continuous period of five years, in particular there was a lack of documentary evidence of residence and of the Appellant or his parents having been in continuous employment or education to show that they have exercised treaty rights for the required period. The Appellant had not therefore acquired a permanent right of residence under the Immigration (European Economic Area) Regulations 2016 (the "2016 Regulations") so consideration was given to his deportation on the grounds of public policy under regulation 23(6)(b) and with reference to the principles set out in regulation 27(5).

7. The Respondent considered that the Appellant had a propensity to reoffend and that he represented a genuine, present and sufficiently

serious threat to the public to justify his deportation grounds of public policy. When considering whether deportation was proportionate, account was taken of the Appellant's age and health, him being 19 years old and in good health was no evidence to show that he had adapted to life in the United Kingdom, including as shown by his offending behaviour. The Appellant speaks Lithuanian and it was considered that his parents could assist him with his return and in addition any skills, work is education received in the United Kingdom could be used on return to Lithuania. Friendships and relationships could be maintained on return.

8. The Respondent considered rehabilitation but noted that there was no evidence that the Appellant undertook any rehabilitative work whilst in custody and that family members are unlikely to provide him with the necessary support to aid rehabilitation on release from detention given they were unable to prevent the offences occurring.

9. The Respondent separately considered the Appellant's right to respect for private and family life under Article 8 of the European Convention on Human Rights, with reference to paragraph 398 and following of the Immigration Rules and sections 117Ato D of the Nationality, Immigration and Asylum Act 2002. The Appellant's deportation was considered to be conducive to the public good and in the public interest following his conviction. The express exceptions to deportation on the grounds of private and family life did not apply to the Appellant and there were no very compelling circumstances over and above those exceptions to outweigh the public interest in deportation.

10. The Appellant separately claimed that his removal to Lithuania would breach Article 3 of the European Convention on Human Rights on the basis that he would have no financial or emotional support on return, no accommodation in Lithuania and would therefore be homeless and destitute. However, the Appellant's parents had supported him in the United Kingdom and the Respondent considered that they would continue to do so on his return to Lithuania and that he could in any event utilised skills in order to gain employment or further his education. There is also a social welfare system in Lithuania which would be available to the Appellant.

11. Finally, the Respondent certified the Appellant's appeal under regulation 33 of the 2016 Regulations such that he could be deported from the United Kingdom prior to the final outcome of any appeal. The Appellant was in fact deported prior to the hearing of his appeal before the First-tier Tribunal hearing on 11 January 2018.

12. Judge Juss allowed the appeal in a decision promulgated on 20 February 2018 on EEA and Article 8 grounds. I set out below the detail of that decision.

**<u>The appeal</u>**

13. The Respondent appeals on three grounds. First, that the First-tier Tribunal decided the appeal under the Immigration (European Economic Area) Regulations 2006 when the decision under challenge was made under the 2016 Regulations which applied to this appeal. Secondly, that the First-tier Tribunal failed to give clear adequate reasons for allowing the appeal and failed to take into account the matters set out in relevant authorities in paragraph 27 to 31 of the decision when making findings in this appeal. Thirdly, that the First-tier Tribunal materially erred in law in finding that the Appellant did not constitute an ongoing risk to the public.

14. Permission to appeal was granted by Judge Farrelly on 8 March 2018 on all grounds.

15. At the oral hearing, Mr Wilding on behalf of the Respondent relied on the grounds of appeal, his skeleton argument and made supplementary oral submissions. He noted that the Appellant did not dispute that the wrong version of the EEA Regulations had been used by First-tier Tribunal and the only issue as to whether that was a material error of law on the facts of this case. Although it was not submitted that the new regulations significantly moved the goalposts in cases such as this one, it was said that they did crystallise the questions which needed to be asked when considering deportation of an EEA national. Reliance on the wrong regulations meant that the First-tier Tribunal did not ask itself the right questions. In any event, it was submitted that the other grounds of appeal were far more detailed and undoubtedly material to the outcome of the appeal.

16. As to the reasons given for finding that the Appellant did not present a future risk, three were identified in paragraphs 34 to 36 of the decision. The first reason given is completely irrelevant to the question and could not amount to a reasonable why the Respondent is not discharged the burden of establishing a future threat.

17. The second, relies on a statement that persistent offending does not equate to a high risk of reoffending but does not go on to make any findings of fact beyond that generalisation. The lack of reasoning and the contradiction in the findings was submitted to be arguably perverse. It is relevant and there is a need to consider the pattern of offending behaviour by this Appellant. On a smaller point, with regards to rehabilitation, this factor carries less weight in circumstances where a person does not have a permanent right of residence.

18. The third reason simply quotes from the sentencing remarks in respect of the Appellant but makes no findings and offers no reasons in relation to them.

19. Overall it was submitted that paragraph 37 and 38 do not contain any proportionality assessment and provides no elaboration, analysis or reasons for the finding that the Judge was unable to find that the Appellant

presents a genuine, present in sufficient a serious threat affecting one of the fundamental interests of society.

20. Mr Gajjar on behalf of the Appellant relied on the rule 24 response and submitted that when the decision of the First-tier Tribunal was read as a whole, the findings reached were open to it on the evidence and it was properly reasoned. As part of that approach, it was noted that there was no OASys report in respect of the Appellant, albeit that was not one of the express reasons given for any of the findings.

21. The Appellant accepted that the wrong regulations were applied but submitted that ultimately the factors were the same and were all taken into account in this decision, with appropriate and relevant authority set out and reference made to the weight given to prospects of rehabilitation. In the rule 24 response there was reference to and quotes from Hansard material on the introduction of the 2016 Regulations, but no *Pepper v Hart* application had been made to rely on such material and none was pursued such that I disregard that material submitted.

## Findings and reasons

22. I deal first with the second and third grounds of appeal together as they deal with the substance of the decision and are determinative of this appeal on the facts of this case. In relation to these grounds of appeal, it is necessary to set out in some detail the findings made by the First-tier Tribunal in paragraphs 34 to 36 of the decision, which states as follows:

> *"34. I am satisfied that the Appellant succeeds in his appeal and that the burden on the SSHD as specified in Arranz (EEA Regulations – deportation – test: Spain) [2017] uKUT 294 (IAC) by Mr Justice McCloskey has not been discharged. I have had regard to 3 particular matters in this regard. First, there is the position of the Appellant himself. He was sentenced to imprisonment and quickly thereafter upon release removed Lithuania, without having the opportunity to demonstrate that he was reformed person. In Lithuania itself he has been trying to find work (in itself laudable behaviour) and has not committed any further offences.*
>
> *35. Second, there is the RL itself. It's sets out a list of the Appellant's offences under the heading 'Assessment of Threat' (at para 26) before concluding that "your client has been identified as a person who is at a high risk of offending" (para 29) but this is not the case. The Appellant may have been a 'persistent offender' (RL para 20) but this does not mean he is for that reason a high risk of offending. In any event, these considerations have to be balanced against the 'Proportionality' of the decision and the Appellant's prospects for 'Rehabilitation' (both of which are considered in the RL at Paris 34 - 39 and 40 - 44 respectively).*
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> *36. Third, and in respect of all these considerations, it is ultimately of some considerable relevance to bear in mind the remarks of the sentencing judge themselves. At Norwich Ground Court, Judge Holt in his sentencing remarks (at C1 – C6) began with the observation that the appellant was 18 at the time of the offences committed. This is*

*consistent with the evidence I've heard from the Appellant's parents that he had fallen in with the wrong crowd at a young age when teenagers are most vulnerable to peer pressure he, moreover, pleaded guilty at the earliest opportunity. The judge went on to say that the Appellant had previous convictions which "are very worrying in my view". He told the Appellant that, "you have five convictions covering nine offences" (line B-D at C). The Judge said of the Appellant that, "to your credit you made admissions to the police that you – say you lost your temper, which is something, I'm afraid, has happened in the past" (line A at C4). The Appellant's violent offences must, nevertheless, be seen for what they are. They were serious. They caused serious injury. The judge knows how the Appellant had attacked a person by the name of Matthew and his younger brother Christopher, who was 16 years old and who suffered a ruptured spleen, and four months thereafter was in discomfort and the injuries were still mending and this attack has had a serious effect on his life. As a 16-year-old he's been unable to take part in any sport and that will be for some time." (line B-C at C4)."*

23. Judge Juss goes on in paragraphs 37 to say nevertheless the test is as set out in regulation 21(5)(c) and the burden of proving that the Appellant is a person who represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society rests upon the Secretary of State. The task of the Tribunal was said to be to make a predictive evaluative assessment of future events based on the relevant factual matrix. On that basis, the Judge found himself unable to find such a threat. Thereafter in paragraph 39, Judge Juss begins by saying this is because…" and then quoting selective parts of the sentencing remarks. There is no further reasoning or explanation as to the relevance of these remarks or why they provide reasons for the conclusion given in paragraph 38.

24. I find that the First-tier Tribunal materially erred in law in failing to give adequate or comprehensible reasons for finding that the Appellant did not pose an ongoing risk to the public, or more accurately being unable to find that the Appellant presented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. As to the three reasons given set out above, the first is clearly irrelevant. It should not be held against the Respondent that swift action has been taken to deport someone in these circumstances pursuant to the unchallenged certificate under regulation 33 of the 2016 Regulations, nor used as a positive factor on behalf of the Appellant by suggesting that he has been unable to show that he was no longer a threat.

25. The second reason makes no findings whatsoever as to whether the Appellant does present a risk of reoffending or not in the general statement that the persistent offender does not mean for that reason alone that the Appellant is at high risk of reoffending for short of any reasoned analysis of all of the circumstances in this case. The reference to these considerations in any event having to be balanced against the

proportionality of the decision and the prospects for rehabilitation is not then followed through with any such assessment.

26. The third and final reason offered refers to the sentencing remarks which on any reasonable and rational view cannot be read in a positive way for the Appellant given that they show a worrying history of persistent offending, including for violent offences of increasing seriousness and the very significant adverse consequences on the Appellant's victims. When sentencing the Appellant there were a number of statutory aggravating features taken into account, in particular the Appellant's previous convictions and that one of them was also for an unprovoked violent attack. The pre-sentence report came to the conclusion that the Appellant poses is a high-risk of serious harm to the public and reference is made to the Appellant being prone to losing his temper, lashing out, causing harm and serious injury to people, as well as to showing no remorse for the last offence. The selective quoting in the First-tier Tribunal's decision in paragraphs 36 and 39 does not reflect a fair reading of the sentencing remarks and provides no rational reasoning in support of the conclusions reached, nor does the statement which seems to find that these sentencing remarks are not directly on point at the beginning of paragraph 37 go on to reach any actual conclusion.

27. In reaching the decision, the First-tier Tribunal has fundamentally failed to have regard to material considerations and failed to make necessary findings of fact to reach a lawful conclusion as to whether the Appellant presented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The reasons that were given for the decision are either not relevant, reach no actual conclusion, or are inconsistent with the evidence before the First-tier Tribunal. For these reasons the decision of the First-tier Tribunal contains material errors of law and therefore must be set aside.

28. As to the first ground of appeal, there is no dispute between the parties that the First-tier Tribunal applied the wrong regulations in considering the appeal. For the reasons already given above, the decision must be set aside in any event and therefore it is not necessary to go into any great detail as to whether this error was material. In summary however, I find that the error was material given that the First-tier Tribunal failed to ask itself the right questions and fails to identify the factors which needed to be taken into account to lawfully determine the appeal, in accordance with the 2016 Regulations and which are not expressly set out in the earlier 2006 Regulations. This is an additional reason why the decision of the First-tier Tribunal contained a material error of law and must be set aside.

29. There is no separate appeal against the conclusion in paragraph 40, allowing the Appellant's appeal on Article 8 grounds. However, given that the sole reason for allowing the appeal on this basis was because the Appellant succeeded on EEA grounds, that part of the decision must also necessarily be set aside.

30. There is no challenge by either party to the findings made that the Appellant had not acquired permanent residence in the United Kingdom and this finding is therefore preserved in the remaking of the appeal. Although the parties both considered that this was a suitable case to remit to the First-Tier Tribunal to remake the decision, I decline to do so as the extent of further fact finding necessary does not require this, having regard to the overriding objective and the relevant Practice Statement.

**Notice of Decision**

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and direct that the remaking of the decision under appeal will be undertaken by the Upper Tribunal on the basis identified above.

No anonymity direction is made.

**Directions**

A. The Appellant to file and serve any further written statement(s) and evidence to be relied upon, no later than 21 days prior to the relisted hearing.

B. The Respondent to file and serve any further evidence to be relied upon, no later than 14 days prior to the relisted hearing.

C. Parties are at liberty to file and serve a further or updated skeleton argument, no later than 7 days prior to the relisted hearing.

Signed Date 22nd June 2018

Upper Tribunal Judge Jackson