Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00615/2017 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 November 2020	**On 6 January 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

SIGITAS STATAUSKAS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Litigant in person
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Lithuania. His date of birth is 5 April 1972.

2. The Secretary of State made an order to deport the Appellant. The order was made pursuant to Regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") on 17 August 2017. The Secretary of State's view is that deportation was justified under the 2016 Regulations because of the Appellant's criminality. The Secretary of State certified the decision to remove the Appellant under Regulation 33 of the 2016 Regulations. The Appellant was

removed on 11 November 2017. He has not challenged the certification decision by way of judicial review. He has not made an application pursuant to Regulation 41 to return to the United Kingdom to attend his appeal.

3. The Appellant appealed against the decision to deport him. His appeal was allowed by Judge of the First-tier Tribunal N M Paul. The Secretary of State was granted permission. In a decision, promulgated on 11 December 2019 Upper Tribunal Judge Lindsley and Upper Tribunal Judge McWilliam set aside the decision of the First-tier Tribunal having found that the judge materially erred. The error of law decision reads as follows:-

> "20. The Appellant has committed several offences for which he received short custodial sentences and alternatives to imprisonment. We have not set out the offences. They are set out in the Secretary of State's decision letter. The judge made an error of law because he did not determine whether the Appellant's integrative links had been broken as a result of his criminality. This is a material omission. Whilst we note what the judge said at [28], this cannot rectify the error. There must be a proper nuanced fact-finding assessment of risk affording the Appellant the appropriate level of protection (whether serious grounds of public policy under Reg 27(3) or imperative grounds of public security under Reg 27(4)). We set aside the judge's decision to allow the appeal.
>
> 21. The starting point for the UT on the next occasion is that the Appellant had acquired permanent residence before he became a criminal and that he has been here for more than ten years.
>
> 22. The issue for the UT on the next occasion is whether the Appellant's integrative links have been broken because of his criminal behaviour so that he is not entitled to the highest level of protection. It may be material that the Appellant has not served a lengthy term of imprisonment. He has committed several offences that in isolation may not be particularly serious, but we will have to consider whether cumulatively such behaviour is capable of breaking integrative links despite the Appellant not having served a lengthy period of imprisonment. It may be that it is material that if the Appellant came here in 2003, he did not complete ten years before he started to offend. Once the level of protection is established the UT will go on to consider the risk presented by the Appellant and whether deportation can be justified.
>
> 23. We adjourned the hearing so that the Appellant would be able to attend the hearing via video link and so that he may have the opportunity to seek legal representation. The UT on the next occasion will re-make the decision".

4. The matter was adjourned until 12 March 2020. On this occasion the matter came before a panel comprising Judge McWilliam and Judge O'Callaghan. We were unable to proceed because of a problem with the video link.

5. The Appellant was not represented before the Upper Tribunal or the First-tier Tribunal.

The Appellant's Criminality

6. Between August 2012 and 6 June 2017, the Appellant amassed sixteen convictions for 21 offences. They are set out in the decision letter. There is no challenge to the accuracy of this. The list reads as follows:-

> On 1 August 2012 he was convicted of being drunk and disorderly. He was sentenced to a twelve-month conditional discharge and fined.
>
> On 9 January 2013 he was convicted of indecent assault (intentionally touching a female and no penetration). He was sentenced to a twelve-month community order with a supervision requirement and unpaid work of 100 hours. He was ordered to pay costs, a victim surcharge and compensation. He was made subject to requirements under the Sex Offences Act 2003 (SOA 2003) for a period of five years.
>
> On 18 April 2014 he was convicted of being drunk and disorderly. He was on bail when this offence was committed. He was fined and ordered to pay costs.
>
> On 29 May 2014 he was convicted of common assault. He was remanded on conditional bail. He was sentenced to a supervision requirement, a twelve-month community order and an activity requirement.
>
> On 4 July 2014 he pleaded guilty to being drunk and disorderly. He was remanded on conditional bail. He was fined and ordered to pay costs and victim surcharge.
>
> On 1 October 2014 he pleaded guilty to failing to comply with the sex offender's notification requirements. He was sentenced to a community order and ordered to pay costs of £85. A curfew requirement and victim surcharge were imposed.
>
> On 23 December 2014 he pleaded guilty to failing to comply with the requirements of a community order. He was fined £50 and ordered to pay a victim surcharge and costs.
>
> On 29 October 2015 he pleaded guilty to theft (shoplifting). He was remanded on conditional bail. He was sentenced to a six-month community order and ordered to pay a victim surcharge. He was made subject to an alcohol abstinence requirement and rehabilitation activity requirement. He was ordered to pay Criminal Courts' charges.

On 29 October 2015 he pleaded guilty to theft (shoplifting). He was sentenced to a six-month community order and given an alcohol abstinence requirement and a rehabilitation activity requirement.

On 13 November 2015 he was convicted of being drunk and disorderly. He committed the offence whilst on bail. He did not receive a separate penalty.

On 12 January 2016 he pleaded guilty to failing to comply with the requirement of a community order. The court ordered that the original conviction of 13 November 2015 continue. He was ordered to continue the rehabilitation activity requirement and pay costs.

On 1 April 2016 he was convicted of being drunk and disorderly. He received a fine and was ordered to pay costs and a victim surcharge.

On 2 June 2016 he pleaded guilty to theft (shoplifting). He was remanded on conditional bail and received no separate penalty.

On 9 June 2016 he was found guilty of having failed to comply with the sex offender's notification requirements and sentenced to a twelve-month community order, alcohol treatment requirement for six months and a 25-day rehabilitation activity requirement.

On 10 May 2017 he pleaded guilty to theft (shoplifting). He was on bail. He was remitted for sentence (I presume that he was committed to the Crown Court for sentence. The outcome of this is not entirely clear to me).

On 18 May 2017 he pleaded guilty to being drunk and disorderly. This was an offence committed whilst on bail. He was fined and ordered to pay costs and a victim surcharge.

On 6 June 2017 he pleaded guilty to indecent assault (intentionally touching a female – no penetration), theft (shoplifting) and racially/religiously aggravated intentional harassment, alarm, and distress – words/writing. He was sentenced to ten weeks' imprisonment. This was suspended in whole for eighteen months. He was made subject to the notification requirements under the SOA 2003 for seven years. He was ordered to pay compensation and given a 40-day maximum rehabilitation activity requirement with unpaid work and alcohol treatment.

Directive 2004/38 ("the Directive")

7. Recitals 17, 18, 23 and 24 of Directive 2004/38 ("the Directive") state:

> '(17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of

permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.

(18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.

...

(23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.

(24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State, in particular when they were born and have resided there throughout their life. In addition, such exceptional circumstances should also apply to an expulsion measure taken against minors, in order to protect their links with their family, in accordance with the United Nations Convention on the Rights of the Child, of 20 November 1989.'

8. In Chapter IV of the Directive ('Right of permanent residence'), Article 16, which is entitled 'General rule for Union citizens and their family members', provides:

'1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of 12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.'

9. In Chapter VI of the Directive ('Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health'), Article 27, which is entitled 'General principles', provides:

'1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

10. Article 28 of the Directive entitled 'Protection against expulsion', which also falls within Chapter VI, provides:

'1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.'

The Immigration (Economic European Area) Regulation 2016 ("the 2016 Regulations")

Continuity of residence

"3.—(1) This regulation applies for the purpose of calculating periods of continuous residence in the United Kingdom under these Regulations.

…

(3) Continuity of residence is broken when—

(a) a person serves a sentence of imprisonment;

(b) a deportation or exclusion order is made in relation to a person; or

(c) a person is removed from the United Kingdom under these Regulations.

(4) Paragraph (3)(a) applies, in principle, to an EEA national who has resided in the United Kingdom for at least ten years, but it does not apply where the Secretary of State considers that—

(a) prior to serving a sentence of imprisonment, the EEA national had forged integrating links with the United Kingdom;

(b) the effect of the sentence of imprisonment was not such as to break those integrating links; and

(c) taking into account an overall assessment of the EEA national's situation, it would not be appropriate to apply paragraph (3)(a) to the assessment of that EEA national's continuity of residence".

Decisions taken on grounds of public policy, public security and public health

"27. (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) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who –

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

(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 health, 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.)"[1].

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[1] **SCHEDULE 1 CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.**

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 of 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 in order 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;

The Appellant's Evidence

11. The Appellant has made a undated witness statement. He gave oral evidence through an interpreter. He has been married for seventeen years and he has a daughter here who was born on 7 July 2020. He is in daily contact with his wife and child. He sends them money. He lost his job in the UK and that made him turn to drink. He now attends Alcoholics Anonymous (AA) meetings in Lithuania that help him with addiction. Alcohol abuse led to temporary separation from his wife, but they now wish to reconcile. The Appellant's sister has lived in the UK since 2001.

12. When giving evidence the Appellant became upset. He said that he is remorseful. He realised that he had made a mistake which he wants to correct. His family is the most important thing to him. He is now moving on from his criminality. He was deported nearly three years ago and during this time he has lived on his own. He has been working in Lithuania. He finds it very hard without his family and they have been unable to visit him because of the pandemic. He wants to start a new life with his family.

13. He spoke to his wife and daughter the day before the hearing. She was not able to attend the hearing because she had to go to work. She is employed on a maternity ward. Her employment is not flexible. She cannot always ask for a day off. He is willing to give the court his wife's telephone number. The last time the Appellant saw his daughter was in summer 2019 when she and her mother visited him in Lithuania.

14. The Appellant is now rehabilitated for alcohol dependency. He attends AA twice weekly. He also attends Mass and spends a lot of time praying.

15. His wife lives in Croydon in a council flat. He last lived with her three years ago. He always lived with his wife while he was in the United Kingdom.

16. I asked the Appellant a number of questions in order to clarify matters. Because of mention of the Social Services in the OASys Report I asked him about this. He began to explain about his wife taking an interest in another man and as a result he (the Appellant) resorted to alcohol and said things he should not have said. The police would be called. He then said that he does not want to remember these things.

(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 maintaining public confidence in the ability of the relevant authorities to take such action;
(g)tackling offences 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 83(1) of the Treaty 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.

17. He conceded that he moved out of the family home in 2016. He said that this was for work purposes. In relation to his wife's evidence at the hearing before Judge Paul, namely that she and the Appellant had lived together up until 2014, he said that they lived separately because of his employment, however they had lived together until his removal.

18. Th Appellant has not had any alcohol since the summer of 2019 when his family visited Lithuania. He has been working as an electrician in Lithuania. He blames alcohol for his criminality. He told me that if he does not consume alcohol then there are no problems.

The Evidence of Grazina Gregory

19. Ms Gregory is the Appellant's sister. She gave evidence. She explained that the Appellant has family here in the United Kingdom. Their mother lives here. She sees the Appellant's wife and daughter.

20. The Appellant's daughter speaks to him daily. The Appellant recognises that he has made mistakes. He is now a different person. He lives on his own in Lithuania. He is depressed and misses his family. His family here need him financially and his daughter needs a father. She believes that his wife would not phone him unless she was still interested in him.

21. She misses her brother. Alcohol has affected his judgment. He has stopped drinking. He wants to get away from alcohol. He is supported by the group meetings. He is trying to get help. He is trying to get a job. It is difficult now that it is winter and there is a pandemic. He does not presently have work.

22. Ms Gregory believes that the Appellant's wife wants to reconcile with him because she talks to her on the telephone and she wants to know what is happening with him. She probably could not get the day off work and that is why she did not attend the hearing. Ms Gregory spoke to her last weekend.

Evidence of DC George Sinclair

23. There is a witness statement from DC George Sinclair of 24 July 2017. His evidence is that he is attached to the Croydon Jigsaw team, his role is to monitor and manage registered sex offenders in the community and that the Appellant is currently managed as being of high risk of further sexual offending. He committed an offence on 26 November 2012 against a 15-year-old girl. He was lying in the street drunk. The girl approached him and asked if he was alright. The Appellant put his hand up the girl's skirt and touched her in a sexual manner.

24. On 6 July 2017 he was convicted of an incident on 24 March 2017 whereby he sexually touched a female police officer during an arrest. There had been incidents of sexualised language and behaviour whilst in custody that have not led to charges.

25. The Appellant first came to police notice on 22 August 2011. He was seen to damage the window of a department store in central Croydon. He was cautioned. He has come to the notice of the police on a number of occasions usually for drunkenness or shoplifting where no formal action was taken due to victims not wishing to prosecute. Most, if not all, of his criminality is related to alcohol misuse. His relationship with his wife has been turbulent. They separated for about eighteen months after he assaulted her in May 2014. He has since moved back in with his wife but due to his behaviour in recent months the relationship has deteriorated again. His employment is described as sporadic and he is currently unemployed due to alcoholism. He finds it difficult to hold down a job because of his drinking.

The OASys Assessment

26. The Respondent relies on the OASys assessment prepared by the Probation Service on 24 July 2017 after the Appellant was given a suspended sentence.

27. In respect of the offences, it is stated that the Appellant was causing a disturbance in a shop. He had been detained for shoplifting two bottles of wine. Whilst he was being searched by a female police officer, he caressed her left hand with his index finger. He tried to hold the police officer's hand in a way that she described as caressing and he then racially abused her.

28. The Appellant admitted that he has a problem with alcohol. It would seem he has a serious alcohol problem and problems with coping strategies which are linked to his sexual offending. When he is not drinking, he works hard and spends time with his wife and daughter. He had been alcohol free for a period of eight months before the offences. He was tempted by a peer. There is a thinking skills deficit and a lack of perspective involved. The Appellant had not yet addressed his alcohol problem despite being subject to previous probation orders.

29. The Appellant pleaded guilty; however, he maintained that he could not recall what had happened. Whilst this may be true it may also be a way of distancing himself from reality and not wanting to come to terms with what he has done. He recognised that he is an alcoholic. He takes a casual attitude towards the situation. He also went on a drinking binge after he committed the offences in question.

30. Attendance at the office of the probation officer is sporadic. He attended with his wife. He is described as "economical with the truth" and had not been making all the positive changes that he said he would. The Appellant separated from his wife after being convicted of assaulting her in 2014. He then moved back in with her and their daughter. However, he could not live with his wife because she was residing in a refuge hostel and she had then moved in with her sister on a temporary basis. In 2016 he privately rented a room. The report states in respect of the Appellant's attitude towards the 2014 assault that he "remained adamant that even if he had not been drinking at the time, he would still hit his wife". At the time of the assault on his wife his daughter was present in the house.

31. His wife challenged his accounts that he gave to the probation officer which have not always been fully accurate. She is described as "at her wits end and is on the brink of ending the relationship altogether if her husband does not address the issues once and for all". The Appellant's daughter is being affected by his behaviour because he will get drunk and bring friends back who urinate all over the property, take money, make a mess and then pass out. Relationship issues are linked to the risk of serious harm.

32. Nearly all his offences were committed whilst he was under the influence of alcohol. The Appellant has had help for alcohol misuse by way of an Alcohol Treatment Requirement (ATR) which he completed in 2016, however he went back to drinking.

33. During 2016 and 2017 the Appellant was rebuilding his relationship with his wife and according to him this was going well. He began drinking heavily and had been asked to leave by his landlord. His marriage is not stable. It is stated in the report that his wife "may ask him to leave if he does not change things around for good".

34. The Appellant was employed as a fireman in Lithuania prior to coming to the United Kingdom. He has also been in the army. He had mostly been employed in construction whilst in the UK and more recently a security guard. He lost a job because of drinking. He was working as a road sweeper and doing work at the weekend cash in hand, however he lost this job because of drinking. The Appellant has a good work ethic. However, he put too much focus on work and not enough on his criminogenic needs.

35. Lifestyle and associates are a major factor contributing towards the Appellant's drinking. This is in part cultural. The Appellant is described as not having any true friends, just people he goes drinking alcohol with. The report states "these peers are very present in his lifestyle which makes it harder, for Mr Statauskas to abstain from drinking alcohol as he does not have the necessary support network outside of probation to encourage this". The following is stated:

> "Mr Statauskas has been motivated to address his alcohol problem and declared his want for a better future and need to attend Turning Point to see an alcohol worker. Mr Statauskas had previously breached the AAMR element of a previous order due to failure to comply. Despite his early motivation the tag did not act as a deterrent to Mr Statauskas".

36. The Appellant managed to remain alcohol free for a period of eight months before he went on a binge leading to the most recent offences. The Appellant has continued to offend and abuse alcohol which displays a lack of consequential thinking and inability to take responsibility for his actions. His excessive alcohol consumption acts as a disinhibitor to his thinking skills. He has previously failed to comply with orders imposed on him by the court. After appearing at court, he continued to carry on drinking. The following is stated in relation to the Appellant's attitude.

> "Mr Statauskas has failed to comply with a previously imposed community order and notification arrangements. Despite displaying a previous clear

motivation to target his alcohol issue and attend additional support groups in the past Mr Statauskas has failed to act on these and has since been in denial of breaching the requirement".

37. The Appellant is assessed at medium risk of reoffending and medium risk of harm to the public. In relation to when the risk is likely to be greatest the following is stated:

> "Mr Statauskas has offended over the past five years, every year, more so in 2015 and 2016. His drinking problem continues to be evident – risk still great at this time until he proves that he can remain abstinent for a period of time. He went eight months abstinent from alcohol and had protective factors in place and yet chose to drink which was reckless – this behaviour is part of an established pattern and he is yet to demonstrate real change towards avoiding reoffending".

38. The following factors are said to increase risk of reoffending: alcohol consumption, relationship difficulties, jealousy within the relationship, lack of support/structure, boredom, peer association when fearful that he has already lost his way. The factors that are said to reduce risk are: alcohol treatment, keeping occupied with work, gaining some stability with accommodation, employment, family life, and focusing on coping strategies. He presents a medium risk of harm to the public, known adults and staff. He was described as quite motivated to change and quite capable of doing so.

The Respondent's Skeleton Argument

39. The Court of Justice law and legal opinion is clear that the Appellant's behaviour/conduct is the starting point for the assessment of integration and public policy justification. As Advocate General Bot said in Nnamdi Onuekwere v Secretary of State for the Home Department [2013] EUECJ C-378/12 O, it is the behaviour/conduct which strongly tells towards integration.

> "50. Periods of residence in prison of course make clear that the person concerned is integrated to only a limited extent. That is even more true where, as in the case in the main proceedings, that person is a multiple recidivist. Criminal conduct in my opinion clearly shows that the person concerned has no desire to integrate in the society of the host Member State".

40. This is further confirmed by the court in B (Citizenship of the European Union – Right to move and reside freely – Enhanced protection against expulsion – Judgment) [2018] EUECJ C-316/16 ("B:-

> "73. Other relevant factors in that overall assessment may include, as observed by the Advocate General in points 123 to 125 of his opinion, first, the nature of the offence that resulted in the period of imprisonment in question and the circumstances in which that offence was committed, and, secondly all relevant factors as regards

> the behaviour of the person concerned during the period of imprisonment".

41. The SSHD accepts that most authority in both the European and domestic context deals with cases in which the EEA national criminal has been the subject of a sentence of imprisonment. That of course simply reflects the high volume of cases in which this is the underlying factual, criminal matrix. However, none of these authorities require that there should be as a matter of fact or law a period of imprisonment to establish conduct.

42. It is the Secretary of State's submission that if the drafters of the Directive felt that imprisonment was a pre-requisite for the instigation of removal action on the basis of public policy, then that would clearly be reflected in the language of the legal scheme itself.

43. The Secretary of State also relies upon the decision of the court in K (and allegations des crimes de guerre) (Citizenship of the European Union – Right to move and reside freely within the territory of the Member State – Restrictions – Judgment) [2018] EUECJ C-331/16 ("K").

44. There is no requirement for the Appellant to have been imprisoned for the decision to be taken. The convictions accrued by the Appellant in this appeal are materially relevant to his conduct with the corollary assessment of the "public disturbance" caused by the Appellant's actions.

45. The Upper Tribunal should make an assessment taking into account the further policy guidance in Schedule 1 of the EEA Regulations.

46. As part of the consideration of the Appellant's attitude to the general public and UK criminal law, as well as the public disturbance caused by his repeat criminality, the Upper Tribunal will bear in mind that the Appellant has, on two occasions been made subject to the sex offenders notification requirements (for five years as a result of his 9 January 2013 conviction and for a further seven years on 6 June 2017). The very fact that the Appellant has been made subject to these requirements on two occasions is particularly telling of the Appellant's general disregard for the safety of women in the UK and the criminal justice system. There is no doubt such assaults cause significant public disturbance.

Submissions

47. Mr Tufan submitted that the Appellant cannot be deemed to have been integrated in the light of his appalling offending over the previous seven- year period. Conduct alone is sufficient to break continuity in residence and integrative links. The Appellant is clearly a recidivist offender and the fundamental interest is maintaining public order and preventing social harm. There is no evidence from the Appellant's wife. There is no evidence that the Appellant plays a critical role in his daughter's life and development.

48. The Appellant in submissions said that the Tribunal had forgotten to ask him why his family would not return to live with him in Lithuania. His daughter was born in the United Kingdom. She is a British citizen. She speaks Lithuanian. She cannot read or write in Lithuanian. His wife is disabled. She is not respected in Lithuania because of her disability and she would be unable to work there.

Discussion

49. From the considerable body of law concerning the interpretation of the Directive, the following can be extrapolated:-

i. The Directive establishes a system of protection against expulsion measures which is based in integration of those persons in the host member state. The greater the degree of integration the greater the guarantees against expulsion.

ii. Those who have a right of permanent residence cannot be the subject of expulsion "except on serious grounds of public policy of public security"

iii. The acquisition of the right of permanent residence is based not only on territorial and temporal factors but also on qualitative elements relating to the level of integration

iv. To "have resided legally" in Article 16 (1) should be construed as meaning a period of residence which complies with Article 7(1).

v. A period of imprisonment cannot be regarded as "legal residence" and may not be taken into account in the calculation of the five-year period required for the acquisition of permanent residence.

vi. In the case of union citizens who have resided in a host member state for the previous 10 years, Article 28 (3) considerably strengthens their protection against expulsion by providing that a measure may not be taken except where the decision is based on " imperative grounds of public security ."

vii. A pre-requisite of eligibility for enhanced protection against expulsion is that a person must have a right of permanent residence.

viii. The 10 – year period of residence must in principle be continuous and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned.

ix. The Directive is silent as to the circumstances which can interrupt the period of 10 years residence.

x. If an individual is imprisoned during the ten-year period prior to the expulsion decision, this will in principle interrupt continuity of residence because in general a custodial sentence is indicative of a rejection of societal values and thus severing integrative links with the member state.

xi. In principle periods of imprisonment cannot be taken into account for the purposes of granting enhanced protection. An overall assessment is required to establish the extent of the severing of integrative links.

xii. The fact that a person has resided in a member state for 10 years prior to imprisonment may be taken into account as part of the overall assessment in deciding whether integrating links previously forged have been broken.

50. There is a large body of law concerning breaks in residence following sentences of imprisonment (or absences from the host country) and the level of protection available following the serving of a sentence of imprisonment. The first issue in this appeal is the level of protection due to the Appellant in the light of his criminality and in the absence of him having served a period of imprisonment. It is necessary to consider why imprisonment breaks continuity of residence to determine this.

51. In Onuekwere Case C-378/12 the CJEU considered a request for a preliminary ruling from the Upper Tribunal on the interpretation of Article 16 (2) and (3) OF THE Directive concerning in what circumstances, if any, will a period of imprisonment constitute legal residence for the purposes of the acquisition of a permanent right of residence under Article 16 of and whether Article 16(2) and (3) must be interpreted as meaning that continuity of residence is interrupted by periods of imprisonment in the host Member State of a third-country national who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods. Before looking at the substantive decision of the CJEU, the opinion of Advocate General Bot offers some guidance on why imprisonment is capable of breaking integrative links in the context of permanent residence.

> "47. The system set up by Directive 2004/38 and more specifically the creation of a right of permanent residence is therefore based on the idea that genuine integration must, in a sense, be rewarded, or at least that it must have an effect of strengthening the feeling of belonging to the society of the host Member State.
>
> 48. Therefore, if such a system is based on genuine integration of the person concerned, how can a person who has been imprisoned on one or more occasions possibly be allowed to enjoy a right of permanent residence? Does integration within the society of the host Member State not first require the person who seeks to profit from it to respect the laws and values of that society?
>
> 49. In my view, that must be the case. As the Court stated in its judgment in Case C-325/09 *Dias*, (18) and as noted in my Opinion in Case C-

348/09 *I.*, (19) the integration which lies behind the acquisition of the right of permanent residence laid down in Article 16(1) of Directive 2004/38 is based not only on territorial and time factors but also on qualitative elements, relating to the level of integration in the host Member State. (20)

50. Periods of residence in prison of course make clear that the person concerned is integrated to only a limited extent. That is even more true where, as in the case in the main proceedings, that person is a multiple recidivist. Criminal conduct in my opinion clearly shows that the person concerned has no desire to integrate in the society of the host Member State. (my emphasis)

…

56. That is the reason for which, in addition, I am of the opinion that, even in the context of reduced sentencing which may find expression, for example, in house arrest or in a part-release scheme obliging the prisoner to return to prison in the evening, it is not possible to consider that the person concerned is residing legally within the meaning of Article 16(2) of Directive 2004/38.

57. For all the above reasons, I take the view that that provision must be interpreted as meaning that a period of imprisonment cannot be qualified as 'legal residence' and may not therefore be taken into account in the calculation of the period of five years required for the purposes of the acquisition of the right of permanent residence".

52. The CJEU decided in Onuekwere as follows: -

"25. Such integration, which is a precondition of the acquisition of the right of permanent residence laid down in Article 16(1) of Directive 2004/38 is based not only on territorial and temporal factors but also on qualitative elements, relating to the level of integration in the host Member State (see Case C-325/09 *Dias* [2011] ECR I-6387, paragraph 64), to such an extent that the undermining of the link of integration between the person concerned and the host Member State justifies the loss of the right of permanent residence even outside the circumstances mentioned in Article 16(4) of Directive 2004/38 (see, to that effect, *Dias*, paragraphs 59, 63 and 65).

26. The imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law, with the result that the taking into consideration of periods of imprisonment for the purposes of the acquisition by family members of a Union citizen who are not nationals of a Member State of the

right of permanent residence for the purposes of Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive in establishing that right of residence.

…….

30. That condition of continuity of legal residence satisfies the integration requirement which is a precondition of the acquisition of the right of permanent residence, noted in paragraphs 24 and 25 of the present judgment, and the overall context of Directive 2004/38, which introduced a gradual system as regards the right of residence in the host Member State, which reproduces, in essence, the stages and conditions set out in the various instruments of European Union law and case-law preceding the directive and culminates in the right of permanent residence (see Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-14051, paragraph 38, and *Alarape and Tijani*, paragraph 46).

31. As was noted in paragraph 26 of the present judgment, the imposition of a prison sentence by a national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law, with the result that the taking into consideration of periods of imprisonment for the purposes of the acquisition by family members of a Union citizen who are not nationals of a Member State of the right of permanent residence for the purposes of Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive in establishing that right of residence".

53. From the decision of the CJEU and the opinion of Advocate Bot, integration is key to the level of protection available and integration is undermined by criminal conduct. In the opinion of Advocate Bot, this is particularly so because he considered that a person subject to "reduced sentencing" could not be legally resident.

54. In SSHD v Viscu [2019] EWCA Civ 1052, the Court of Appeal considered Regulation 3 of the 2016 Regulations which is intended to give effect to the Directive and the interpretation of "sentence of imprisonment." It was argued by the Respondent in those proceedings that a detention and training order (DTO) was not a sentence of imprisonment breaking continuity of residence. The Court rejected the argument. Flaux LJ said as follows; -

"44. The CJEU jurisprudence to which I have referred establishes (i) that the degree of protection against expulsion to which a Union national resident in another member state is entitled under the Directive is dependent upon the degree of integration of that individual in the member state; (ii) that, in general, a custodial sentence is indicative of a rejection of societal values and thus of a severing of integrative

links with the member state but (iii) that the extent to which there is such a severing of integrative links will depend upon an overall assessment of the individual's situation at the time of the expulsion decision.

45. Although the jurisprudence refers most frequently to "imprisonment" rather than "custodial sentence" I am quite satisfied that the rationale for the principle that, in general, a custodial sentence is indicative of a rejection of societal values and a severing of integrative links so as to interrupt the required continuity of residence, is equally applicable to sentences of detention in a YOI as it is to imprisonment. This is because, on a proper analysis, it is not the sentence which indicates rejection of societal values but the offending which is sufficiently serious to warrant a custodial sentence whether of imprisonment or some other form of detention.

46. This was the point made by Advocate-General Szpunar in [75] of his Opinion in *Vomero*: "…it is the offence itself which is directed against the values expressed by the criminal law of the host member state. The imposition of a prison sentence leads only to the assumption that the convicted person committed a serious offence". Similarly, Advocate-General Bot focused on the gravity of the offence in the passage in his Opinion in *Onuekwere* at [54] to [56] which I quoted above. That is why he considered that continuity of residence might be interrupted even by house arrest or partial deprivation of liberty.

47. Given that, in regulation 3, Parliament was avowedly intending to give effect to the decisions of the CJEU in *Onuekwere* and *MG*, I agree with Mr Lask that "sentence of imprisonment" in the regulation should be widely construed to include all forms of custodial sentence, including detention in a YOI, in order to reflect the principle (whether one categorises it as an "interruption principle" or as an "integration principle") and its rationale to which I have just referred. There is nothing in domestic law which precludes that construction of "sentence of imprisonment". As Mr Lask submitted, there is no reason why imprisonment may not include other forms of detention: it all depends upon the context".

55. The reasoning of the court supports that it is criminal conduct rather than imprisonment that breaks continuity of residence and severs integrative links. This is made plain at paragraph 46 with reference to the opinion of Advocate General Szpunar in SSHD v Vomero EUECJ C-316/16 (delivered on 24 October 2017).

56. In Hafeez v SSHD [2020] EWCA 406, the Court of Appeal found that a period of imprisonment does not count towards the ten- year period. Bean LJ said as follows; -

> "43. For these reasons, I consider that the FTT judge was wrong to give the Appellant the benefit of the legal doubt on this point. As I said in *Hussein* at paragraph [18] (in a judgment handed down after the FTT and UT decisions in the present case), an individual relying on imperative grounds protection who has served time in custody must prove *both* that he has ten years' continuous (or non-continuous) residence ending with the date of the decision on a mathematical basis *and* that he was sufficiently integrated within the host State during that ten year period. In the present case, if the Appellant could not count his three and a half years in prison towards the necessary ten years' residence, he failed to qualify for imperative grounds protection under Regulation 27(4) for simple mathematical reasons. The question of whether his integrative links with the UK were broken by the three and a half years in custody (as to which see *Viscu,* another decision of this court given after the FTT and UT judgments in the present case) therefore does not arise".

57. The decision emphasises the need for an Appellant to establish that he was sufficiently integrated throughout the ten-year period. The test is more than just a mathematical calculation. There is a need for a qualitative assessment.

58. The Secretary of State relies on B in which the CJEU decided that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that, in the case of a Union citizen who is serving a custodial sentence and against whom an expulsion decision is adopted, the condition of having 'resided in the host Member State for the previous ten years' laid down in that provision may be satisfied where an overall assessment of the person's situation, taking into account all the relevant aspects leads to the conclusion that, notwithstanding that detention, the integrative links between the person concerned and the host Member State have not been broken. Those aspects include, inter alia, the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which that offence was committed and the conduct of the person concerned throughout the period of detention.

59. The CJEU has repeatedly referred to a person's criminal conduct and behaviour which is capable of breaking continuity and integrative links. I have no hesitation in finding that criminality without imprisonment is capable of breaking continuity of residence and reflects that a person committing offences is not genuinely integrated. It is an individual's criminal conduct which shows non-compliance with the values expressed by the society of the host Member State in its criminal law. This much is made clear throughout European and domestic decisions. The imposition of a sentence of imprisonment reflects the seriousness of the offence/s which explains why deportation normally follow sentences of imprisonment. However, what is key is the degree of integration at the date of the decision to exclude.

60. Regulation 3 of the 2016 Regulations was intended to give effect to Article 28 of the Directive as interpreted by the CJEU. Reg 3 (3) (b) provides that a deportation order breaks continuity. The Appellant has not served a sentence of imprisonment so the exceptions in Regulation 3 (4) (a) cannot be applied to him. This gives protection to those who have resided in the United Kingdom for 10 years before imprisonment or where the effect of imprisonment does not break integrative links, subject to an overall assessment. However, the case law makes it overwhelmingly clear that where a person, like the Appellant, has been here for ten years while he may meet the mathematical requirements, there must still be an assessment made to determine whether forged integrative links have been broken by the Appellant's conduct.

61. A conviction for an offence which does not result in imprisonment is unlikely to break continuity of residence or justify deportation regardless of the level of protection available to the Appellant. Generally speaking, a more serious offence will receive a sentence of imprisonment and the converse is true. Whether such conduct is capable of breaking continuity of residence, depends on the following: the seriousness of the offences (considered cumulatively if more than one), the frequency of offending and whether the Appellant is a persistent offender, and the duration of the criminal conduct. In all cases there must be an overall assessment of a person's integrative links.

Findings and Reasons

The level of protection available to the Appellant

62. The Appellant has been here more than ten years, counting back from the deportation decision. He has permanent residence. At the time of deportation, he had been here for fourteen years.

63. The Appellant is a persistent offender. There is no definition of this under EU law. However, he would meet the definition in Chege ("is a persistent offender") [2016] UKUT 00187. His criminal record is appalling. He is a recidivist. He has committed offences including an assault on his disabled wife, a sexual assault on a child and an assault on a police officer. He has repeatedly breached court orders and twice failed to comply with the sex offender's notification requirements. His offending took place over a period of five years. The sentences imposed include fines, community penalties and alcohol treatment orders. He has spent significant periods subject to conditional bail. Restrictions have been placed on his liberty through a variety of sentences. The final sentence was a suspended sentence imposed in June 2017, shortly before the Appellant was deported. A suspended sentence is a custodial sentence. (As an aside I note that the definition of imprisonment does not include a suspended sentence under UKBA 2007 justifying automatic deportation. However, that would not prevent the deportation of a persistent offender on conducive grounds).

64. The case of Binbuga (Turkey) SSHD [2019] EWCA Civ 551 considered how criminality can impact on social and cultural integration. This is a case concerning

deportation of a foreign criminal who was a member of a criminal gang. This Appellant is not a member of a gang. The protection offered to EU nationals is greater for those who are integrated. However, the judgement is useful when considering the impact of criminality on integration. The Court of Appeal said that:-

> "58. Social and cultural integration in the UK connotes integration as a law-abiding citizen. That is why it is recognised that breaking the law may involve discontinuity in integration. As was found in the *Bossade* case at [55]:
>
> > '…his history of offending (repeated robbery) betokens a serious discontinuity in his integration in the UK especially because it shows blatant disregard for fellow citizens. ….. We also agree with Mr Jarvis that even when not in prison the claimant's lifestyle over the period when he was committing offences was manifestly anti-social….. We have to decide whether he is socially and culturally integrated in the UK in the present. He is now 29. Whilst his recent acceptance of the reprehensible nature of his criminal conduct is an important factor, we consider the negative factors we have just mentioned indicate that his history of criminal offending broke the continuity of his social and cultural integration in the UK and he has not regained it. This means that currently he has not shown he is socially and culturally integrated.'"

65. This Appellant was a law-abiding citizen from 2003–2012. By any account he forged significant integrative links here, culminating in his entitlement to permanent residence in 2008/9. He is a hard worker and when not drinking, he is able to hold down employment. Before he had lived here for 10 years, he started to commit offences (he was cautioned in 2011). By the time of the deportation order, he had been a persistent offender for 5 years. I have considered that there are times during the period of criminality when he was working. He has produced some evidence of this. This would accord with the OASys report. This is evidence of some integrative links. However, he lost employment as a result of drinking and spent periods unemployed. His offending caused problems in his marriage, not least because he was violent to his wife. The Appellant's evidence about this, was evasive. He said that he had always lived with his family. This was clearly untrue and at odds with the OASys report and the evidence of his wife before the First-tier Tribunal. He attempted in oral evidence to justify domestic violence on the basis that his wife was interested in another man. In the light of his serious and persistent criminality he cannot be considered to have been genuinely integrated during this period of his offending. Any integrative links were severed.

66. The Appellant is not entitled to enhanced protection.

Is the Appellant's deportation justified on serious grounds of public policy?

67. The Appellant has permanent residence under the EEA Regulations, with the result that the tests in Regulations 27 (3) and 27 (5) must be satisfied in his case if the Secretary of State's deportation decision is to be upheld. The burden of proving that a person represents a genuine, present, and sufficiently threat affecting one of the fundamental interests of society under Regulation 27(5)(c) of the EEA Regulations rests on the Secretary of State and the standard of proof is the balance of probabilities: Arranz (EEA Regulations - deportation - test) [2017] UKUT 294.

68. The decision to remove the Appellant must be based exclusively on his personal conduct. Matters that do not directly relate to the case or which relate to considerations of general prevention do not justify a decision to remove him. Deterrence has no part to play. There is a need to look to the future. (It was not the Secretary of State's case` that the "*Bouchereau*" exception applied Case 30/77 [1977] ECR 1999 (Bouchereau)).

69. In Straszwewski v SSHD [2015] EWCA Civ 1245, Moore – Blick LJ said the following about the test:

> "25. In the present case the Secretary of State sought to justify Mr. Straszewski's deportation on serious grounds of public policy or public security. "Public policy" for these purposes includes the policy which is reflected in the interest of the state in protecting its citizens from violent crime and the theft of their property. These are fundamental interests of society and therefore, although regulation 21(3) does not speak in terms of the risk of causing harm by future offending, in a case of this kind that is the risk which the Secretary of State is called upon to assess when considering deportation. That requires an evaluation to be made of the likelihood that the person concerned will offend again and what the consequences are likely to be if he does. In addition, the need for the conduct of the person concerned to represent a "sufficiently serious" threat to one of the fundamental interests of society requires the decision-maker to balance the risk of future harm against the need to give effect to the right of free movement. In any given case an evaluative exercise of that kind may admit of more than one answer. If so, provided that all appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in the sense of falling outside the range of permissible decisions".

70. The Secretary of State relies on K where the CJEU said as follows:

> "57. In this case, the referring court in Case C-331/16 is uncertain as to the effect of the considerable period of time that has elapsed since the assumed commission of the acts that justified K.'s exclusion from refugee status under Article 1F of the Geneva Convention.

> 58. In that regard, the time that has elapsed since the assumed commission of those acts is, indeed, a relevant factor for the purposes of assessing whether there exists a threat such as that referred to in the second subparagraph of Article 27(2) of Directive 2004/38 (see, to that effect, judgment of 11 June 2015, *Zh. and O.*, C-554/13, EU:C:2015:377, paragraphs 60 to 62). However, the possible exceptional gravity of the acts in question may be such as to require, even after a relatively long period of time, that the genuine, present and sufficiently serious threat affecting one of the fundamental interests of society be classified as persistent.
>
> ……
>
> 60. In that regard, it must be observed that, however improbable it may appear that such crimes or acts may recur outside their specific historical and social context, conduct of the individual concerned that shows the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, such as human dignity and human rights, as revealed by those crimes or those acts, is, for its part, capable of constituting a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, within the meaning of the first sentence of the second subparagraph of Article 27(2) of Directive 2004/38".

71. The Appellant is a persistent offender. He has committed offences which are capable of affecting the fundamental interests of society (maintaining public order, removing social harm, protecting the public from sexual assaults and violence). However, he has not committed any offences since the middle of 2017. He was removed shortly after the Crown Court imposed a suspended sentence. The Secretary of State has not, as far as I am aware, asked the Lithuanian authorities to confirm whether the Appellant has been arrested or convicted of offences between 2017 and the date of the hearing. The Appellant's evidence is that he has not done so. I accept this. The offences committed by the Appellant cannot by any account be considered of such exceptional gravity that the threat can be classified as "persistent" (in the sense intended by the CJEU in K at [58]). This was not argued by the Secretary of State. The Appellant was in immigration detention before his removal. Therefore, it is not of significance that he did not commit offences before he was removed. However, in the light of the Secretary of State's decision to remove him pending his appeal and the application of the burden of proof, it is reasonable to expect her to have liaised with the authorities in Lithuania to seek information concerning the Appellant's conduct since his return.

72. I have considered the OASys assessment. Had I been deciding this appeal in 2017 or 2018, I may have reached a different conclusion in respect of risk of re-offending. The suspended sentence has now expired. There is no evidence of further offending. I accept that risk does not need to be imminent; however, the Appellant has gone from committing 21 offences in five years to not committing any in the last three years. It

is the persistence of the Appellant's offending which presented a risk. While not wishing to trivialise the offences committed, it is a significant factor that he has not received an immediate term of imprisonment at any time. This must reflect the seriousness of the offences as found by the sentencing judges who would have had more information before them concerning the offences and any relevant mitigation.

73. Notwithstanding the Appellant's appalling record the Crown Court decided in 2017 to suspend a custodial sentence. The sentencing comments have not been disclosed, but it is difficult to reconcile the sentence with the Secretary of State's case that the Appellant represents a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society and that deportation is justified of grounds of serious grounds of public policy. The Secretary of State has not produced evidence of the Appellant engaging in conduct which is at least capable of breaching the suspended sentence.

74. While the Appellant's evidence about employment, alcohol abstinence and attending meetings was unsupported by direct corroborative evidence, it is supported by him having remained out of trouble for three years. Alcohol is the main cause of his offending behaviour. During the time of the OASys assessment the risk of offending was assessed as medium; however, I must consider the risk at the date of the hearing before me. The passage of time and the lack of evidence of reoffending or criminal behaviour during this time is material to the risk now posed by the Appellant. The risk factors identified in the OASys report are present in Lithuania where he might arguably be under more stress, but the Secretary of State has not produced evidence of criminal conduct since his return.

75. I findthat the likelihood of re-offending is less now than it was in 2017. When assessing risk, I have taken into account that the Appellant was not a straight-forward witness. He was evasive about his offending. I do not accept that his wife intends for the marriage to continue. I do not accept that interest in his appeal as described by the Appellant's sister, indicates that she wishes for the relationship to resume. She did not give evidence and nor did the Appellant's daughter. I find that the Appellant's sister's evidence was wishful thinking. She want to support her brother, but her evidence did not disclose any rational basis on which to believe that the Appellant's wife wants him to return to the United Kingdom never mind the marriage to resume. The Appellant will have to cope with this on return here. However, he has coped with separation from his family since deportation in so far as he has managed to stay out of trouble, stop drinking and for the most part find work.

76. The decision to deport the Appellant must be considered through EU law. However, should he return to the United Kingdom and re-offends and should the Secretary of State wish to deport him, he will no longer have the protection of EU law. If I were considering the Appellant's appeal under Article 8 of the European Convention on Human Rights, I would have no hesitation in dismissing the appeal on the evidence before me. It falls far short of establishing that the Appellant has a family life with his wife. The evidence does not establish that his wife is hoping for a reconciliation. She did not attend. The prospect of resuming family life with her was unlikely. He

has family life with his daughter here. While it may be in her best interests for him to return here, the evidence does not establish that separation is unduly harsh. There are no properly identified very compelling circumstances over and above in the context of section 117C (6) of the Nationality, Immigration and Asylum Act 2002. However, for now none of this is relevant as the Secretary of State cannot under EU law justify the Appellant's deportation.

The Appellant's appeal is allowed under EU law.

No anonymity direction is made.

Signed Joanna McWilliam Date 16 December 2020

Upper Tribunal Judge McWilliam