Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00635/2018 (V)**

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On Tuesday 17 November 2020	**On Wednesday 13 January 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR JEVGENIJ LODEISCIKOV

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Slatter, Counsel, instructed by Faradays Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

PROCEDURAL BACKGROUND

1. By a decision dated 27 May 2020, made under Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 on the papers and without a hearing ("the Decision"), I found an error of law in the decision of First-tier Tribunal Judge Davey promulgated on 3 January 2020 dismissing the Appellant's appeal. The Decision is annexed hereto for ease of reference. The resumed hearing before me took place prior to the recent judgment in JCWI v The President of the Upper Tribunal (IAC) [2020] EWHC 3103 (Admin) dealing with the unfairness of the determination of appeals without a hearing. However, in this case, the Appellant has benefitted from the Decision since it set aside the dismissal of his appeal and was therefore in

his favour. Moreover, both parties had the opportunity to reargue their case at the hearing before me.

2. The hearing before me took place via Skype for Business. There were some minor difficulties with the giving and taking of evidence remotely, particularly since two of the witnesses gave evidence remotely via interpreters. However, those witnesses managed to give their evidence in a coherent manner via that medium and I am satisfied from their answers that they were understood by me and the legal representatives. Neither party indicated that they considered the hearing to have been unfair.

3. An issue arose at the outset of the hearing as one of the Appellant's witnesses, his sister, Julija Olsanskaja, had returned to Lithuania in the previous week and was not therefore present in the UK at the time of the hearing. She joined the hearing remotely from Lithuania and was ready to give evidence if needed. However, Ms Cunha cautioned me against receiving evidence from abroad in this manner without any indication that Ms Olsanskaja had the permission of the Lithuanian authorities to give evidence to a Tribunal in the UK in this manner. I have regard to the Tribunal's decision Nare (evidence by electronic means) Zimbabwe [2011] UKUT 00443 (IAC) at [21(d)]. Although, obviously the pandemic has changed the Tribunal's general willingness to take oral evidence via remote means (at least for so long as the current situation prevails), that does not alter the point made about ensuring that diplomatic relations are not upset by the taking of evidence from within the jurisdiction of another nation.

4. The problem was not in this case insurmountable since Ms Cunha had only one question for this witness. I agreed therefore that the question would be put to the witness via the Appellant's solicitors who could then provide the answer by way of instructions or a clarificatory statement. I gave the Appellant seven days following the hearing in order to provide that answer. I have not received any further information. I take that into account when assessing the evidence of Ms Olsanskaja.

5. I also gave the Appellant seven days to provide evidence to the Tribunal as to the reasons for the non-attendance of the Appellant's wife, Ms Laura Pashaeva, as a witness. It had been expected that she would attend remotely. However, I was informed by the Appellant who made contact with her during the hearing to ascertain her whereabouts that she was unable to attend as she felt unwell. Again, I have received no explanation for her failure to attend and therefore, again, I take that into account when assessing the weight to be given to her evidence as well as to the relationship between her and the Appellant.

6. Another of the Appellant's witnesses, Mr Richard Smith, is the director (as I understand it) of a company called Kensington Guards Inc Ltd. The Appellant used to do work for that company. Mr Smith had been expected to give evidence remotely, but the Appellant indicated that, due to the delays in reaching that gentleman's evidence, he had to leave the hearing in order to work. I did not consider it appropriate to adjourn since that gentleman's oral evidence would have been of limited if any benefit particularly since the Appellant himself was able to give evidence about his previous employment and job prospects in the future.

7. I received in evidence a composite bundle of evidence consisting of the Appellant's bundle and supplementary bundle for the First-tier Tribunal hearing and evidence adduced for this hearing. I refer to that below as [AB/tab reference/page reference)]. In relation to the additional evidence adduced for this hearing, that was filed under cover of an application notice seeking permission to adduce it. My earlier directions gave permission to rely on some further evidence adduced with the grounds. There was no objection by the Respondent to the admission of the further evidence and, given the need to consider the up-to-date position, I considered it appropriate to admit it.

FACTUAL BACKGROUND

8. As indicated in the Decision, the Appellant is a national of Lithuania. Although there was some dispute as to the date of the Appellant's entry to the UK, Judge Davey found at [12] to [14] of his decision that the Appellant entered as he claimed in 2004. I see no reason to disturb that finding and no challenge was made to the Appellant's evidence at the hearing before me as to the date of entry.

9. However, the period of residence has limited bearing on the Appellant's case if, as I indicated at [29] of the Decision I was minded to do, I also preserve Judge Davey's finding that such integrative links as the Appellant has built up in the UK were broken by his imprisonment. That finding was not challenged by the Appellant in his grounds of appeal to this Tribunal. I am invited by the Appellant to revisit that finding in light of the further evidence. I will consider that submission in due course based on the evidence before me.

10. As I also concluded at [29] of the Decision, though, the Appellant has shown that he has been continuously resident for five years prior to his imprisonment and has therefore established that he is permanently resident. As I there note that issue was conceded by the Respondent, even prior to Judge Davey's decision (and in fact the Judge's failure to expressly recognise that fact was the reason for my finding that there was an error of law in his decision). Accordingly, as I come to below, the Respondent has to show that there are serious grounds for believing that the Appellant is a genuine, present and sufficiently serious threat to public policy and public security in the UK.

11. The other major factors to be considered are the Appellant's private and family life in the UK and the extent of the risk he poses (which also incorporates the extent to which he has rehabilitated himself and his future prospects of rehabilitation here and in Lithuania). The Appellant also suffers from health conditions, some of which appear to have been caused or contributed to by previous misuse of drugs and alcohol. The Appellant's alcoholism is also said to be the main cause of his offending.

12. By way of background to the Appellant's life in the UK are his relationships with his wife (from whom he is estranged) and his son as well as his mother, sister and other relatives in the UK. The Appellant's son [E] was born in 2012.

13. As to the risk which the Appellant poses, the index offence is a conviction on 20 August 2018 at Chelmsford Crown Court of wounding/inflicting grievous bodily harm for which the Appellant was sentenced to twelve months' imprisonment. However, there have also been a significant number of previous offences between the period 2005 to March 2018 when the index offence was committed. I will come on to the detail of those offences below when dealing with the evidence.

14. The sentence for the index offence triggered the notice of liability to deportation dated 2 October 2018 (at [AB/C/19-43]). By a supplementary letter dated 10 October 2018 (at [AB/C/44-45]) the Respondent conceded that the Appellant had acquired permanent residence in the UK but continued to assert that deportation was justified on serious grounds.

LEGAL FRAMEWORK

15. The legislation which forms the legal framework in this case is the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

16. Regulation 27 of the EEA Regulations reads as follows so far as relevant:

> "**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 a right of permanent residence under regulation 15 and who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
> …
> (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 his 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.)"

17. Schedule 1 to the EEA Regulations provides as follows so far as relevant:

"**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 a 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 one 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. …

The fundamental interests of society

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include –
   (a) …;
   (b) maintaining public order;
   (c) preventing social harm;
   (d) preventing the evasion of tax and duties;
   (e) protecting public services;
   (f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and 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 in the United Kingdom, or otherwise taking an EEA decision against a child);
   (l) …."

18. The essential questions for me therefore are, first, whether there are serious grounds for considering that the Appellant poses a genuine, present and sufficiently serious risk to public policy and/or public security (and, if I am persuaded that I should re-open the earlier finding in relation to integrative links being broken, whether there are imperative grounds) and, second, even if the Appellant does continue to pose such a risk, whether deportation is proportionate. The Appellant also submits that I need to consider the respective prospects of the Appellant's rehabilitation in the UK and in Lithuania. It is asserted that the weight to be given to the respective prospects of rehabilitation is affected by the length of his legal residence (Secretary of State for the Home Department v Dumliauskas & others [2015] EWCA Civ 145 at [46]).

CONSIDERATION OF THE EVIDENCE

19. I heard evidence from the Appellant, his mother, Tatjana Molcanova, and the Appellant's friend, Ms Tsvetanka Drankova. Ms Drankova gave evidence via a Bulgarian interpreter. The Appellant's mother gave evidence via a Russian interpreter. The Appellant gave his evidence in English.

Risk Posed by the Appellant and Rehabilitation

20. The Appellant was first convicted on 21 December 2005 of theft (in the form of shoplifting) occurring on 11 July 2005. That offence therefore occurred after about one year of him coming to the UK. There then followed seven similar offences. The Appellant was sentenced to financial penalties, terms of unpaid work and suspended prison sentences.

21. On 2 May 2007, the Appellant was convicted of having an article with a sharply pointed blade in a public place, that offence occurring at the same time as one of his shoplifting offences on 30 April 2007. The Appellant was sentenced to a term of 12 weeks in prison which was suspended and a term of unpaid work.

22. On 30 January 2008, the Appellant was convicted of making a false representation to make a gain for himself or another or to cause loss to another or expose another person to risk. That offence occurred on 28 January 2008. The Appellant pleaded guilty and pleaded guilty also to a breach of his suspended sentence. He was sentenced to a term of imprisonment of 16 weeks with a consecutive term of 12 weeks for breach of the suspended sentence imposed on 2 May 2007.

23. On 11 July 2008, the Appellant was again convicted of having a knife or other sharp pointed article in a public place, that offence occurring on 16 January 2008. He pleaded guilty and was sentenced to three months in prison.

24. On 23 July 2008, the Appellant was convicted and given a conditional discharge in relation to a charge of possessing heroin.

25. On 17 March 2009, the Appellant was convicted of using disorderly behaviour or threatening/abusive/insulting words likely to cause harassment, alarm or distress in relation to an offence on 16 March 2009. He was fined £150 but served one day in prison for failure to pay.

26. On 23 February 2010, the Appellant was convicted of possessing/controlling an article for use in fraud. He pleaded guilty in relation to the offence which occurred on 14 October 2009 and was sentenced to a term of eight months in prison.

27. On 20 August 2018, the Appellant pleaded guilty to the index offence which occurred on 3 March 2018. He pleaded guilty and was sentenced to twelve months in prison.

28. On 21 June 2019, the Appellant pleaded guilty to two further offences which occurred between January 2016 and September 2017 of failing to notify a change of circumstances affecting entitlement to benefits. He was made subject to a community order and unpaid work requirement.

29. In relation to the index offence, the Judge made the following remarks in sentencing:

> "…Yes, this is a very nasty offence indeed. The jury have convicted you of inflicting grievous bodily harm, a serious offence in itself.
> I have to sentence you in accordance with the sentencing guidelines unless it's unjust to do so. The guidelines make clear that albeit you are not being sentenced on the basis that you went in as a trespasser, nevertheless you did assault this man in his home. And may I make it entirely plain to you that the fact that someone is a tenant in their house in this country doesn't mean that it's not their home. This was his home, and you assaulted him in a thoroughly disgraceful way in his home. And accordingly, the case is a serious one.
> The prosecution suggest that you should be in a greater harm category because of the seriousness of the injuries. These were very serious injuries, although fortunately your victim seems to have survived them well. And I've seen the victim personal statement, and there is no indication – thank heavens – of any serious long lasting consequences. Nevertheless, it seems to me it would be quite wrong to sentence you on the basis of this being the lowest category, category 3. Your counsel very properly concedes that all the aggravating features including your previous convictions such as they are – they're not a greatly aggravating feature, but you're not a man of good character and you have some record of violence. All these matters mean that the case goes into the next category, albeit I keep it towards the lower end of that category.
> There's no question of any discount for a guilty plea. You fought the case. And accordingly it seems to me that the appropriate sentence in your case is 12 months' imprisonment, a year in prison. You have, as I am told, been on remand for five months, and accordingly you'll be released within a relatively short period of time. However, you will be on licence for the remainder of your sentence…"

30. As appears from the foregoing, there appears to be a contradiction between the Appellant's guilty plea and his conviction by a jury. The Appellant explained in his oral evidence that this was because he was charged with grievous bodily harm and robbery and pleaded not guilty to the charge of robbery so stood trial for both offences. The Appellant also suggested that he had not been aggressive and used violence only by way of self-defence. I do not accept that as he would not have been convicted if this were so. The Judge's sentencing remarks also record the level of violence used and that the Appellant's criminal record contains other incidents involving the use of violence.

31. In spite of the Appellant's apparent denial of part of the offence concerned, he did express remorse for his criminal past. He was released from prison in October 2018 and has not offended since (his convictions in 2019 were for offences committed in 2016 and 2017). However, he has been imprisoned in the past (in 2008 and 2010) and did not apparently learn his lesson on those occasions. Although Ms Cunha also made reference to the Appellant being served in 2010 with a decision warning of possible deportation action, the Appellant denied receiving this and I can find no copy of this letter in evidence.

32. The Appellant also suggested that his relationship with his wife and son might act as protective factors against further criminal offending. However, his relationship with his wife has broken down and he no longer lives with her and his son. Although there is a break in his offending between 2010 and about 2016, which

coincides with the period when he was living with his wife and son, those relationships did not prevent him offending thereafter.

33. Similarly, the Appellant says that the prospect of future employment places him at less risk of further offending. He was however in employment between 2008 and 2010. That employment was, as the Appellant clarified in his evidence, actually in the form of self-employment providing services to the company Kensington Guards Inc Ltd. The Appellant explained that he was not a security guard as such. He was just sitting behind a desk watching a camera in a car park and putting a ticket on the cars of those who failed to pay. When it was pointed out to him that this apparently stable job had not prevented him committing offences, the Appellant said that this was a "great mistake on [his] part".

34. The Appellant went on to say that he was drunk when he committed the index offence. Crucially, therefore, the Appellant says that the risk of further reoffending is much reduced or eradicated by his abstinence from alcohol. He says that he has been abstinent for two years. He said in evidence that his drinking problem started when he stopped taking drugs (which he clarified was following his conviction in 2008). However, when it was pointed out that his addiction to alcohol did not improve when his son was born in 2012, he said that "it was not so much of a drinking problem as you think. I could go without for a week and then let go and binge drink". That gives me some cause for concern as it appears that, even now, the Appellant is reluctant to admit to the addiction which lies at the heart of much of his criminal offending, including the index offence itself.

35. The Appellant's friend, Ms Drankova, gave evidence which was in the form of a character reference. Her husband also provided a letter of support although did not give oral evidence. The general tenor of Ms Drankova's evidence was that the Appellant had made mistakes when he was very young and was explicable by him living in an ex-communist country which did not have established rules. When it was put to her that the Appellant had committed his crimes in the UK and not in Lithuania, she accepted that but insisted that, because he had grown up in an ex-communist country, this had somehow influenced his behaviour here and that he had needed time to adjust. She suggested, as had the Appellant, that the index offence had occurred because the Appellant was threatened, and she said that it was a mistake.

36. Whilst I have no reason to doubt Ms Drankova's evidence that the Appellant was kind to her and her husband when they were down on their luck, I can give her evidence no weight when it comes to assessing the risk of the Appellant reoffending now. Her evidence ignores the fact that the Appellant has committed not one but a large number of offences and over a period of about fourteen years since his arrival. The Appellant was aged thirty years when he came to the UK and in his forties when he committed the index offence. It is not credible that his offending was caused or explained by his youth or lack of adjustment on arrival in the UK.

37. The more persuasive evidence concerning the risk which the Appellant poses is to be found in his actions during his most recent term of imprisonment and since leaving prison in October 2018.

38. The Appellant has successfully completed a BTEC HND in Health and Social Care (certificate dated 25 October 2019 at [AB/C/246]). Although, as was pointed out to the Appellant in the course of his evidence, he may not be able to pursue his aim to find employment in this field (as such employment is likely to require a criminal records check), nonetheless it does show that the Appellant is committed to finding meaningful employment and is willing to re-train to this end.

39. The Appellant has provided a letter from Mr Richard Smith of Kensington Guards Inc Ltd dated 9 November 2020 ([AB/B/99]). I have already explained that I was unable to hear oral evidence from Mr Smith as he had another work commitment. I can give Mr Smith's evidence some but more limited weight for the following reasons. Mr Smith says that the Appellant has worked for the company "since 2008". That is not entirely consistent with the Appellant's evidence that he was self-employed when he worked for that company and his employment was only for a couple of years. I can also give limited weight to Mr Smith's offer of "fulltime support" given the nature of the previous employment. Mr Smith also describes the Appellant as showing during his employment that he has "leadership skills" which is not consistent with the Appellant's description of a quite menial job. Nonetheless, I accept the letter as a genuine sign of intent to offer some employment to the Appellant if he were allowed to remain in the UK. Such employment may not be in the Appellant's chosen field and the offer of employment made by Mr Smith now has to be seen in the context of irregular work on a self-employed basis. However, this is a positive indication.

40. That said, I was unimpressed by the Appellant's evidence as to his (lack of) employment prospects, if he were to return to Lithuania. There is no evidence as to the general employment position there. He has worked there in the past. He has worked in a number of different jobs and has training previously as a chef and a barber and now as a healthcare worker.

41. Since leaving prison, the Appellant has also volunteered for a charity called Build on Belief. The Service Manager and Manager for that organisation, Ms Helen Hayden and Ms Linda Rose, have provided letters in support of the Appellant [AB/C/90 and 91]. Build on Belief describes itself as "a tier 2 level service for those with drug and alcohol issues" which is run by volunteers. The Appellant has some training as a chef and has helped with cooking classes. He is also involved with fitness programmes. Ms Rose describes him as "punctual and reliable" and a man who gets on well with others.

42. There is a further letter dated 5 May 2020 from Ms Linda Chan, Lead Service Manager for this organisation ([AB/B/81]). She describes how the Appellant "has always gone above and beyond his role as a volunteer not only for other volunteers but also for the service users". For example, he provides ad hoc translation for other Eastern Europeans who do not speak English. She says that the Appellant is

"really focussed on his recovery and also willing to put in the hard work to maintain his recovery". She also describes him as "an invaluable member of our team".

43. The documentary evidence also indicates that the Appellant took advantage of his time in prison in 2018 to undertake courses to improve his English language skills and to engage with recovery programmes to address his substance abuse ([AB/C/92 and 94-96]). Further to that engagement, the Appellant self-referred to "Recovery Intervention Service Ealing" ("RISE") immediately following his release. Letters from the Recovery Coordinator, Mr Andrew D'cruze and Group Recovery Worker, Mike Bishop at [AB/C/88-89] confirm that the Appellant's "attendance and engagement have been excellent" and that "[t]his program has been very helpful in [the Appellant's] recovery". Mr D'cruze reports, in August 2019, that "it was clear that [the Appellant] remains focused in continuing to lead a positive life and he said that he has no intentions of ever returning to his previous lifestyle".

44. The evidence provided by the Probation Service was criticised by Judge Davey when determining the appeal in the First-tier Tribunal. I set out the evidence at that stage at [26] of the Decision and Judge Davey's findings in that regard at [27]. For the reasons I gave at [28] of the Decision, I agreed with Judge Davey that this evidence was unsatisfactory and concurred with the giving of little weight to it.

45. That evidence is now supplemented by additional evidence which appears at [AB/B/91-92]. The e-mail dated 20 October 2020 at [AB/B/92] is from Ms Sharon Dunbar who provided the initial evidence. That reads as follows:

> "Mr Lodeiscikov was released on licence on 11/10/2018 and initially he reported weekly for the first four weeks and then fortnightly moving on to monthly reporting. Each session is booked for one hour and depending on the session this could sometime last for over an hour.
> **Likelihood of further offending:** Using OGRS (Offender Group Reconviction Scale) which draws upon statistical date such as number and type of convictions and age at first and current convictions, Mr Lodeiscikov is assessed as posing a low risk of re-offending (12%) within 1 year and within 2 years (21%). This is a system that is used to calculate risk of further offending and risk of harm.
> Mr Lodeiscikov was on a 12 month Community Order imposed by Westminster Magistrates Court on 21/06/2019 with two requirements: any new order imposed the service user has to attend an initial appointment and again once per week for the first [four] weeks, thereafter fortnightly then monthly. In relation to any further offences or police contact, at that time BIU checks did not reveal any further offences or any police arrest after the COMMUNITY ORDER was imposed. The court also did not inform us of any further offences committed."

46. Whilst Ms Dunbar's evidence is still lacking to some degree, for example, in relation to the factors which have led to the percentage risks calculated, I accept that the evidence from her is certainly more detailed than was her initial evidence and I am able to place some weight on it.

47. There is also a letter dated 16 October 2020, at [AB/B/91] from Ms Natalie Pond, the Probation Service Office who assumed conduct of the Appellant's case in February 2020. However, as she admits in this letter, she has had "very little contact" with the Appellant as she has been away and off sick and therefore colleagues have covered her appointments during her absence. Although she notes that the Appellant missed two appointments, he provided medical evidence as to the reasons for his failures to attend. He has otherwise been fully compliant save on one occasion in May 2020 which was an appointment by phone when he missed the call and sought to phone back the same day but outside working hours. The Appellant is deemed by the Probation Service to be a "lower risk Service User" and therefore appointments have been conducted by telephone since April 2020. The Appellant has completed 81 of the 150 hours unpaid work to which he was sentenced but that is due to such work being on hold. The Appellant has only completed 2 of the 35 days of rehabilitation required by the Rehabilitation Activity Requirement but that is, I assume, for the same reason since no criticism is made by Ms Pond in that regard. In conclusion Ms Pond says that "[o]verall Mr Lodeiscikov has complied with his order to date".

48. I can place little weight on Ms Pond's evidence as it is clear on her own account that she has had very limited dealings with the Appellant since she took over the case. I accept however her evidence and that of Ms Dunbar that the Appellant has not offended or been in trouble with the police since his release from prison in October 2018 (the more recent conviction pertaining as it does to events which pre-date his imprisonment). I also note and take into account the Probation Service's assessment of the Appellant as a "lower risk Service User".

Appellant's Ties to the UK and Life in Lithuania

49. The unchallenged evidence is that the Appellant has a wife and son in the UK. His mother and sister (and her husband) also live here.

50. Dealing first with the Appellant's relationship with his wife, Ms Laura Pashaeva, she and the Appellant's son have been given settlement status in the UK. There is evidence that Ms Pashaeva is seeking naturalisation and the intention is that their son will also apply for naturalisation. There is no evidence, however, that Ms Pashaeva's status is at risk of being affected by the Appellant's criminal offending. That does not therefore provide an explanation for her failure to attend to give evidence in support of her husband. As Mr Slatter very fairly accepted, this is part of a pattern as she did not attend either before the First-tier Tribunal. I have no medical evidence in support of her assertion to the Appellant during the hearing that she was too unwell to attend. Of course, it was only ever intended that she would attend remotely and not in person and there is nothing to suggest that she was suffering from any illness which would have affected her ability to do that.

51. Given Ms Pashaeva's reluctance to give oral evidence, I give her written evidence less weight. However, in any event, that evidence does not support the Appellant's case that she and the Appellant are proposing to reconcile. The Appellant said that they had been waiting for him to complete his rehabilitation programme. It may

well be that he would wish to reconcile and thinks that this is the obstacle to that occurring.

52. However, Ms Pashaeva's evidence, including her letter signed as recently as 2 November 2020 does not reflect any desire to resume cohabitation with the Appellant. Given the emphasis placed by the Appellant on his relationship with his wife and child in relation to proportionality, I set Ms Pashaeva's recent evidence out in full. Her letter dated 2 November 2020 (at [AB/B/93]) reads as follows:

> "My name is Laura Pashaeva. I am writing this letter to ask for your understanding and support in allowing my husband to stay in the United Kingdom. I have been married to Jevgenij Lodeiscikov for over 9 years and we have amazing 8 years old son [E]. Like any family we have had ups and downs, but Jevgenij was always supportive, caring, watchful and reliable father.
> Despite his illness and issues with alcohol, we have remained together during very difficult times. Due to all stresses surrounding our relationships, me and Jevgenij split in January 2018. When Jevgenij was sentenced in March 2018, I tried to support him, however it was too distressing for me and our son. After release from the prison, Jevgenij has stopped all bad habits and has resumed his parental duties by continuing to be involved with his son. [E] and Jevgenij have great bonding, which is incredibly important thing to nurture. I truly believe that for [E] this bonding will result in healthier understanding of what it means to be a man, more of a chance of having high self-esteem, more of a feeling of how to succeed in life and simply be happy.
> I would like to ask You to allow Jevgenij to remain in the country as his removal will have severe emotional impact on Ernest and me."

53. Although, read on its own, the final sentence might suggest that Ms Pashaeva still wishes to continue her own relationship with the Appellant, read in the context of the rest of the letter, my impression of her evidence is that the emotional impact to which she refers is on [E] and on her only as his mother. Neither I nor the Respondent was able to explore this evidence with Ms Pashaeva as she did not give oral evidence. I therefore give her evidence less weight, particularly on this issue in relation to which her evidence is at best ambiguous.

54. The Respondent, in her deportation decision, accepted that the Appellant has a subsisting relationship with his wife and son based on the evidence which was before her at that time. However, that was during the Appellant's imprisonment following his conviction which was itself at a time immediately following the breakdown of the relationship. Although the Appellant and Ms Pashaeva are not divorced, I do not accept that there is any evidence that there is an intention on her part to reconcile.

55. However, the position in relation to the Appellant's son also has to be taken into account. [E] is aged eight years. He as the Appellant's wife has permanent residence in the UK. Whilst I accept that there is limited evidence about the Appellant's role in [E]'s life, there is evidence of a continuing relationship.

56. As I understand the Respondent's position based on the deportation decision, it is accepted that the Appellant has (or at that time had) a subsisting relationship with his son but did not accept that the Appellant could not be deported due to that relationship. Her position is that [E] and the Appellant's wife could stay in the UK without him or accompany him to Lithuania.

57. The latter option may not now be reasonable given that the Appellant's relationship with his wife has broken down. However, the option of them remaining in the UK without him may still be available if that is not disproportionate (whether under EU law or Article 8 ECHR). In relation to Article 8 ECHR, the point taken by the Respondent (in addition to the fact that [E] is not a qualifying child) is that the Appellant's relationship with [E] is not a parental one because there is not "a significant and meaningful positive involvement" of the Appellant in [E]'s life.

58. Ms Cunha's cross-examination of the Appellant focussed on why he had not managed to continue direct contact with [E] during the pandemic restrictions. I am not persuaded that the lack of direct contact during that period is indicative of the quality of the relationship more generally.

59. Whilst it is the case that separated parents with joint custody of a child were both entitled to have staying contact with that child during "lockdown", it is not clear to me that the Appellant's contact with [E] had progressed to that stage. The Appellant said in his evidence that his wife has sole care of [E]. In any event, it was explained by the Appellant's mother that she has health conditions (asthma) which meant that she was shielding and, since the Appellant lives with her, it would not have been possible for [E] and the Appellant to have that direct contact. The Appellant gave evidence which I accept that he sees [E] when he is able to do so and contributes to his upkeep, again when he is able to do so. The Appellant's wife is supportive of the continuation of the relationship.

60. That the Appellant continues to have a relationship with [E] though, does not necessarily mean that the relationship is a parental one. It is accepted that the Appellant is [E]'s biological father. Whether the relationship is a parental one though depends on the degree of involvement he has in [E]'s upbringing and development.

61. The evidence I have about the relationship, aside what is said by the witnesses, is limited. There are a limited number of photographs of the Appellant with [E] which appear at [AB/B/70-74] – five photographs undated but which appear to have been taken on three separate occasions - and at [AB/C/261-265] a further five photographs also undated which also appear to have been taken on three or possibly four occasions. There are also a few documents from [E]'s school but those do not mention the Appellant and show that Ms Pashaeva is their parental contact. [E] does not have the Appellant's surname but that may be for cultural reasons.

62. I have already set out Ms Pashaeva's most recent evidence including about the Appellant's relationship with [E]. Her letter to the Respondent dated 13 September 2018 at [AB/C/58] speaks of the Appellant "resuming [of] his parental

responsibilities with his son as soon as he is released". I do not place any weight on that in my assessment of the legal position. I anticipate that she meant only that the Appellant would be able to resume contact and would be able to pay towards [E]'s upkeep. Her statement dated 2 December 2019 at [AB/C/249-250] speaks of the Appellant and [E] having a close bond, that the Appellant is "a positive influence on [their] son" (which is perhaps debatable) and that [E] "looks up to and respects his father". She also says that the Appellant supports her "in each step of [their] son's educational and upbringing developments". She also says that he is "reliable and trustworthy" which is perhaps a surprising statement in the context of her description of the relationship more generally.

63. It is in any event evident from Ms Pashaeva's statement that her focus is on [E] and his wellbeing as she goes on to say that she "must protect" [E] "in the event his father is taken out of [their] lives".

64. The Appellant's own most recent statement (at [AB/B/75-79] says the following about the relationship:

> "[10] The documents which appear at item 9-10 are particularly relevant to the fourth ground of the appeal, that being proportionality. These documents demonstrate my genuine and subsisting relationship with my son [E]. I have attached a few photographs taken from my face to face contact sessions with my son his birth which was taken on 12th March 2020, since the hearing on 12th December 2019. I was enjoying regular direct contact with my son by way of telephone calls and face to face meetings, until the lockdown, which was imposed due to the current public health emergency. Once the current social distancing measures are eased, I will once again begin to have direct face to face contact with my son. My return to Lithuania would result in a significant interference with my relationship with my son."

65. The Appellant's earlier statements and letters speak of he and his family being "a happy family unit" ([AB/C/49]) which was certainly not entirely true when that letter was written in September 2019 and that his son "means everything to [him]" ([AB/C/50]). I accept that, on Ms Pashaeva's evidence, prior to the Appellant's incarceration for the index offence, the relationship remained intact (at least until January 2018) and it is perhaps for that reason that little detail is given of the relationship or extent of it. His later statement (dated 2 December 2019) confirms that he continues to have regular contact with his wife and son and that they "spend quality time together". It is also evident from that statement that he was involved in the decision that [E] should seek naturalisation and remain in the UK for his future.

66. I have referred to the fact that the Appellant's sister, Julija Olsanskaja, was not permitted to give evidence remotely despite being online and ready to do so. I did not receive any further evidence via the Appellant's solicitor in reply to Ms Cunha's only question of her which concerned the extent to which she sees the Appellant in company with his wife and son. The Appellant himself said that she has seen him with them during either summer 2020 or possibly the previous summer. Her only evidence in this regard is a very brief statement which says that the Appellant is a

loving and caring father and that it is "very important for [E] to stay close with his father". She does not profess to have any qualifications to make that assessment and there is no independent evidence in that regard. That is no more or less than the statement that one might expect of a family member who is considering the prospect of separation of a father from his son.

67. Although I accept that the evidence of the extent of the role which the Appellant plays in [E]'s upbringing is somewhat limited, there is enough to show that there is a parental relationship (in the context of an estranged relationship between [E]'s parents). I will come on to the impact of that relationship as regards proportionality later in my decision.

68. Ms Olsanskaja also says that the Appellant provides for his grandmother in Lithuania financially and helps his mother. It is said that if the Appellant returns to Lithuania, he will be unable to support his son financially due to lack of employment prospects. Again, there is no independent evidence as to employment prospects in Lithuania and limited if any evidence about the financial support which the Appellant provides to family members now. The Appellant obviously was unable to support his family when he was in prison and even now his work is on a voluntary basis. The Appellant said in his evidence that his wife has a job as a children's entertainer and is "earning quite good money". He has only recently started to give her money to help with his son's upkeep. I can therefore give only limited weight to Ms Olsanskaja's written evidence about the impact of the Appellant's deportation on his family.

69. The Appellant's mother, Tatjana Molcanova, says that the Appellant pays his grandmother's bills and for an assistant for her but omits to mention what happened when the Appellant was in prison. She gave oral evidence that she works in the UK and also worked in Lithuania in the past and therefore presumably has some income to assist with her own upkeep and that of her mother.

70. In relation to [E], Ms Molcanova's main concern in her statement appears to be that she would not see her grandchild because she would return to Lithuania with the Appellant. When asked why she would have to leave the UK in the event that the Appellant were deported, she said that she would "want to be with [her] son" that she wanted them to live together and that in Lithuania he would be alone so she would want to return to "help him settle".

71. Although Ms Molcanova appeared unsure of her own status in the UK when giving evidence, I accept that there is evidence (at [AB/B/124]) that she has been given indefinite leave to remain in the UK under the EU Settlement Scheme. Were the Appellant to return to Lithuania, she would therefore be giving up a right to remain in the UK. That would, though, be a matter of her choice.

72. It was also clear from Ms Molcanova's evidence that she spends at least some of the year in Lithuania now, with her mother. Both the Appellant and his mother gave evidence that her mother (the Appellant's grandmother) continues to live in Lithuania. The Appellant's sister was in Lithuania at the time of the hearing before

me, looking after her grandmother. The Appellant's mother said that she went back there to look after her mother as often as she could. She goes back in summer to take her mother on holiday. Although she said that her mother only had a studio flat in Lithuania, she said that she (and the Appellant when he accompanies her) stay in the flat with her mother. The Appellant's mother also said that she has friends in Lithuania.

73. The Appellant also confirmed that he visits Lithuania quite often to see his grandmother. He also went to Lithuania for a month in 2014 to look after his grandfather when his grandfather was dying.

74. Ms Molcanova also says that if the Appellant were deported, this would affect his ability to reconcile with his wife. I have already referred to the evidence of the Appellant's wife which does not show an intention to reconcile irrespective of the Appellant's immigration status. I do not place weight on Ms Molcanova's views in that regard.

75. Dealing with the Appellant's employment in the UK and in Lithuania, I have already pointed out that the only evidence that the Appellant might regain paid employment is from Mr Smith. The Appellant has given evidence that this work previously was on a self-employed basis and is not therefore evidence of long-term stable employment. I have already pointed out that the Appellant may face difficulties in securing stable employment in the health and social care sphere due to his criminal record.

76. The evidence of the Appellant's employment in the UK in the past consists of documents at [AB/C/97-113]. These documents show that the Appellant was self-employed from 2010 onwards. He earned £3207 in 2010-11, £6761 in 2011-12, £8524 in 2012-13, £9504 for 2013-14, £3046 for 2015-16 and £9303 for 2016-17. I cannot see any evidence for 2014-15 and thereafter there is no evidence of any earnings. There is some evidence that he has been in receipt of benefits during this latter period.

77. The Appellant gave evidence that he has worked in Lithuania. He has had a number of different careers including being a chef and a barber for which he will no doubt have required some training. He has undergone a recent course of requalification in health and social care. There is no evidence that he would not be able to retrain if that were required in the future.

78. The Appellant also has various health conditions which are managed by treatment in the UK. The document at [AB/C/114] dated 4 April 2019 indicates that he has suffered from cirrhosis and hepatitis C in the past but he has been successfully treated for hepatitis and his liver function is said now to be "stable" (which is an indicator that he is truthful when he says that he is no longer drinking alcohol). He is on medication for "essential hypertension" and gout and takes painkillers intermittently for osteoarthritis of his foot. He gave evidence that he has recently undergone an operation for varicose veins and was shortly due to have another operation on the other leg. There is no evidence that treatment for the Appellant's conditions is not available in Lithuania.

79. In terms of the Appellant's past alcohol abuse, that is outlined in the hospital letter dated September 2017 at [AB/C/130]. At that time, he is said to have "stopped drinking heavily" but still drunk (at that time) a bottle of wine at the weekend and two to three pints during the week. The content of that letter is consistent with the Appellant's evidence that he was a "binge drinker". The evidence now is consistent with him remaining abstinent as he said was the case.

FINDINGS, DISCUSSION AND CONCLUSION

Imperative grounds or Serious grounds?

80. The Appellant has lived in the UK for over ten years. However, in order to establish that the Respondent has to show imperative grounds for his deportation, he would need to show that he has resided continuously for ten years dating back from the decision to deport. Continuity of residence is broken by periods of imprisonment. However, the Tribunal has to consider whether integrative links formed in any earlier period are broken by the later imprisonment (see Vomero v Secretary of State for the Home Department [2016] UKSC 49 at [13]).

81. In this case, the Appellant came to the UK in 2004. His first conviction came in under two years from entry. He was not imprisoned until 2008 but by that stage had already amassed a number of convictions for more minor offences. He was imprisoned again in 2008 following his first release and was sentenced to a further eight months in 2010. Admittedly, he was not convicted of any offences in the period 2010 until the index offence some eight years later. In fact, he was later convicted in 2019 for offences committed in 2016 and 2017 so he was only free from offending for about six years in any event. His history of offending throughout the period between 2005 and 2010 and thereafter between 2016 and 2018 does not indicate integration during that period.

82. I concluded in my error of law decision at [15] that there was no error in Judge Davey's conclusion that "the evidence showed that his periods of imprisonment and criminal conduct demonstrated that he had broken any integrative links, if there ever were any, so that the necessary 10 years had not been established to require enhanced grounds to remove him".

83. Although I was invited to revisit that conclusion based on the additional evidence which was before me, I am unpersuaded that any different conclusion can be reached. The evidence shows that the Appellant has links with family members and a few friends in the UK (for the most part also of Eastern European origin). There is however scant evidence as to the Appellant's integration in the UK via employment and relationships formed here. The evidence does not show that, in 2018 when he was imprisoned for the index offence, he had integrated in the UK. At best, the evidence shows that he had not offended for a period of about six years but that is not in itself sufficient to show integrative links which had been forged in that period. I therefore conclude that the Appellant cannot show that imperative grounds are required to justify his deportation.

84. The Respondent does however concede that the Appellant is permanently resident in the UK by reason of the evidence of his length of residence coupled with the evidence as to his employment (albeit not particularly well paid) for a period of five years. That was conceded when Ms Pashaeva was accorded settlement.

85. Accordingly, the Respondent must show that there are serious grounds for believing that the Appellant constitutes a genuine, present and sufficiently serious threat to public policy and security in the UK.

Assessment of Risk

86. Mr Slatter submits, and I accept, that the type of past conduct of which the Appellant has been convicted is not itself sufficient to satisfy the test as to risk. Past conduct may be indicative of present risk but that present risk must be assessed based on the evidence. In an extreme case, the past conduct may be sufficient in and of itself to satisfy the test (see R v Bouchereau [1978] 1 QB 732). However, as the Court of Appeal said in Secretary of State for the Home Department v Robinson [2018] EWCA Civ 85 at [85], that reasoning is reserved for a case where the "facts are very extreme" and where the past conduct has caused "deep public revulsion" ([84-86]). Although the Appellant has amassed a large number of convictions and the offences are of escalating seriousness, this case does not fall within that category; nor did I understand the Respondent to assert that it does.

87. The index offence was one involving violence. Although I accept that sentencing was "towards the lower end of [the] category", the sentencing Judge made clear that he did not view the Appellant as being of good character and that some of his previous offences had also involved violence. It goes without saying based on the history of offending which I set out at [20] to [29] above that the Appellant has shown a strong propensity to reoffend in the past.

88. Turning then to the evidence about the risk which the Appellant poses currently, as I indicated at [46] above, the evidence from the Probation Service about the risk, whilst better than that before Judge Davey, is still not particularly detailed. I can, however, place some weight on it. That evidence indicates that the Appellant is a low risk. That is not to say that he poses a negligible risk. The risk is said to be 12% in the first year rising to 21% in the second. However, he remains assessed as a "lower risk Service User". I can also take into account now the actuality of the situation since the Appellant has been out of custody now for over two years.

89. The Appellant's offending behaviour in the past is linked to his addictions, first to drugs and then to alcohol. The Appellant gave evidence that he had ceased to use drugs following his imprisonment in 2008. He also gave evidence that he has abstained from alcohol since the commission of the index offence. I indicated at [34] above, that I have some concerns whether the Appellant even now recognises the extent of his alcohol dependency. If he does not, he might be more tempted to revert to that behaviour which in turn would or might lead to an enhanced risk of

reoffending. However, I can place weight on the fact that he has not returned to drink since his release from prison in October 2018.

90. I can also place weight on the Appellant's actions during his last term of imprisonment and since his release. He has undertaken courses in prison. Since his release he has been volunteering for Build on Belief. That organisation is there to help him to tackle his own addiction, but the Appellant has also provided services on a voluntary basis to others to assist them with their own addictions. The testimony from those involved with that organisation speaks highly of him. I am satisfied that those persons and the organisation more generally would not permit the Appellant's involvement with the organisation in this way if there were any concerns about the risk of further offending.

91. I also place weight on the reports from the Recovery Coordinator and Group Recovery Worker from RISE which I have mentioned at [43] above as to the Appellant's progress since his release and engagement with their support services.

92. I am unpersuaded on the evidence that the Appellant's relationships with his wife, son and other family members are a sufficient protective factor against further offending. He was married and his son was born when he committed the index offence. Whilst I accept that this offence was, on the evidence, preceded by a fairly lengthy period of non-offending (at least between 2010 and 2016), he reoffended after the birth of his son and when his familial circumstances were much as they are now (except now, as I have found, his relationship with his wife has deteriorated).

93. I am also unpersuaded that the offer of paid employment is sufficient in and of itself to prevent the Appellant reoffending. As I have indicated, that job offer has to be looked at in context. The Appellant's previous employment for the same company was as a self-employed person. The job appears to have been quite menial and employment appears to have been of a sporadic and short-term nature.

94. Whilst, as I have pointed out at [38] above, the Appellant may not be able to secure work in the field in which he has recently obtained his qualification, the obtaining of that qualification provides strong evidence of the Appellant's motivation to change his life.

95. Balancing the above considerations and giving such weight as I consider appropriate to the pieces of evidence individually and as a whole, I have reached the conclusion that there are not serious grounds for believing that the Appellant is a genuine, present and sufficiently serious risk to public policy and public security in the UK.

96. It follows from that conclusion that the Respondent has failed to justify the Appellant's deportation and he is entitled to succeed. Strictly, I do not need to go on to consider the relative prospects of rehabilitation in the UK and Lithuania or proportionality whether under the EEA Regulations or Article 8 ECHR. I do so however in case it should be necessary to revisit those issues if the case is taken further or in the event that the Appellant reoffends.

Proportionality of Deportation

97. As I have found on the evidence, I am not satisfied that Ms Pashaeva has any interest in reconciling her relationship with the Appellant. Whilst she is not obstructing the Appellant's contact and continued relationship with his son, I have already indicated that I do not consider that either relationship with his wife or son is a sufficient protective factor to prevent the Appellant reoffending (were I to have concluded that he remained at risk of doing so). Through no fault of his own, the Appellant has had limited contact with his son throughout the past months during the pandemic. He has retained contact by remote means.

98. The Respondent has considered whether deportation is proportionate applying Article 8 ECHR and I am not therefore restricted in my consideration of proportionality to the EEA Regulations. Whilst I accept that the Appellant may be said to remain in a parental relationship with [E], there is scant information or evidence about the impact of deportation on [E]. Ms Pashaeva and the Appellant say that the absence of his father would have an adverse emotional impact on [E] and I accept that this will be so to some degree. I accept that, marginally, it may be in [E]'s best interests to remain in the UK with both parents (even though they are estranged). However, applying Section 117C Nationality, Immigration and Asylum Act 2002, I would not have concluded that it is unduly harsh to deport the Appellant in the circumstances. There is simply not enough evidence that the impact would be particularly severe. There is no evidence that [E] was unduly affected by the Appellant's term in prison.

99. The Appellant's sister and her family reside in the UK although continue to visit Lithuania. More importantly, though, the Appellant's mother with whom he currently resides (and has done for some time) continues to have ties with Lithuania. Her mother lives there and she visits regularly to look after her mother and take her on holiday. She has friends in that country. Importantly, also, she said that, if the Appellant were deported, she would go with him to Lithuania to help him settle there.

100. I have already found in the context of whether imperative grounds needed to be shown for deportation that the Appellant has failed to show that he has any or any strong integrative links in the UK. Such links as he has demonstrated on the evidence now are ones which have been forged since he left prison in 2018. They remain quite weak.

101. The Appellant continues to have links to Lithuania. He said that he visits quite often mainly to look after his grandmother. There is no evidence that he has lost his ties to that country. He left there when he was already aged thirty years. He has worked there in the past. There is no evidence that he would not be able to find paid employment there on return, particularly given his previously acquired skills in various professions and newly acquired qualifications. In fact, as I have observed, he may struggle to find work in his chosen field in the UK due to

criminal records checks. That may be less of a problem in Lithuania (although I accept that I have no evidence whether that is so).

102. I do not have any evidence either that the Appellant's health conditions cannot be managed in Lithuania via medication in the same way as they are in the UK.

103. If I had found that the Appellant's rehabilitation was incomplete and that he remained a sufficient risk, I would not have found that his prospects of rehabilitation in Lithuania were less than in the UK. He would continue to have family support there and there is no evidence that he would be any less likely to find paid employment in Lithuania than in the UK. He has had very limited ongoing engagement with the Probation Services, particularly during the pandemic. I have found that he has limited integrative links in the UK and that he continues to have links to Lithuania. This case is dissimilar on its facts to those under consideration in Secretary of State for the Home Department v Dumliauskas and others [2015] EWCA Civ 145.

104. For all those reasons, had I concluded that the Appellant remains a genuine, present and sufficiently serious threat to public policy and public security in the UK, I would not have concluded that deportation would be disproportionate on the facts of this case and the evidence before me. As it is, though, I allow the appeal on the basis that the Respondent has failed to make out her case as to the risk which the Appellant poses.

Conclusion

105. The Respondent has failed to show that there are serious grounds to believe that the Appellant poses a genuine, present and sufficiently serious threat to public policy and public security in the UK. Accordingly, deportation is not justified under the EEA Regulations and the appeal is allowed under the EEA Regulations.

DECISION
The Appellant's appeal is allowed under the EEA Regulations.

Signed *L K Smith* Dated: 15 December 2020
Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00635/2018 (P)

THE IMMIGRATION ACTS

Decided under Rule 34
On Tuesday 27 May 2020

Determination Promulgated

……

Before
UPPER TRIBUNAL JUDGE SMITH

Between

MR JEVGENIJ LODEISCIKOV

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND DIRECTIONS

BACKGROUND

1. The Appellant appeals against the decision of the First-tier Tribunal Judge Davey promulgated on 3 January 2020 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 1 October 2018 making a deportation order against him under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. The Appellant is a national of Lithuania. The date of his entry into the UK and residence here is the subject of a dispute between the parties. The Respondent did not accept that the Appellant had been continuously resident in the UK for ten years prior to his imprisonment. The Appellant claims to have come to the UK in August 2004.

3. The Appellant was convicted on 20 August 2018 of wounding/inflicting grievous bodily harm and was sentenced to a period of twelve months in prison.

4. The Judge accepted that the Appellant had, as a matter of fact, been in the UK for over ten years as at the date of the Respondent's decision to deport. By reference to relevant case-law, he considered whether the period of imprisonment had broken integrative links forged prior to that period. However, based on the Appellant's previous criminal offending, he did not accept that the Appellant was integrated ([32] of the Decision). The Judge gave little weight to the views of the Appellant's probation officer that the Appellant poses a low risk. He noted the attempts made by the Appellant to abstain from alcohol whilst in prison. His alcoholism is directly linked to the risk of reoffending. Based on the totality of the evidence, the Judge concluded that the Appellant posed a genuine and present risk of reoffending which was "sufficiently serious" ([44] of the Decision).

5. The Appellant was in a relationship with a Russian national, Ms Pashaeva, and they have a son, [E] born in 2012. The Appellant and his wife are now separated. The Judge accepted that [E]'s best interests lie in having continued contact with his father and that there would be "significant interference" with that relationship if the Appellant were deported, which interference could not be overcome by remote forms of communication. Nonetheless, the Judge concluded that the Respondent's decision to deport was proportionate.

6. The Appellant raises four grounds of appeal as follows:
Ground one: the Judge failed to take into account that the Appellant had acquired permanent residence (which was not disputed by the Respondent) and therefore failed to take into account that serious grounds of public policy were required to justify expulsion.
Ground two: the Judge's analysis of the risk of reoffending was unsupported by the evidence and "Wednesbury unreasonable". In the alternative, the Judge failed to give adequate weight to the views of the Appellant's probation officer and erred in fact when considering the extent of the probation officer's involvement with the Appellant.
Ground three: the Judge failed to provide sufficient reasons for his conclusion as to the Appellant's likely future conduct in light of the efforts made to rehabilitate whilst in prison.
Ground four: the Judge failed to take into account when considering proportionality the likely prospects of rehabilitation and/or failed to provide sufficient reasons to justify his conclusions in that regard.

7. Permission to appeal was granted by First-tier Tribunal Judge Landes on 28 January 2020 in the following terms so far as relevant:

> "..2. I consider it arguable that the judge failed to apply the correct 'serious grounds' test. He does not refer anywhere to the respondent's acceptance that the appellant had achieved permanent residence and he described the test he had to apply at [44] as 'the appellant's conduct represented now a genuine, present and sufficiently serious threat' without mentioning anything additional.

> 3. I also consider that the judge erred in failing when considering proportionality to consider and compare the appellant's prospects for rehabilitation in the UK as compared with Lithuania.
> 4. I do not consider it arguable that the judge gave inadequate reasons for considering that the appellant's conduct since the offence could not yet be seen as sustained or a reliable indicator of future conduct. The appellant was a serial criminal who had had alcohol problems and in that context the judge was entitled to conclude that although he had not significantly offended since 2018 that was too short a period for his present good conduct to be seen as sustained. I also do not consider it arguable that the judge gave inadequate reasons relating to the probation officer; whilst it is not clear whether the judge appreciated that the officer had been supervising the appellant before the community order was imposed, the officer still did not explain who she had reached her assessment of risk.
> 5. Despite my comments, I do not intend to restrict the grounds which may be argued."

8. By a Note and Directions dated 26 March 2020 and sent on 24 April 2020, having reviewed the file, I reached the provisional view that it would be appropriate to determine without a hearing (pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 – "the Procedure Rules") the following questions:

   (a) whether the making of the First-tier Tribunal's decision involved the making of an error of law and, if so

   (b) whether that decision should be set aside.

   Directions were given for the parties to make submissions in writing on the appropriateness of that course and further submissions in relation to the error of law. The reasons for the Note and Directions was the "present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules".

9. On 6 May 2020, the Appellant filed written submissions. The Appellant repeated in summary form the grounds to which I refer above. In relation to whether the error of law issue could be determined without an oral hearing, the Appellant submitted that it was not clear why I had reached the view that the error of law issue could be determined on the papers and that, as the Respondent had failed thus far to indicate her response to the appeal, it was "extremely difficult to meaningfully add to the grounds of appeal upon which permission to appeal was granted". As such, an oral hearing was requested.

10. It remains the position that the Respondent has not replied either to the Appellant's challenge to the Decision or to the Note and Directions. However, I do not understand why the absence of a response nor the fact that the Appellant is unable to add to the grounds as pleaded indicates that an oral hearing is required. If anything, the converse is true since it indicates that the pleadings set out the Appellant's full case in relation to the grounds, that the Respondent has no comments to make and that little would be gained from an oral hearing.

11. In those circumstances, I do not consider that either a remote hearing or a face to face hearing is necessary in order fairly to consider the Appellant's case at this stage. A face to face hearing is not currently practicable and the error of law issue

can fairly be determined on the basis of the pleaded grounds put forward. I therefore proceed to determine the error of law issue on the papers. At this stage, the issue for me is whether the Decision contains an error of law. If I so conclude, I will need to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

12. The Appellant has also made an application pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce further evidence which was not before the First-tier Tribunal Judge. It is said that items one and two with that application were before the Judge but not until after the hearing and he refused to take them into account. I have not been able to find those on file. In any event, they confirm the Appellant's enrolment into full-time education which the Judge accepted as fact ([41] of the Decision). The other documents were not before the Judge and therefore cannot serve to impugn the Decision but may be relevant to the materiality of any error. They may also be relevant as additional evidence in the event that I find an error of law to exist.

DISCUSSION AND CONCLUSIONS

13. As the Appellant points out in his submissions and I accept, the grant of permission to appeal is focussed on the first and fourth grounds and therefore I begin with those.

Ground One

14. Regulation 27(3) of the EEA Regulations provides that "[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". The Respondent disputed the Appellant's claimed residence in the UK. However, although she initially disputed that the Appellant had acquired permanent residence, by her letter dated 10 October 2018, she conceded that he had done so. However, she otherwise maintained the deportation decision. It follows that the Judge's statement at [4] of the Decision that "the Secretary of State did not accept the Appellant had acquired permanent residence in the United Kingdom" is factually incorrect. Although reference is made thereafter (at [6] of the Decision) to the 10 October letter, there is no recognition in that paragraph that the Respondent had conceded this issue.

15. This error is not overcome by the Judge's own consideration of the issue. The focus of the Judge's consideration of the period of the Appellant's residence relates to whether the Appellant could rely on his ten years' residence (see [8] and [12] to [32] of the Decision). Although the Judge accepts at [14] of the Decision that "the Appellant had shown on a balance of probabilities that he did engage the Regulations in relation to the time spent in the United Kingdom from 2004" that is thereafter taken into account only in terms of whether the period of residence showed the forging of integrative links not broken by the period of imprisonment. The Judge's conclusion in this regard ([32]) is that "the evidence showed that his periods of imprisonment and criminal conduct demonstrated that he had broken

any integrative links, if there ever were any, so that the necessary 10 years had not been established to require enhanced grounds to remove him". There is no challenge to that finding and no error in the Judge's reasoning in that regard.

16. There is however no separate consideration of the effect of the finding that the Appellant had been in the UK for over five years. There is no reference to regulation 27(3) and to the need for serious grounds being required to justify the Appellant's expulsion. The closest one comes is the Judge's conclusion at [44] that the Appellant "remained a genuine and present risk, in the sense of real risk of reoffending, which continued as a sufficiently serious risk". However, that statement goes to the seriousness of the risk and not to the sufficiency of the justification required to deport him.

17. The Appellant draws my attention to the case of Hussein v Secretary of State for the Home Department [2020] EWCA Civ 156. That is a not dissimilar case where the Court of Appeal concluded that it could not be satisfied that the Judge had adopted the right test. For similar reasons in this case, I conclude that the Appellant has shown by his first ground that the Judge has erred in law by failing to apply the "serious grounds" test. I will return to materiality in due course.

Ground Four

18. Regulation 27(5)(a) of the EEA Regulations provides that the decision to deport must comply with the principle of proportionality. The Appellant says that the Judge has failed to provide adequate reasons to justify his conclusions. He also says that the Judge has failed to consider the Appellant's prospects of rehabilitation under that heading. As the Appellant accepts, the basis of the grant of permission on this point is slightly more nuanced. Judge Landes found it arguable that the Judge had failed to "consider and compare the appellant's prospects for rehabilitation in the UK as compared with Lithuania".

19. The Judge recounts at [31] to [44] the evidence and submissions concerning the Appellant's progress towards rehabilitation. That passage recognises the relevant factors as the Appellant's grounds appear to accept. It is though suggested that the Judge has failed to provide reasons for his conclusions in this regard.

20. The Judge accepted at [44] of the Decision that "[the Appellant] has some insight into the impact of his offending, and more self control, insofar as there ever can be, of his problems associated with alcoholism". However, "[i]n the context of [the Appellant's] serial criminality" the Judge "had reservations about the real intentions of the Appellant". The Judge expressed "some hope" that the Appellant would not revert to alcohol. Read as a whole, this section contains reasons which are adequate. In that regard, I find the point made at [9] of the Appellant's further submissions difficult to follow. The Appellant's child was already aged six years at the date of the index offence. The Appellant married his wife in 2011. Therefore, if family ties were likely to influence the Appellant's prospects of rehabilitation, it is unclear why they did not deter him from offending previously.

21. There are however two reasons why I find there to be an error of law in this regard. The first is that identified by Judge Landes; that is to say the Judge's failure to consider the prospect of rehabilitation in Lithuania when compared with the UK, particularly since it was accepted by the Judge that his wife and son would remain here and that deportation would significantly interfere with and interrupt the relationship between the Appellant and his son.

22. The second is the reliance placed by the Appellant in his further submissions on the Court of Appeal's judgment in Secretary of State for the Home Department v Dumliauskas and others [2015] EWCA Civ 145 where, at [45] and [46], the Court said this:

> "45. The judgment of the Court of Justice in Tsakouridis was considered by the Upper Tribunal, consisting of the President Blake J and UTJ Warr, in *Daha Essa v Secretary of State for the Home Department* [2013] UKUT 316 (IAC). The Tribunal concluded that the prospects of rehabilitation in the offender's home State are relevant to the decision to deport only if he has acquired a permanent right of residence:
>
> > 23. As we observed in our ruling and directions the Court of Justice in *Tsakouridis* used the term 'genuinely integrated' to describe those for whom the prospects of rehabilitation were a relevant issue in the assessment of the balance.
> > 24. *Tsakouridis* was a case where the Court examined the issue of imperative grounds relating to those who had resided in the host state for ten years or more. The Court of Appeal in the instant case did not elaborate on whether the principles apply generally or only to those who had permanent rights of residence. As the case below was determined on the basis of an assumption that the appellant had rights of permanent residence, we conclude that the Court of Appeal did not consider that only those with ten years residence could benefit from the principle.
> > 25. In our directions for remaking, we invited the parties to consider the matter and suggested that the test was genuine integration rather than the precise number of years of residence. Mr Allan's skeleton argument disputed that proposition and suggested that genuine integration was not a novel test but only shorthand for the structured approach based on length of residence.
> > 26. We agree that the Court's reference to genuine integration must be directed at qualified persons and their family members who have resided in the host state as such for five years or more. People who have just arrived in the host state, have not yet become qualified persons, or have not been a qualified person for five years, can always be removed for non-exercise of free movement rights irrespective of public good grounds to curtail free movement rights. If their presence during this time makes them a present threat to public policy it would be inconsistent with the purposes of the Directive to weigh in the balance against deportation their future prospects of rehabilitation.
>
> 46. While I have considerable sympathy with this approach, I am unable to agree with it. I can think of no other example of a factor bearing on proportionality being relevant to those who qualify in a certain respect (here, lawful residence) but not others. Once proportionality is engaged, the factors to be taken into account do not vary with the qualifications of the individual concerned. In

> addition, what was said by the Upper Tribunal in that appeal is not consistent with its error of law decision in ME, referred to at paragraph 23 above. As I point out below, the cases of AD and ME highlight this conclusion. What is however affected by length of legal residence (in the sense used in Art 16.1) is the weight to be given to the respective prospects of rehabilitation. In addition, it seems to me that the decision of the Upper Tribunal in *Daha Essa* is inconsistent with what was said by Maurice Kay LJ in *Daha Essa."*
> [my emphasis]

23. Taken together with the error identified under ground one, therefore, there is an error arising from the failure of the Judge to recognise that the Appellant had established an entitlement to permanent residence.

Grounds Two and Three

24. Although, as the Appellant accepts, the grounds which found favour with Judge Landes were one and four, and which grounds I have found to be made out, it may be helpful if I make brief observations about these other two grounds.

25. There is a substantial crossover between the Appellant's grounds three and four and therefore, having found an error in relation to ground four, I do not consider it necessary to deal separately with ground three.

26. The focus of ground two is the Judge's conclusion about the probation officer's "report" which appears from a short typed "Progress Report" and an exchange of e mails between the probation officer and the Appellant's solicitors at [AB/81-83]. The substance of the latter is is to be found in the following:

> "Further to our telephone conversation I can confirm that since the above has been released from HMP Chelmsford on 11/10/2018 he has reported steadily and the main focus of supervision has been around
> Exploring offending behaviour (anger management)
> Explore alcohol issues
> Exploring victim empathy
> Problem-solving exercise
> There are no current issues or concerns and Mr Lodeiscikov is compliant with his Post Sentence Supervision Order."

The "Progress Report" (dated 11 December 2019 and filed separately) reads as follows:

> "Mr Lodeiscikov is currently on a 12 month Community Order imposed by Westminster Magistrates Court on 21/06/2019 with two requirements:
> Rehabilitation Activity Requirement (RAR) 35 days
> Unpaid work – 150 hours
> In relation to Mr Lodeiscikov Community Order he has reported consistently and is engaging well with his RAR supervision and Community Payback. He also attends Ealing Drug and Alcohol Services and is currently undertaking voluntary work with them three times per week. They are very happy with his positive attitude and his willingness to work.

> The focus of work for Supervision has been around:
> - Exploring offending behaviour which is linked alcohol misuse
> - Exploring thinking and problem solving skills and to raise victim awareness.
>
> Mr Lodeiscikov is assessed as posing a low risk of re-offending and at this point I am not aware of any further offences or contact with the police."

27. The Judge dealt with this evidence at [39] and [40] of the Decision as follows:

> "39. The decision I reached was solely based upon the conduct of the Appellant. I take into account that the Appellant's probation officer, Ms S Dunbar, expressed in a somewhat inadequate letter, despite requests for a report, the view that the Appellant did not present anything other than a low risk of reoffending. It was clear Ms Dunbar was a probation officer but the material she produced did not show her experience or the basis for the view she formed of a low risk of reoffending. Her view may be right but it was of limited value as the expression of an opinion without any evident reasoning behind it. I attach little weight to her opinion. Her note recorded the Appellant has been undertaking rehabilitation activities, involved in unpaid work, has reported in accordance with requirements upon him and engaged well with his rehabilitation activity requirement, supervision and community payback. It also confirmed that the Appellant attended a drug and alcohol services system and was undertaking voluntary work three times a week, displaying a positive attitude and willingness to work.
>
> 40. It was said by Ms Rupra that she has for about one month tried to get a full report from Ms Dunbar, whose email attachment of 11 December 2019 was materially brief but obviously related to contact she has been having with the Appellant pursuant to a twelve month community order imposed by Westminster Magistrates in June 2019."

28. Even if it is the case that the Judge has misunderstood from that last sentence the extent of the probation officer's interaction with the Appellant in terms of the start of his reporting to her (which is not entirely clear in any event), the fact remains that the evidence is unsatisfactory. Ms Dunbar does not in fact say in her e mail or letter when contact commenced and, in any event does not say how often she has contact or for how long on each occasion. As the Judge points out, Ms Dunbar's assessment of risk is unreasoned and is to an extent equivocal (she says that she is "not aware" of any further contact with the police or offences). The Judge was entitled to give that evidence little weight. I make that observation in order to draw the Appellant's attention to the evidential deficiency in this regard.

Conclusion

29. Drawing together the above, although the errors found are relatively narrow in scope, those errors, particularly in the failure to recognise that the Appellant has established a permanent residency in the UK, are sufficient to impact on the findings as a whole. For that reason, I am persuaded that the errors of law are material and I set aside the Decision. However, there has been no challenge to the Judge's findings as to integrative links and that the period of imprisonment has

broken such links as might have existed. For that reason, I preserve the final sentence of [32] of the Decision and therefore the finding that the Respondent does not have to show that there are imperative grounds to deport in this case. It follows from what I have already said that the Appellant has established that he is permanently resident, the Respondent having conceded as much.

NEXT STEPS

30. I have not received any submissions from the Respondent. Moreover, the Appellant seeks to rely on further evidence which I am prepared to allow him to adduce. Although the impact of the errors requires reconsideration of a number of issues including risk of reoffending, rehabilitation and proportionality, I do not consider that this appeal needs to be remitted for rehearing. I do however consider that an oral hearing is required. In the current conditions, although there is likely to be a need to hear evidence from the Appellant himself, that hearing can, in my provisional view be held remotely. I have therefore given directions below for consideration of that course and listing as appropriate.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Davey promulgated on 3 January 2020 is set aside save for the final sentence of [32] of that decision. The appeal will be re-determined by this Tribunal in accordance with the following directions.

DIRECTIONS

1. **No later than 7 days** after these directions are sent by the Upper Tribunal (the date of sending is on the covering letter or covering email):

   (a) the parties shall file and serve by email any objection to the hearing being a remote hearing, giving reasons; and

   (b) without prejudice to the Tribunal's consideration of any such objections, the parties shall also file and serve:

      (i) Skype contact details and a contact telephone number for any person who wishes to attend the hearing remotely, which might include the advocates, instructing solicitor, the Appellant and any other witnesses;
      (ii) dates to avoid in the period 20 July to 30 September 2020;
      (iii) confirmation whether a court interpreter is required for the purposes of receiving evidence from the Appellant or any other witness and, if so, the language required;
      (iv) a time estimate and timetable for the hearing, indicating who it is proposed should be called to give evidence and in what order.

2. **If there is an objection to a remote hearing**, the Upper Tribunal will consider the submissions and will make any further directions considered necessary.

3. **If there is <u>no objection</u> to a remote hearing**, the following directions supersede any previous case management directions and shall apply.

   (i) **The parties** shall have regard to the Presidential Guidance Note: No 1 2020: Arrangements During the Covid-19 Pandemic when complying with these directions.

   (ii) The Appellant is permitted to rely on the further evidence filed and served with his application dated 5 May 2020.

   (iii) **The Appellant** shall file with the Upper Tribunal and serve on the Respondent an electronic skeleton argument within **<u>21 days</u>** of the date this decision is sent.

   (iv) **The Respondent** shall file with the Upper Tribunal and serve on the Appellant an electronic skeleton argument within **<u>21 days</u>** of the date when the Appellant's skeleton argument is served on her.

   (v) **The Appellant** shall be responsible for compiling and serving an agreed consolidated bundle of documents which both parties can rely on at the hearing. The bundle should be compiled and served in accordance with the Presidential Guidance Note [23-26] at least **<u>7 days</u> before the hearing**.

4. The parties are at liberty to apply to amend these directions, giving reasons, if they face significant practical difficulties in complying.

5. Documents or submissions filed in response to these directions may be sent by, or attached to, an email to [*email*] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. <u>This address is not generally available for the filing of documents</u>.

6. Service on the Secretary of State may be to [*email*] and on the Appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

Signed *L K Smith* Dated: 27 May 2020
Upper Tribunal Judge Smith