Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00418/2019**

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 5 November 2021	**On 18 November 2021**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[G J]
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant:	Ms Chaudhry, Counsel, instructed by Optimus Law
For the Respondent:	Mr Bates, Senior Home Office Presenting Officer
Interpreter:	Ms Noland

DECISION AND REASONS

1. Although the Secretary of State for the Home Department is referred to as the Appellant in these proceedings, due to the fact she was the party appealing the First-tier decision, I intend hereafter to refer to the parties as they were in the First-tier

Tribunal with Mr [J] being referred to as the Appellant and the Secretary of State for the Home Department as the respondent.

2. The Appellant, a Lithuanian national, was made the subject of a deportation order on 16 July 2019 and the decision was certified pursuant to Regulation 3 of the Immigration (EEA) Regulations 2016. In supplementary decision letters, dated 4 and 19 September 2019, the deportation decision was maintained.

3. On 19 August 2019 the Appellant lodged his notice of appeal and that appeal was listed for a substantive hearing before Judge of the First-tier Tribunal Hembrough on 11 November 2019 and following a full hearing, he made the following findings:

   (a) There were, at the date of the deportation order, public policy grounds justifying the Appellant's deportation as a persistent offender.

   (b) The Appellant was not rehabilitated such that the public interest in his removal as a persistent offender had been significantly diminished much less evaporated.

   (c) He allowed the Appellant's appeal on human rights grounds because the weight to be attributed to his private and family life and that of his partner and children exceeded the present public interest in his removal.

4. The respondent appealed that decision and permission to appeal was given to the respondent. The matter came before Upper Tribunal Judge Pickup on 24 January 2020 and in a decision promulgated on 3 February 2020 he found there had been an error in law and set aside the First-tier Judge's decision in relation to human rights. He preserved the findings of the First-tier Tribunal in relation to the 2016 Regulations and specifically found:

   (i) There was no evidence that the Appellant was exercising treaty rights in the United Kingdom prior to being notified of his liability to deportation and that under the 2016 Regulations the deportation was justified on grounds of public policy and was proportionate.

   (ii) There were at the date of the deportation order public policy grounds justifying the Appellant's deportation as a persistent offender.

   (iii) The Appellant was not entitled to permanent residence under the Regulations and therefore did not benefit from any enhanced level of protection.

5. The appeal was next listed for hearing on 1 June 2020, but that date was vacated as a result of the Covid-19 pandemic. The appeal was then listed on 29 June 2021, but that hearing date was adjourned because the Appellant had instructed fresh legal representatives and the matter now comes before me following a transfer order made by the Upper Tribunal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

6. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

PRELIMINARY ISSUES

7. Mr Bates confirmed the only additional document he intended to rely on, over and above those previously before the Tribunal, was an updated PNC record.

8. Ms Chaudhry confirmed that the only additional documents, served since the last hearing, was a supplemental bundle which included a birth certificate confirming the Appellant was registered as the father of Master DJ, who was born on 29 March 2020, a letter from probation and a further letter from the Appellant's partner dated 1 November 2021.

THE APPELLANT'S OFFENDING HISTORY

9. A PNC printout confirmed the Appellant has the following convictions:

   (a) On 15 July 2004, at the Ukmerge District Court in Lithuania, he was convicted of theft and ordered to undertake 60 hours unpaid work. It appears that the requirement was varied on 28 October 2004 to a sentence of 15 days imprisonment.

   (b) On 13 October 2005, at Ukmerge District Court in Lithuania, he was again convicted of theft for which he received a sentence of imprisonment of 1 year.

   (c) On 18 April 2011, at Ukmerge District Court in Lithuania, he was convicted of being found on enclosed premises for an unlawful purpose and battery and received a sentence of imprisonment for 1 year and 11 months.

   (d) On 5 June 2013, at the County Court of Tiergarten in Germany, he was convicted of theft, attempted theft and two counts of possession of a firearm and was sentenced to 9 months imprisonment suspended until 24 June 2016 although the Appellant claimed at his appeal before the First-tier Tribunal that he had been acquitted of these offences.

   (e) On 27 June 2016, at West London Magistrates Court, the Appellant was convicted of driving with excess alcohol and using a vehicle whilst uninsured (offences from 12 June 2016). He was disqualified from driving for 20 months and ordered to pay a fine.

   (f) On 16 March 2018, at the Kedainiu Courthouse of Kaunu District Court Lithuania, he was convicted of battery for which he received a community

order of 8 months with an education requirement aimed at addressing his violent behaviour. This sentenced was varied by the same court on 31 August 2018. The record indicated that the offence was committed on 10 January 2018 which would indicate that the Appellant was in Lithuania on that date, but the Appellant claimed he did not attend court on either sentence date as he was in the United Kingdom.

(g) On 3 August 2018, at Merseyside Magistrates Court, he was convicted of driving otherwise in accordance with the terms of a licence and driving whilst uninsured for which he was again disqualified for 12 months and ordered to pay a fine.

(h) On 6 November 2018, at West London Magistrates Court, he was convicted of driving whilst disqualified, driving whilst uninsured, driving whilst using a mobile phone and using a vehicle with a defective tyre for which he was disqualified for a further period of 12 months and ordered to undertake 180 hours of unpaid work.

(i) On 11 April 2019, at Merseyside Magistrates Court, he was convicted of failing to comply with a community order between 1 February and 15 February 2019 for which he received a fine.

(j) On 11 October 2019, at Merseyside Magistrates Court, he was convicted of failing to comply with a community order between 13 August and 3 September 2019 for which he received an additional 24 hours unpaid work and the order was extended until 5 May 2020.

(k) On 6 July 2021, at Blackburn Magistrates Court, he pleaded guilty to four offences of theft on 4 November 2018, 12 November 2019, 14 November 2019 and 19 November 2019 and he was made the subject of a twelve month community order, expiring on 5 July 2022, requiring him to carry out 150 hours unpaid work.

THE LAW

10. The deportation order was made pursuant Regulation 23(6)(b) of the 2106 Regulations on the grounds it was justified on the grounds of public policy and by virtue of Regulation 32(3) of the said Regulations the Appellant was to be treated as if he was liable to deportation by virtue of section 3(5)(a) of the Immigration Act 1971 (his deportation is conducive to the public good).

11. The Appellant's article 8 ECHR rights are to be assessed within the complete code provided for under paragraphs A398 to 399 of the Immigration Rules and section 117C of the 2002 Act. These Rules and statutory provisions reflect Parliament's views of the balance between human rights and the public interest in the case of a foreign criminal. These Rules emphasise the high public interest in deporting foreign criminals.

12. Paragraph 398(c) HC 395 states:

> "Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

13. The provisions of 399 and 399A are as follows:

> "399. This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> > (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
> >
> > (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
>
> (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
>
> > (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
> >
> > (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
> >
> > (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.'
>
> 399A. This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

14. These provisions are mirrored in s117C of the 2002 Act where it is provided that deportation of a foreign criminal is in the public interest and conducive to the public good. The more serious the offence the greater the public interest in the Appellant's removal from the UK with the test of 'very significant obstacles ' (117C(4)(c)) and the effect on the child being unduly harsh (117C(5)).

15. In SC (paras A398 – 339D: 'foreign criminal': procedure) Albania [2020] UKUT 187 (IAC) the Tribunal confirmed:

> 1. Paragraph A398 of the immigration rules governs each of the rules in Part 13 that follows it. The expression 'foreign criminal' in paragraph A398 is to be construed by reference to the definition of that expression in section 117D of the Nationality, Immigration and Asylum Act 2002: OLO and Others (para 398 - 'foreign criminal') [2016] UKUT 56 affirmed; Andell (foreign criminal - para 398) [2018] UKUT 198 not followed.
>
> 2. A foreign national who has been convicted outside the United Kingdom of an offence is not, by reason of that conviction, a 'foreign criminal' for the purposes of paragraphs A398-399D of the rules.
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> 3. In the absence of a material change in circumstances or prior misleading of the Tribunal, it will be a very rare case in which the important considerations of finality and proper use of the appeals procedure are displaced in favour of revisiting and varying or revoking an interlocutory order: Gardner-Shaw (UK) Ltd v HMRC [2018] UKUT 419 followed.

THE APPELLANT'S CLAIM

16. The Appellant and his partner adopted their statements and both gave evidence through a Lithuanian interpreter. They were cross-examined by Mr Bates.

17. The Appellant's evidence can be summarised as follows:

(a) He had been living in this country since 2017.

(b) He and his partner, Evelina Uzkuraityte currently lived together in this country with their son DJ. He also confirmed that tragically their second child had been born stillborn on 24 September 2020.

(c) Until around four months ago his partner's two children from her marriage (now aged 9 and 7) had also lived with them, but they had gone to live with their father in Lithuania. They had gone there primarily because of the stresses that these proceedings had placed on his partner for which she was now taking medication.

(d) His offending days were behind him and this was despite the four theft offences that were dealt with by the Courts in July 2021.

(e) As regards the two breaches of the community order, he stated that he had been detained by the authorities and had been unable to do his order. After being released on 27 June 2019 he attended the court and the Judge sentenced him to additional hours on his community order and he believed the first breach occurred because he had maybe gone to a dental appointment.

(f) The four theft offences (November 2018 and November 2019) related to when he had been released from detention and he was not allowed to work and out of desperation he stole bags, to a weight of 100 kilogrammes, that had been left for a charity shop. He intended to sell the property for money.

(g) He was looking after his son on a full-time basis because his partner worked at Starbucks, Liverpool Airport, between the hours of 3am and 12 noon. He stated that his partner had previously worked as a carer, but as she refused to be vaccinated she had lost her employment. He stated that if he was allowed to remain in this country then he intended to either return to his old employer (V & M Recycling) who still had a position for him or obtain work as an HGV driver.

(h) When questioned about his employment with his former employer in 2019 he confirmed he had worked for them as a driver from 1 July 2019. When challenged about how he could have done this when he was banned from driving he explained his partner had called and written to the DVLA and been told to find out the dates of his ban.

(i) His partner suffered with her mental health and had been taking medication for around 12 months. He had to constantly support her because she was finding this whole situation very difficult.

(j) Neither he nor his partner had any family or other ties in Lithuania. His parents had passed away and he had not spoken to his brother for over ten years. He confirmed his partner had a sister in Lithuania but she had no contact with her and although her brother lived in Litherland, Liverpool but he had his own life.

(k) He believed his child would be better off in this country as he was born here and there were no prospects for any of them in Lithuania. He confirmed that the language spoken in the house was Lithuanian.

18. The Appellant's partner adopted her statements and gave oral evidence. Her evidence could be summarised as follows:

(a) Her two children from her previous marriage now lived with their father and had done so for the last few months. Although his involvement with them had been nil since they divorced around 6 ½ years ago, he had stepped in when she was struggling and agreed to look after them. She had taken the children to

Lithuania in the summer and they were now living with their father until further notice. She stated that they wanted to come back and live with her (and the Appellant), but she felt that until these proceedings were concluded it was in their best interests to remain with their father.

(b) She had become very depressed after she lost their child in September 2020. She described being prescribed Sertraline prior to being pregnant and that she had stopped taking it when pregnant. After she lost the baby she went back onto 50mg although about 3-4 weeks ago her prescription had been increased to 100mg although her doctor had said her dosage maybe increased to 150mg. She had recently received a referral to Talk Liverpool but was still awaiting a meeting.

(c) The Appellant's partner supported her family and if the Appellant was removed to Lithuania she would be left alone with their son and there would be a real risk she herself would become homeless as she would be unable to go to work and pay a childminder. She had been working as a carer until around 6 weeks ago but lost that job as she had not been vaccinated. She now worked at Starbucks for between 4-5 days a week depending on requirements. Her current hours of work were 3am to 11am.

(d) When both of them had been working she stated that she worked nights and the Appellant worked days so there was always someone to look after the children. Her younger brother, now aged 24, had also assisted her in the past but now lived in a different part of Merseyside. She was unable to ask friends or anyone else to look after their son because he did not like to be with anyone but them. When the Appellant had been in detention she had initially paid a child minder but that was too expensive. She had taken time off on long-term sickness.

(e) As regards the Appellant's 2018 disqualification she stated she had called and written to the DVLA but they had no trace of his details.

(f) She believed the breaches of the community order occurred because on one occasion he was detained and on the other the children possibly were ill or she had to go to work and he could not get to his community service. She believed that the Appellant had learnt his lesson.

19. The Appellant also relied on a letter from the probation service who confirmed that his overall compliance with the order was good. There were also a number of letters in the bundle from friends and colleagues of the Appellant's partner who confirmed the positive effect the Appellant had on her and their family.

20. Both the Appellant and his partner maintained they would be unable to live in Lithuania as they had no ties or connections there and it would be unduly harsh to either require them to go and live there as a family. Alternatively, it would be unduly harsh to split the family up for the reasons they had given.

RESPONDENT'S SUBMISSIONS

21. Mr Bates relied on the deportation decision and the preserved findings of Upper Tribunal Judge Pickup. He stated that the Tribunal had already concluded he was a persistent offender and public policy justified his deportation.

22. The fact he had failed to comply with the terms of his community order on two occasions and had thereafter gone on to commit four offences of theft in November 2018 (one offence) and November 2019 (three separate offences on different dates) demonstrated he was a persistent offender who despite his claim to have changed had not been rehabilitated. These latest offences were cruel offences as he had stolen property that was meant to be for vulnerable people.

23. Although he had not committed offences since the end of November 2019, Mr Bates submitted this may be due to the fact he had known in January 2020 his deportation case was being revisited by the Tribunal, but given his record of offending he suggested the Tribunal should have little confidence he would not re-offend.

24. The Appellant's partner's eldest two children were now living in Lithuania with their father and despite their oral evidence there was no evidence that these children would be returning to the United Kingdom any time soon. These children were Lithuanian nationals (albeit born in this country) and were now living in their country of nationality and whilst their youngest child was a British citizen, he was only eighteen months old and lived in a family unit which spoke Lithuanian as their main language and it should not be overlooked that both the Appellant and his partner has spent the majority of their lives living in Lithuania.

25. The Appellant and his partner had entered into their relationship and the Appellant's partner gave birth at a time when the Appellant's immigration status was precarious. The Tribunal had previously rejected his claim he was an EEA national exercising treaty rights and had also found it was not unduly harsh for the Appellant's partner to return to Lithuania. Those findings remained and Mr Bates submitted that the real issue was whether the medical circumstances of the Appellant's partner and/or the birth of their child made it unduly harsh for either the Appellant to have to return to Lithuania on his own or for his partner and child to accompany him there.

26. The adduced medical evidence was limited and there was only a short letter from the doctor. Considering the argument being advanced it was reasonable to expect more detailed evidence about the partner's medical condition.

27. Both the Appellant and his partner had demonstrated an ability to both work and find accommodation in a foreign country and Mr Bates submitted both had transferable skills and there would therefore be nothing to prevent the Appellant and his partner both working in Lithuania in a similar way that they had done in this country when the Appellant was allowed to work.

28. If the Appellant's partner felt she could not return to Lithuania then it was open to her to vary her working schedule and seek support from family and friends if

necessary in much the same way she did when the Appellant was not involved in her life or when he was detained. Whilst there had been a delay in dealing with the appeal since the original decision had been set aside this had given the Appellant and his partner an opportunity to look into their options.

29. Mr Bates submitted it was not unduly harsh to either require the whole family to voluntarily return to Lithuania or for the Appellant to be deported to Lithuania as the public interest outweighed the Appellant's claim it would be unduly harsh.

30. If the Tribunal accepted that the Appellant could not meet paragraph 399 HC 395 then he submitted paragraph 399A HC 395 could not apply as the Appellant had not lived here lawfully the majority of his life.

31. Mr Bates submitted that if the statutory exceptions were not met then the Appellant had to demonstrate "very compelling circumstances over and above those described in paragraphs 399 and 399A".

32. The Appellant was a persistent offender and had committed further offences despite the decision to deport him being taken in July 2019. He had stolen donations given to charity intending to gain financially from his unlawful acts. These offences undermined his claim in his own statement from November 2019 that he had reformed. He invited the Tribunal to find there were no such compelling circumstances and to dismiss the appeal.

MS CHAUDHRY'S SUBMISSIONS

33. Ms Chaudhry invited the Tribunal to allow his appeal on human rights grounds either on the statutory exceptions set out in paragraph 399 HC 395 or to find there were very compelling circumstances over and above those described in paragraphs 399 that would make his deportation disproportionate.

34. She submitted the pressure placed on the Appellant and his partner had already directed affected the family because the Appellant's partner health had suffered and this had led to her giving temporary custody of her eldest children to their natural father. Moving to Lithuania to live with their father was very difficult for the children given they were born in the United Kingdon here and were settled here.

35. The Appellant's partner has indefinite leave to remain in this country and save when she was off work on sick leave she had worked to support herself and her children. Ms Chaudhry submitted that taking into account her medical condition, her miscarriage, the significant ties the partner has to this country and the lack of ties she has to Lithuania it would be unduly harsh to either require his her and their child to accompany the Appellant to Lithuania or for the Appellant to be required to return alone to Lithuania given the role the Appellant played within the family.

36. Ms Chaudhry relied on the oral evidence about the partner's Sertraline dosage and that it had recently increased and was likely to increase again. The partner had previously been on long term sickness as she could not cope and Ms Chaudhry

submitted it would be less likely she would be able to cope if the Appellant was deported as she could no longer rely on the support of her brother as he lived in a different part of Merseyside.

37. Alternatively, she submitted the circumstances taken together amounted to very compelling circumstances over and above those described in paragraphs 399 not to deport the Appellant. Whilst he had re-offended, his offences were out of desperation and were not the most serious of offences. Probation had confirmed he was complying with the terms of his order and his appeal should be allowed.

FINDINGS

38. Whether or not specifically identified herein, I confirm that all the relevant documents available to me on the court file, together with the oral evidence and submissions have been carefully taken into account in the determination of the appeal and I confirm that I have had regard to the totality of the evidence, taking it in the round and in the context of the whole, before reaching any of my findings of fact.

39. Mr Bates accepted the following:

    (a) The Appellant's partner and child were qualifying persons under paragraph 399 HC 395 and section 117C of the 2002 Act.

    (b) The Appellant did have a genuine and subsisting relationship with both his partner and child.

    (c) The Appellant did have a genuine and subsisting relationship with his partner's older children albeit they no longer lived in this country having returned to live in Lithuania.

40. Whilst I was provided with a letter from the Appellant's partner's son this was written when he was seven years of age in 2019 and given he now lives in Lithuania I find little weight should be attached to the contents. There was no statement from the older children's father about the current or future arrangements and whilst the Appellant's partner claimed their father had had little involvement with the children until the summer, I found it lacked credibility that she would have allowed her children to go and live with their father in Lithuania if that had been the case.

41. The Appellant commenced his relationship with his partner at a time when he did not have any recognised immigration status. His partner had also conceived at a time when his immigration status was precarious as he had been served with the notice of an intention to consider deporting him on 20 June 2019. The medical notes, in the original Appellant's bundle, indicated the Appellant's last menstrual period was 8 July 2019 and she reported the pregnancy to her doctor on 9 August 2019.

42. Whilst I accept that the Appellant provides daily care for their son I find this is due to the fact he is unable to work due to his immigration status.

43. In assessing whether the Appellant's removal to Lithuania or requiring the family to move to Lithuania is unduly harsh I have considered the medical evidence provided

by the Appellant's representative. In a letter, dated 26 October 2021, Dr Harris stated the Appellant's partner had been diagnosed with anxiety and depression and was prescribed medication for it and she was on the waiting list for psychological talking therapy. He stated the upset of her miscarriage and the Appellant's immigration status were impacting on her mental health. A welcoming letter dated 22 October 2021 from Talk Liverpool confirmed the referral although it is clear from the doctor's letter this was a very recent request. The doctor's letter referred to the Appellant's three children living at home which clearly was not correct as the elder children had gone to live in Lithuania in the summer.

44. The only other medical documents from her doctors dated back to August and September 2019. At her visit on 9 August 2019 she was issued with a "not fit for work" statement for one week due to stress. Prior to this appointment her records show she had previously been on 50mg Sertraline for one month in March 2019. There was no other medical records showing how long she was on this drug for and save for the brief reference in the aforementioned letter there was no information about how long the Appellant's partner had been taking medication and in what dosage. If reliance is being placed on a medical condition it is imperative that adequate evidence is adduced. Whilst I accept the Appellant's partner is currently prescribed medication there is no documentary evidence to say what the current dosage is or that it may be increased.

45. Other factors I have taken into account when considering whether the unduly harsh test is met include:

    (a) The Appellant's partner's immigration status.

    (b) The Appellant's partner has lived here for over eleven years.

    (c) Their son is a British citizen.

    (d) The Appellant and partner are Lithuanian nationals

    (e) Both the Appellant and his partner have lived the majority of their lives in Lithuania.

46. I have also considered the best interests of the children pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009. I have considered and taken into account the guidance as to best interests in the case law such as EV (Philippines) and Others [2014] EWCA Civ 874 and Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC). This includes the principle that as a starting point it is in the best interests of a children to be with both their parents; that it is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong; and lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. The case law has identified a nominal threshold of 7 years, but that 7 years

from age 4 is likely to be more significant to a child that the first 7 years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

47. I find their son's current needs can be met by either parent as both are capable of providing a supportive and nurturing homelife. The Appellant's partner demonstrated she could do this because she had to do this with her two older children for between 3-4 years when she was not in a relationship with the Appellant. There was also a period, more recently, when she had to care for her children when the Appellant was incarcerated. Whilst I accept she is currently suffering with anxiety and depression I do not find this has prevented her from continuing to provide a supportive and nurturing homelife. The Appellant is currently providing for his son's needs for part of the day but this is because his partner works between 3am and 11am. The Appellant made it clear that if he is allowed to stay he would personally seek work which would then alter the current parental situation.

48. I am satisfied on the evidence, taken in the round, that the best interests of their son which has to be assessed in isolation of the immigration history of his father is to be with both parents because in an ideal world a child should have the involvement of both parents in his upbringing in a single family unit.

49. Both parents have demonstrated an ability to find employment and to live in a country other than Lithuania. Leaving aside the fact there are ongoing deportation proceedings there appears no strong arguments against them living in the United Kingdom or Lithuania as they clearly have ties to both countries.

50. I have taken all these factors into account as a primary consideration, however the best interests of the child are not a 'trump card.' Whilst those interests are significant they have to be put into balance against other factors, in particular the public interest.

51. Both the Appellant and his partner played down their ties to Lithuania. I accept the Appellant's partner has spent the last eleven years in this country and all her children were born here. The Appellant has spent less time in this country having come here in 2016 (according to his convictions).

52. If the Appellant's partner's older children had been living in this country then that would have been a strong factor for saying the partner's life was in this country, but the fact the children are now living in Lithuania does alter the position.

53. Whilst the Appellant's partner states the children will return to live with her when she feels better there was no documentary evidence to suggest that would be the case. The youngest child is British but would also clearly be entitled to Lithuanian nationality as both his parents are from that country.

54. he Appellant and his partner speak Lithuanian as a first language and both have job skills that could be utilised in Lithuania. I have considered the documents in the

bundles and I find nothing in those documents that suggests the Appellant could not return to Lithuania.

55. In all the circumstances of this case, taking full account of the evidence including the evidence in the bundle, the oral evidence of the Appellant and his partner and the best interests of the children, I do not accept it would be unduly harsh for the Appellant's partner or child to live in Lithuania. If this happened the family would all be together and the Appellant's partner would also be near her other children. T

56. Whilst I accept the bond that exists between the Appellant, his son and his partner nevertheless it would not be unduly harsh for the Appellant's partner and child to live here if they chose not to accompany him to Lithuania.

57. In reaching this conclusion I have taken into account the obvious adverse effect there would be on a child without his father in the United Kingdom. The threshold is a high one and whilst recognising that the impact will be harsh on both his child and his mother I do not accept given all of the circumstances of the case that it will be unduly harsh on any of them. Taking all of the circumstances of the Appellant into account I find there are no very significant obstacles to the Appellant's return to Lithuania either with or without his family.

58. In the alternative, I have considered whether there were "very compelling circumstances over and above those described in paragraphs 399 and 399A" that would make his deportation disproportionate

59. Applying the Rules with the guidance of the case law, I have considered all the relevant circumstances, including all that has been urged upon me in the oral evidence and submissions and in the documentary evidence. I take into account all the considerations set out above, including the best interests assessment of the children.

60. Amongst all of the evidence taken as a whole and considered in its entirety before reaching any conclusions, I take into account the following non-exhaustive list of relevant factors and considerations:

    (a) The circumstances of the children, their ages, their lives and integration in the UK. The older children now live in Lithuania and the age of the youngest child is also something to take into account.

    (b) The Appellant has a genuine and subsisting relationship with both his partner and the child in this country;

    (c) I give full weight to the best interests of the child as a primary consideration;

    (d) I do not underestimate the effect on the child if he were separated from the Appellant.

(e) I have taken into account the effect of being separated from a parent, including every aspect urged upon me by Ms Chaudhry.

(f) If the Appellant's partner and child chose to remain in the United Kingdom then it will hard on the child to be permanently separated from his father but that is the reality of the effect of deportation, it separates families.

(g) I have given weight to the Appellant's partner current medical condition, but for the reason set out earlier I find the evidence presented to be extremely limited in value.

(h) I also take into account that the family could live in Lithuania if they so choose despite their claim to have limited ties. The Appellant and his partner continue to speak Lithuanian as their first language in the home and of course the older children do now live in Lithuania.

(i) The Appellant was previously found to have been a persistent offender and since the original Tribunal hearing he has continued to commit offences. I agree with the previous finding that the Appellant is a persistent offender.

(j) Following case authorities of Daso [2015] EWCA Civ596 and Velasquez [2015] EWCA Civ 845, I note that the weight to be given to rehabilitation of a foreign criminal is limited. The Court of Appeal recently stated in SM (Zimbabwe) v Secretary of State for the Home Department [2021] EWCA Civ 1566 that whilst there was authority to the effect that, the fact that a foreign criminal was unlikely to offend again, might not carry great weight by itself, it was nonetheless required to be put into the balance when considering proportionality.

(k) I place significant weight on the fact that since the service of the deportation paperwork the Appellant breached his community service order receiving an additional 24 hours unpaid work and thereafter went on to commit three unpleasant thefts in November 2019 for which he eventually received a further community order in July 2021. The Appellant has displayed a record of persistent offending in this country and despite stating in his statement dated 3 November 2019 that he had learnt his lesson and was a changed man he then went on to commit three unpleasant thefts in the space of 10 days which were not, contrary to his claim, just after he had been released from prison.

(l) The public interest is wider than the mere protection of the public from harm from future offending, and includes weight to be given to the public revulsion at the Appellant's conduct and the need to deter others. Any lack of offending since December 2019 and the adherence to the law is no more than to be expected and cannot be said to reduce public interest in deportation.

61. Taking all of the evidence, together in the round, for the reasons set out herein, I am far from satisfied that there are very compelling circumstances in this case. I find

there are no particularly compelling circumstances in this case over and above the unduly harsh test under paragraph 399 HC 395.

62. It follows that the public interest in maintaining the deportation is not outweighed by the family life or other considerations of this case.

63. The Rules and the statute of s117C are a complete code for assessment of the balance between the public interest and the private and family life rights of the Appellant, his partner and their child(ren).

64. Applying the Rules and case authorities to the specific facts of this case, the merits or "case by case" approach is in effect a proportionality balancing exercise between on the one hand the family life rights of the Appellant, his partner and the children, and on the other the public interest in maintaining the deportation order.

65. There remains a significant public interest in the deportation of the Appellant as a foreign criminal and his removal is deemed to be conducive to the public good. The Appellant has been unable to meet any of the statutory exceptions and applying the statutes and the Rules tests he has not been able to demonstrate very compelling circumstances over and above those described in paragraphs 399 and 399A.

66. Even outside the complete code that these rules and statutory considerations provide, I am satisfied that taking everything as a whole, undertaking carefully the article 8 proportionality balancing exercise, giving full weight to the effect on the family of separation of the Appellant, I find that the decision to remove him is entirely proportionate and not disproportionate to those private and family life rights, for the reasons summarised above.

NOTICE OF DECISION

67. The Tribunal has previously dismissed found the Appellant could not succeed under the EEA Regulations.

68. The Tribunal has previously set aside the decision to all the Appellant's appeal under Article 8 ECHR.

69. I remake this part of the decision and dismiss his appeal on all grounds.

Signed Dated 14 December 21

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

No fee award made as the appeal has been dismissed.

Signed Dated 14 December 21

Deputy Upper Tribunal Judge Alis