Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00587/2018**
(V)

THE IMMIGRATION ACTS

Heard by way of a remote hearing	**Decision & Reasons Promulgated**
On the 05 January 2022	**On the 28 February 2022**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

D K
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G. Lee, Counsel instructed on behalf of the appellant
For the Respondent: Ms H. Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant appeals, with permission, against the determination of the First-tier Tribunal promulgated on 8 February 2021. By its decision, the Tribunal dismissed the appellant's appeal against the Secretary of State's decision dated 5 September 2018 to deport him from the United Kingdom.

2. The First-tier Tribunal did not make an anonymity order although the Upper Tribunal had previously made such an order in 2020. Mr Lee made an application for an anonymity order. Ms Aboni on behalf of the respondent agreed with the application and also invited the Tribunal to make an

anonymity order. I consider that it is appropriate to make such an order. There is no dispute between the parties that an anonymity direction should be made, and the Upper Tribunal had previously made an anonymity order in 2020. The starting point for consideration of such a direction in this Chamber of the Upper Tribunal, as in all courts and tribunals, is open justice. On the other side of the balance, there are the interests of the children who are involved in these proceedings which require protection and having taken that into account, I accept the submission made that the public interest is outweighed.

3. I therefore make an anonymity direction as follows: Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or his family members. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

4. The decision to deport was made under Regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The appellant's case was that the decision was not in accordance with Regulation 27 and Schedule 1 of the Regulations, and/or that it was incompatible with his rights under Article 8 of the Convention, and thus unlawful by reason of S.6 of the Human Rights Act 1998.

5. By a decision and reasons promulgated on the 12 February 2021 the FtTJ dismissed the appeal, holding that the decision was in accordance with the Regulations as he found that the respondent had established that the appellant represented a genuine, present and sufficiently serious threat to public policy or security such that his deportation was justified. The judge also considered the issue of proportionality of the decision.

6. The appellant appealed and permission to appeal was refused by the First-tier Tribunal but on renewal was granted by UTJ Sheridan on 30 April 2021.

7. The hearing took place on 5 January 2022, by means of *Microsoft teams* which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant so that he could see and hear the proceedings being conducted with the assistance of the court interpreter. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing, and I am satisfied both advocates were able to make their respective cases by the chosen means.

8. I am grateful to Mr Lee and Ms Aboni for their clear oral submissions.

Background:

9. The appellant is a citizen of Lithuania. The key factual background is set out in the decision of the FtTJ, the decision letter and the witness statements filed on behalf of the appellant. The appellant entered the United Kingdom in 2013. He is in a relationship with his partner, and they have a child together, born in 2015, and she has a child from a previous relationship, born in 2014 but has been brought up as his child from an early age.

10. The appellant was convicted of battery arising from an incident on 8th April 2015 against his partner and was sentenced to a Community Order. He did not comply with that community order and additional hours of unpaid work requirement were imposed. On 16th February 2017 the appellant was convicted of battery arising from an incident again relating to his partner and was sentenced to a Community Order. On 8 March 2018, having failed to comply with the community order the sentence was varied by the magistrates court to a suspended sentence of 12 weeks imprisonment. He failed to comply with the unpaid work requirements and therefore the suspended sentence was activated, and he was sentenced to 12 weeks imprisonment on 2 July 2018.

11. On 5 September 2018, the appellant was served notice that he was liable for deportation pursuant to regulation 27 of the Immigration (European Economic Area) Regulations 2016. In that decision it was recorded that he had been convicted of 2 offences of battery in April 2015 and in July 2017. In addition it was recorded that he was convicted in July 2018 for an offence of assault for which he received a sentence of 12 weeks imprisonment. Subsequently, the respondent accepted that there were not 3 convictions but 2 and a supplementary decision dated 29 April 2019 records the conviction on 2 July 2018 related his failure to comply with the requirements of the community order and not for a separate offence of assault.

12. The decision letter began by considering his residence noting that he had not provided any evidence in support to show that he had been exercising treaty rights in the UK for a period of 5 years continuously. Thus it was not accepted that he had acquired a permanent right to reside in the UK. Consideration was therefore given to whether his deportation was justified on grounds of public policy or public security. The respondent undertook an assessment of threat and consideration was given to the principles set out in regulation 27 (5). On the available evidence the respondent concluded that it indicated he had a propensity to reoffend and thus represented a genuine, present and sufficiently serious threat to the public to justify his deportation on grounds of public policy.

13. In terms of proportionality, the decision letter stated that he had not provided sufficient documentary evidence to show that he had a genuine and subsisting relationship with his partner and children in the UK. He had family in Lithuania and would have developed social relationships with others in that country. Having regard to all the available information, it was concluded that deportation to Lithuania would not prejudice the prospects of rehabilitation and that any interference to it would be proportionate and

justified when balanced against the continuing risk posed. It was concluded that there was a real risk that he may reoffend and therefore it was considered that his deportation was justified on grounds of public policy, public security, or public health in accordance the regulation 23 (6) (b). His personal circumstances had been considered but given the threat posed, the decision to deport was proportionate and in accordance with the principles of regulations 27 (5) and (6).

14. The decision letter also addressed additional matters relevant to Article 8 of the ECHR.

15. The appellant appealed the decision, and it came before FtTJ Myers on 29 October 2019. In a decision promulgated on 20 November 2019 the FtTJ allowed the appeal finding that the respondent had not demonstrated that the appellant had a propensity to reoffend having taken into account the evidence that he had completed offence focused work by August 2019 demonstrated a better understanding of the offence and his emotions leading up to it. He had complied with the probation requirements and demonstrated a motivation to address his offending behaviour by completion of offence focused work (paras 30 – 31)and that he was in a supportive relationship with his partner and that they had expressed their wish to continue their relationship and there had been no further offending behaviour since his release. The respondent sought permission to appeal, and permission was granted. An oral hearing was listed for April 2020 however due to the pandemic and the covid -19 restrictions in place, the appeal was adjourned, and the error of law was considered without a hearing and "on the papers" in July 2020. At this stage the appellant was not represented and provided no legal submissions in support of his case. The Upper Tribunal found that the decision involves the making of an error on a point of law and set aside the decision.

16. The appeal came before the FtTJ on 4 February 2021. The appellant was not represented at the hearing although the FtTJ recorded that he had a bundle of documents prepared by his former solicitors and also a skeleton argument prepared by Counsel from the previous proceedings in 2019. The FtTJ heard evidence from the appellant and his partner and having considered the evidence in the OASys report dated September 2019 and the ISW report the judge found that the appellant still posed a present, genuine sufficiently serious risk. The judge was not satisfied from the manner in which the appellant and his partner gave their evidence and found that their account of engagement the local authority was "implausible" which undermined their credibility. He found that the appellant's partner sought to minimise the appellant's behaviour. The judge placed weight on the OASys report from 2019 of a medium risk of serious harm and that whilst there was no evidence of any further violence or misconduct and that the witnesses evidence was that the appellant had changed, the FtTJ did not accept that evidence in light of these adverse credibility findings made. The judge was satisfied that the appellant and his partner were in a genuine and subsisting relationship and that he had a genuine and subsisting parental relationship with both children which had not been accepted in the decision letter. As regards proportionality, he

took into account that the appellant had lived in the UK for over 7 years, he had a partner and children with whom he retained relationships, he had been a working man had been so for the majority of his time in United Kingdom. However he lived the majority of his life in Lithuania, was familiar with the language and culture and that he would be able to obtain employment and support there. He did not accept that they would be very significant obstacles to his integration to Lithuania. Whilst his removal would part him from the children, he was not satisfied that the appellant should remain in the United Kingdom. The FtTJ therefore found that the decision to deport the appellant was proportionate in all respects.

The applicable legal framework:

17. The appellant is an EU citizen. Under Article 20 of the Brexit Withdrawal Agreement the conduct of EU Citizens, their family members, and other persons, who exercise Citizens' rights under the Withdrawal Agreement, where that conduct occurred before the end of the transition period, 31 December 2020, shall be considered under the provisions of Directive 2004/38/EC which gives effect to the free movement of persons. This means that in this appeal it is the EU standards and not the UK standard that applies to any decision to deport, which are more favourable to the appellant than those applying under UK law.

18. The deportation of EEA nationals is subject to the regime set out in the Immigration (European Economic Area) Regulations 2016 ('The EEA Regulations') which were made under section 2 of the European Communities Act 1972 by way of implementation of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States. The Directive sets conditions that must be satisfied before a Member State can restrict the rights of free movement and residence provided for by EU law.

19. By virtue of Regulation 23(6) of the 2016 regulations an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if:

> (a) that person does not have or ceases to have a right to reside under these Regulations; or
>
> (b) the Secretary of State has decided that the person's removal is justified on the grounds of public policy, public security, or public health in accordance with regulation 27; or
>
> (c) the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under regulation 26(3).

Regulation 27 of the EEA Regulations provides as follows: -

> '**27.** - (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security, or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.

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

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

> (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
>
> (b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles-”

> (a) the decision must comply with the principle of proportionality.
>
> (b) the decision must be based exclusively on the personal conduct of the person concerned.
>
> (c) the personal conduct of the person concerned 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.

...

(8) A court or Tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the

considerations contained in Schedule 1 (considerations of public policy, public security, and the fundamental interests of society etc.).

SCHEDULE 1

20. CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.

Considerations of public policy and public security

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

Application of paragraph 1 to the United Kingdom

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

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

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as-”

(a) the commission of a criminal offence.

(b) an act otherwise affecting the fundamental interests of society.

(c) the EEA national or family member of an EEA national was in custody.

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

6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including-”

(a) entering, attempting to enter, or assisting another person to enter or to attempt to enter, a marriage, civil partnership, or durable partnership of convenience; or

(b) fraudulently obtaining or attempting to obtain or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

The fundamental interests of society

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include-"

(a) preventing unlawful immigration and abuse of the immigration laws and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area.

(b) maintaining public order.

(c) preventing social harm.

(d) preventing the evasion of taxes and duties.

(e) protecting public services.

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action.

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union).

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27).

(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking.

(j) protecting the public.

(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child).

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

<u>The appeal before the Upper Tribunal:</u>

21. In the light of the COVID-19 pandemic the Upper Tribunal issued directions, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face-to-face hearing and that this could take place via Microsoft Teams. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.

22. Before the Upper Tribunal, the appellant was represented by Mr G. Lee of Counsel and the Secretary of State was represented by Ms H. Aboni, Senior Presenting Officer.

The submissions:

23. Mr Lee relied upon the grounds as drafted. He confirmed that a skeleton argument had been sent to the Tribunal on the morning of the hearing and his oral submissions mirrored those written submissions. He relied upon 4 grounds; Ground 1 the judge failed to consider the relative prospects of debilitation the UK compared to Lithuania. Ground 2;That he erred in his assessment of the appellant and his partner's credibility and that this error infected his assessment of the risk that the appellant posed, Ground 3, that he erred in his approach to the burden of proof and Ground 4, that he erred in his approach to the expert evidence.

24. In his oral submissions, he set out the context of the case and that this was an appeal against the decision to remove and exclude the appellant pursuant to Regulation 27 in the circumstances where he had received one custodial sentence of 12 weeks and where his offending would not have triggered the domestic automatic deportation provisions within section 32 (5) of the UK Borders Act 2007. He further submitted that the position of an EEA national is "very different" from that of a "foreign criminal" who is subject to deportation provisions (relying on the decision in SSHD v Straszewski [2015] EWCA Civ 1245) and that the burden of proof and the appeal was on the respondent to show that the appellant represented a genuine, present and sufficiently serious danger to the community and that if he did so, it was proportionate to remove and exclude him. Mr Lee submitted that the appellant had been sentenced to one custodial sentence of 12 weeks, he had committed no further offences since his release from prison almost 3 years by the time of the judge's decision he had been in the UK for 8 years and the effect of the decision would be to remove him from his partner and children.

25. Dealing with ground 1, he submitted that the judge did not consider the relative prospects of successful rehabilitation in the UK and Lithuania and that this amounted to an error of law relying on the decision in Secretary of State for the Home Department v Dumliauskas & Ors [2015] EWCA Civ 145. He submitted that in that appeal none of the appellants had permanent residence but having found that the Upper Tribunal had erred in the approach their appeals, the Court of Appeal remitted their cases back to the tribunal for reconsideration. Thus if the court considered so little weight fell to be attached to the relative prospects of rehabilitation,

the court would not have remitted the case to the tribunal for further consideration.

26. Mr Lee set out four important factors which he submitted rendered the judge's failure to consider the relative prospects of rehabilitation a material error. He referred to the length of time that the appellant had been in the UK and the degree of integration that he could evidence, the fact of his offending was such that rehabilitation could well have been an important factor; the evidence of his progress during the rehabilitation work that he had already done and the incentive to rebuild and maintain his relationship with his wife and partner. He submitted that this was not a case where the factual background was overwhelmingly in favour of deportation and that the question of rehabilitation was therefore of importance. In this respect he referred to there being "genuine integration" and that it was the appellant's case that he resided in the UK continuously since October 2013 but could not show that he was entitled to permanent residence at the date of the hearing because of the interruption of his continuous residence by his sentence of imprisonment. Nonetheless he submitted that there was strong evidence of integration.

27. As to the seriousness of the offending, Mr Lee referred to the chronology. Originally, the respondent had made a decision to deport the appellant based on a misunderstanding of the offending history on the basis that there were 3 convictions but in fact there were 2 with the appellant being resentenced to custody for the latter offence having failed to complete the unpaid work requirement for sentence. Neither offence was considered to cross the custody threshold by the sentencing magistrates. He submitted that the sentence imposed by the magistrates court was the best indication of its view of the seriousness of the offending. He therefore submitted that in this context it was not a case where prospects of rehabilitation could properly be said to have made no difference, if it was to be said that the appellant's offending or the propensity to offend meant that he posed a threat to the community, the question of whether and where that threat might be best negated was material to the proportionality assessment.

28. In his oral submissions and in the skeleton argument he submitted that the evidence before the tribunal showed that this was a paradigm case of an appellant that had responded to the rehabilitative opportunities provided to him and that by the time of the final report (OASys) the assessment was that it made significant progress. In his submissions he set out the references in the evidence supportive of his submission. He therefore submitted that this was a case which where rehabilitation was progressing and ought to have been considered in any assessment of the appellant's case. He submitted that there was a strong incentive to build up and strengthen the relationship with his partner and the children.

29. Dealing with ground 2, he submitted that the reasons set out in the grounds of challenge, the approach of the tribunal to the assessment of the credibility of the evidence provided by the parties was materially flawed because it left out of account material evidence. Mr Lee direct the

tribunal to paragraphs 20 and 21 of the decision which set out the credibility assessment. In particular that the judge had dismissed the appellant's partner's evidence that the appellant had exhibited no "further aggression" on the basis that her credibility had been undermined at least in part by her account of "vague and evasive" evidence about the engagement of the local authority (see paragraph 20). As the question of the appellant's behaviour since his return to the family home is clearly material to any assessment of risk you pose and therefore her evidence on this point was important..

30. He further submits that the FtTJ on this point wholly left out of account evidence provided by the appellant's former solicitors of attempts to contact the local authority, letters and emails sent by them and also the evidence contained in the ISW report. At page 42, the ISW noted that the parents were confused as to the involvement of the local authority. He submitted that if the judge was to draw an inference regarding their failure to engage, the evidence of their attempts to do so in difficulties that the expert had in making contact should have been taken into account. Reference was also made in his submissions concerning the view taken of the appellant's return to the family home. Mr Lee submitted that there had been no legal prohibition on returning to the family home and there was evidence in support of this before the FTT in the ISW report and set out in the skeleton argument.

31. Ground 3 related to the burden of proof and that when considering the risk of reoffending the judge failed to set out anywhere in the determination that the burden of proof in respect of the EEA aspect of the appeal was on the respondent. The judge had set out the burden of proof in respect of article 8 at paragraph 17 but it failed to set out any reference to the burden of proof for the main part of the appeal. Whilst there was no obligation on the judge to set out the burden of proof, the fact that he had done so in relation to the human rights aspect of the case and demonstrated that he had not properly directed himself. He submitted that having read the decision, there was a failure to make clear where the burden of proof did lie and that was material to the outcome.

32. The last ground of appeal related to the approach taken to the evidence of the ISW. Mr Lee referred the tribunal to paragraph 35 of the ISW's report where the conclusion was that it would not be in the best interests of the children to remove the appellant as there was a good chance that his partner could successfully parent the children together. He submitted the reasons given by the judge for rejecting the ISW's evidence was flawed and that the reasoning given that the ISW did not adequately address in detail the offending behaviour as set out at paragraph 22 left out of account the social workers report where firstly, she took into account there been a great improvement in understanding on the part of the adults as to what needed to be done to change their behaviour to meet the needs of the children (paragraphs 29 and 31) and also that the ISW who was an experienced independent social worker set out references to the serious concerns about the behaviour of the appellant and the potential harm to the children of witnessing domestic abuse. Thus he submitted the

wholesale rejection of the report for the reasons given at paragraph 22 were unsustainable and amounted to an error of law.

33. In summary he submitted that the effect on the appellant of this decision could not be starker and that the errors of law rendered the decision and unsustainable and it should be set aside and considered afresh.

34. Ms Aboni confirmed that the respondent had not complied with the directions issued by the Tribunal where the respondent was directed to file a skeleton argument for this hearing . Nor was there a rule 24 response filed on behalf of the respondent. Thus she made oral submissions.

35. Ms Aboni conceded that the FtTJ made an error in law by failing to consider the relative prospects of rehabilitation. However she submitted it was not material because the judge engaged with the evidence and gave adequate reasons for finding that the appellant posed a risk and that his deportation was appropriate and proportionate.

36. She submitted that by reference to the decision Secretary of State for the Home Department v Dumliauskas & Ors, in the absence of permanent residence rehabilitation could not be a weighty factor therefore the judge had given adequate reasons for finding the appellant did not have permanent residence and had not established that he would be seeking to rehabilitate himself in any active way. Ms Aboni submitted that the judge did engage with the evidence and that the appellant had joined the family without the approval of the local authority and that the evidence was "vague and evasive". The judge did accept the positive opinions at paragraph 22, but the evidence was not up-to-date. Thus she submitted the social worker, whilst making positive comments have not made an up-to-date statement and therefore the judge was entitled to attach weight to the failure of there being no up-to-date evidence from the probation service. Thus she submitted the judge had no updated report or any evidence of rehabilitation or that his behaviour had changed.

37. In relation to ground 2 Ms Aboni submitted that the judge adequately considered the evidence the appellant and his partner and gave adequate reasons for stating that their evidence was vague and evasive and there was a lack of regard to the views of the local authority.

38. As to ground 3, there was no error as asserted in the grounds relating to the burden proof even if it had not been set out in the decision.

39. In relation to ground 4, Ms Aboni submitted that the judge had adequately considered the ISW report and whilst he accepted the report had positive matters, the ISW had not assessed the situation since he re-joined the family. Whilst the judge accepted that there was a genuine and subsisting relationship between the appellant's partner, the judge is entitled to find that he represented a risk. She concluded in her submissions by stating whilst there was an error of law as set out in ground one, it was not material to the outcome.

Conclusions:

40. I am grateful for the submissions made by each of the advocates. I confirm that I have taken them into account and have done so in the light of the decision of the FtTJ and the material that was before him.

41. Dealing with ground 1,which concerns the issue of rehabilitation, it is conceded on behalf of the respondent that the FtTJ erred in law by failing to consider the relative prospects of rehabilitation in the UK and in Lithuania. As set out in the grounds of challenge and is cited by Mr Lee in his submissions, this is supported by the decision in Secretary of State for the Home Department v Dumliauskas & Ors [2015] EWCA Civ 145 (at [52]-[55]). Thus the parties are in agreement that the FtTJ when considering the issue of proportionality did not undertake any consideration of this issue. Whilst the parties agree that the judge fell into legal error, Ms Aboni on behalf of the respondent submits that the error was not material and submits that the lack of a permanent right of residence demonstrates that the issue of rehabilitation could not be a weighty factor. She therefore submits that the judge gave adequate reasons for finding that the appellant had not established a permanent right of residence and was not seeking to rehabilitate himself in the UK.

42. Ms Aboni further submitted that the judge did make reference to the positive opinion set out at paragraph [22] of the ISW report but that the FtTJ was entitled to attach weight to the fact that there had not been any up-to-date evidence from the probation service or any social work assessment. As there was no satisfactory evidence of working towards rehabilitative change, the issue of rehabilitation would have no weight attached to it in any assessment.

43. Having considered the submissions of the parties on this issue I accept the submission made by Mr Lee on behalf of the appellant. In his written submissions and grounds he identified 4 factors which went to the materiality of the error to consider the relative prospects of rehabilitation. As set out, those factors relate to the length of time the appellant had been in the UK (since 2013), his degree of integration, the nature of the offending in the context of his rehabilitation and the family unit, the evidence of his progress and incentive he had to maintain and rebuild his relationship with his partner.

44. Dealing with the 1st factor, as Ms Aboni highlighted there was no dispute that the appellant had not established a permanent right of residence. This had previously been accepted by counsel who appeared before FtTJ Myers on the basis that he had entered the UK in 2013 and there was evidence of employment from October 2013 but there were gaps thereafter. Although not referenced in the later decision of the FtTJ, the appellant had worked since 2016 and after release from detention in 2018 had returned to his employment. Judge Myers referred to the evidence in the bundle from his employer (paragraph [28] of the decision). There were therefore gaps in his employment and in addition as Mr Lee points out, the period of imprisonment in 2018 broke his continuity of residence. Again this was set out by the FtTJ at paragraph [24].

45. Whilst the appellant did not have a permanent right of residence, this is not a prerequisite before genuine integration can be demonstrated. Both parties accept that the FtTJ did not consider the issue of rehabilitation and as Mr Lee submits nor was there any consideration of integration in this context. The appellant had resided in the UK since 2013 and had established life with his partner with whom he had a child and there was a further child who had been raised by the appellant since she was 6 months old. The appellant had worked in the UK in various types of employment, he had relatives albeit on his partner's side in the UK and there had been a period of time where the appellant had not offended further. In this context the appellant had received a custodial sentence of 12 weeks in 2018 which was imposed following his failure to comply with the unpaid work requirement as part of the community penalty which had been imposed for the offence of battery committed in February 2017. The term of imprisonment was not imposed by the magistrates court for the offence for which he was convicted but for the failure to comply with the court order. Whilst Mr Lee submits that the sentenced imposed is the best indication of its view of the seriousness of the offending and in this context it was not a sentence of imprisonment, in my view it cannot be ignored that the original offences related to incidents of domestic abuse which are serious offences and that the appellant failed to comply with the court order which is also has significance. Nonetheless the point remains that the appellant had not committed any further offences for a significant period of time at the date of the hearing in 2021 and therefore this was a further factor relevant to the issue of integration and any consideration of the the relative prospects of rehabilitation when assessing the proportionality of the decision and also a further factor relevant to the issue of risk.

46. In addition there was evidence before the FtTJ relevant to the issue of rehabilitation and whether the appellant had responded in any positive way. Ms Aboni has submitted that the judge did accept some of the positive behaviour and pointed to paragraph [22] of the decision. However at [22] the reference made to the ISW report and the conclusion that the appellant and his partner wanted to provide a safe and loving home together and that the ISW hoped that the social services were putting plan a place to reintegrate the appellant and the family. There is no reference to the material in the OASys's report on the issue concerning the progress the appellant had made when considering issues of proportionality at that paragraph or later in the decision.

47. In his written submissions and also the grounds Mr Lee has set out the relevant material. At page 52 of the OASys's report when considering whether the period of supervision has been effective, it is recorded that the appellant "had engaged with this period of supervision more than he had engaged in supervision in the past; he had had no unacceptable absence is recorded in has shown willingness to engage in offence focused work". Reference was made to the period of supervision having been "effective" whilst noting that it would have been useful to have had more time to complete offence focused work particularly with regards to victim awareness however the author's opinion was "I believe that (appellant)

has begun to develop skills to manage his emotional arousal and reduce conflict." Reference was made to the circumstances of his past offending but that it had not been tested as they were not living together. At 2.8, reference was made to the appellant initially denying involvement in the offence and had minimised his own involvement in the role his emotions had played in triggering the offence but that the appellant "does appear to be accepting some responsibility for the event now". It is recorded that at the termination stage in August 2019 (the appellant) appears to have developed an insight into the motivation of the offence, noting that his arousal is heightened and that he acted impulsively." At 2.11 it is also recorded that at the termination stage in August 2019, (the appellant) "appears to take more responsibility for offence and that he is able to reflect more accurately and objectively on the lead up/triggered the event, as well as to the event itself". Whilst he initially appeared to justify the offence and blames his partner, he was able to recognise unhelpful thinking which contributed to his behaviour at the time of the offence. At 2.14 the positive factors identified were that the appellant had "increase thinking skills" the appellant reports are now thinking about consequences for acting, no further offending during the licence period confirmed by police callouts and engagement with both NPS and x". Reference was made to having completed offence focused work whilst in supervision sessions and the report refers to the appellant demonstrating "a better understanding of the offence and his emotions in thinking leading up to it. He was able to discuss the forms domestic abuse might take, he was able to consider his expectations in a relationship and that the parties were more "open" now and spoke about the issues more. It is right to observe that the report makes reference to this sounding as a positive step but noted that it had not been fully tested in the community. Further recorded were techniques adapted to lower his emotional arousal during conflict which had been set out. In summary the probation officer found that was very positive that the appellant had begun to address his offending behaviour problems and he "displays a much better understanding this triggers court thoughts and emotions and this alongside no father police callouts suggests that the appellant is managing his risk factors". However as stated earlier the probation officer noted it had not been tested as the couple had not been living together.

48. In the ISW report reference is made to the social worker discussing with the appellant the work with the probation service and the anger management course (page 47) and the ISW set out his recognition of his past behaviour and its effects on the family. At page 48, the ISW recorded that she had also spoken to the appellant's probation officer and recorded "she was pleased with the progress that he had made, and that he is now signed off."

49. Consequently there was evidence before the FtTJ that pointed to rehabilitative progress including having engaged with the courses undertaken since his offending which was relevant evidence in the assessment of proportionality. I would also accept Mr Lee's submission that in this context the incentive to build and maintain his relationship with his partner was relevant to the issue of rehabilitation. The FtTJ accepted that

the appellant and his partner had a “genuine and subsisting relationship as partners” and also that he had a “genuine and subsisting parental relationship with both children” (at [23]). This was a relevant factor in light of the relationship which had continued, and their stated position are set out in the ISW report and their evidence before the FtT in 2019 and 2021 that they intended to remain together as a family unit and had done so. It is not clear whether the FtTJ had sight of the previous decision of FtTJ Myers who in November 2019 had allowed the appellant’s appeal. Judge Myers recorded that the appellant and his partner had been attempting to get the social services to assess them (at paragraph 21) and at paragraph 34 found that in 2019 he was in a supportive relationship his partner and that both had expressed a wish to continue their relationship and cohabitation. The factual scenario in 2021 was relevant to the prospects of rehabilitation in the UK which was likely only to be assessed with the family including his partner who were resident in the UK and not Lithuania.

50. The relative prospects of rehabilitation in the UK my view could not be determinative of the issue of proportionality, but nonetheless was a factual issue to be determined as part of that assessment and as both parties agree no factual assessment was made on the evidence and therefore it is not possible to say that it would not have made any difference to the outcome. I therefore accept the submission made by Mr Lee and that ground 1 was material error.

51. Dealing with ground 2, it is submitted on behalf of the appellant that the FtTJ erred in law in his assessment of the credibility of the parties’ evidence. This principally relates to the FtTJ’s assessment of their evidence at [20] which relates to their contact/position with the local authority. At [20] the judge considered that the appellant and his partner were “vague and evasive” when asked about their engagement with the local authority in particular they stated that there had been no meetings between the appellant and the local authority which the judge found to be “implausible “if the local authority was to assess the risk of him living with the family. Having reached that conclusion that evidence was “vague”, he was not satisfied that they had engaged with the local authority.

52. The relevance of that evidence was that this credibility assessment formed part of the overall assessment relevant to the assessment made under Regulation 27 and whether the appellant was a genuine and present risk. It is not entirely clear what evidence was given to support the assessment that the appellant and his partner’s evidence was “vague and evasive”. The point made by Mr Lee is that in reaching that assessment, the judge left out of account material evidence concerning the issue of contact/engagement with the local authority. He further makes the point that there was evidence in the bundle from the appellant’s solicitor who had made attempts to contact the local authority set out between pages 54 and 58 of the bundle including a letter seeking clarification of whether there was any legal prohibition on the parties being in contact or return to the family home and follow-up correspondence asking for the local authority to assist with the enquiry but no reply. There was also evidence

in the ISW report at page 43 referring to the difficulties concerning her contact with the local authority.

53. The submission made by Mr Lee is that the judge drew an adverse inference from their evidence based on what he considered to be a failure to engage with the social services but that to do so, the evidence of the attempts to engage and the difficulties they had as set out in the written documentation and also by the ISW was relevant evidence to be taken into account overall. The ISW recorded in her assessment that having spoken to the couple that "from talking to the parents they are confused and not clear what the future plans are.." At page 52 the ISW also stated "at the present time the matter of whether the family can be re-established seems to be in a state of confusion due to the low level of engagement from (local authority). At paragraph 15 the ISW had tried to ascertain the future plans for the family that having considered the file reached the conclusion that it was "not clear". I observe that when giving evidence before Judge Myers in 2019 the judge recorded and observed at paragraph 11 the both the appellant and her partner are confused as to the local authority and having been given "inconsistent information". The ISW also referred to the position of the parties that they had wished to be assessed but that the local authority decided not to do so until after the immigration matters were resolved and that after the ISW reviewed the file, the ISW stated that "the appellant's partner did not seem to have been informed of this intention to delay the assessment" (page 51). The ISW has provided an addendum report in 2021. This was evidence that was not before the FtT. Nonetheless it supports her earlier report that the issue of contact with the local authority had been confusing for the couple highlighting her own experience and the language barrier. I do not attach weight to the report as evidence to demonstrate an error of law but make the observation that it is supportive of the earlier points made in the report that was before the FtTJ.

54. In summary I accept that as a general point that issues of credibility are best made by the judge who has the advantage of seeing and hearing witnesses give evidence. However where adverse inferences are to be drawn from that oral evidence but where there is other relevant evidence, that should be taken into account in the overall assessment when making factual findings or adverse inferences. Thus I accept the materiality of the error as when considering whether the appellant was a present risk, the judge did not accept the appellant's partner's evidence that he had not been aggressive to her on the basis (at least in part) on account of what he described as vague evidence as to the engagement with the local authority. The evidence on that issue from the ISW and others involved was material evidence when considering whether the parties evidence as to them being confused as to the local authority's plans, and the lack of contact with them was in fact implausible. The appellant's behaviour since returning to the family home was material to the assessment and was material evidence relevant to risk and the appellant's partner's evidence was also relevant to this issue. This was particularly so bearing in mind that the risk assessment in the OASys report related to a medium risk of harm in 2019, and that the positive aspects of the report in favour of the

appellant had at that time considered in the context of it not being tested in the community. At the date of the hearing in 2021 there had been a period of time where it had been tested in the community and therefore the appellant's partner's evidence was relevant to that assessment. I do note however that her evidence was not entirely satisfactory on other matters as identified by the judge at paragraph 21, but that does not by itself undermine the submissions made by Mr Lee relating to the assessment of credibility overall.

55. Mr Lee also referred to the judge's view of the appellant's return to the home. The history of events is not entirely clear. The appellant was successful in his appeal before Judge Myers in November 2019 and his appeal was allowed. It is not known whether the local authority were informed about the success of his appeal in the light of the ISW's reference to waiting until the "immigration matters" were settled. It is also not known whether they were aware that the respondent had appealed that decision. It appears that permission was granted, and an oral hearing was listed for April 2020 but as a result of the pandemic was adjourned. In the intervening period the appellant lost his representation and when the appeal was considered "on the papers" in July 2020 no legal representations were made on behalf of the appellant. However it appears that the parties had resumed cohabitation at some point in time. The position of the local authority has not been addressed against that background at the date of the hearing in 2021. Mr Lee submits there was no legal prohibition to their resumption of cohabitation and that the ISW had referred to the local authority having no intention of making a public law application (p44 ISW). There is a lack of clarity as to the events that have taken place.

56. For those reasons I accept the submission on behalf of the appellant that evidence relevant to the overall assessment of credibility had not been factored in and that this led to a flawed assessment which was relevant to the issue of risk and the necessary assessment of Regulation 27(5) (c).

57. As to ground 4 this relates to the ISW report and the FtTJ's rejection of the evidence set out in the report. The grounds assert that the ISW had reached a positive assessment of the parties and in particular when considering the future of the family and any risk of harm. At paragraph 35, the ISW concluded that it would not be in the best interests of the children to return the appellant to Lithuania as there seemed to be a good chance that he and his partner could successfully parent the two children. It is therefore submitted that the reasons given of rejecting the assessment are flawed. Mr Lee points to the assessment at paragraph [22] where the judge considered the ISW had not adequately addressed in detail the offending behaviour and he submits that this reasoning leaves out of account the ISW 's evidence in the report at paragraph 29 where the ISW referred to the past conduct of the appellant but that in her opinion "there has been a great improvement and understanding on their part as to what needs to be done to change their behaviours that they are able to meet the needs of the 2 children. I'm confident that together (they) can parent these 2 children in a satisfactory loving way." At paragraph 31, the ISW

also set out that she took into account that there had been serious concerns about the behaviour of the appellant towards his partner and the issue of children witnessing domestic abuse. Ms Aboni on behalf of the respondent submits that the judge adequately considered the ISW report but noted that there had not been an updated assessment since he re-joined the family and therefore there was no error of law in his reasoning.

58. I have considered the submissions made. There is no dispute that the ISW concerned was an experienced and independent social worker. Her qualifications are set out in the report and the FtTJ properly acknowledged this at paragraph [10] where he referred to her as "an appropriately qualified social worker." Whilst Mr Lee has pointed to relevant paragraphs of the ISW report where she plainly referred to the serious concerns as to the appellant's conduct and the adverse effect upon children witnessing domestic abuse, in my view it was open to the judge to note that the ISW had not seen the latest OASys report although I observe that the solicitors for the appellant had set out in a covering letter that the updating assessment remained broadly the same as the previous assessment which the ISW had seen (see covering letter dated 24th of October 2019). Furthermore, no addendum had been obtained. That was an accurate statement of the state of the evidence in 2021. However, for the reasons set out earlier when considering the issue of genuine and present risk, the evidence of the ISW concerning her assessment of the parties still had relevance as explained when considering ground 1. Her evidence on the issue of contact with the local authority could be viewed as supportive of the evidence given by the parties. I also observe that whilst the judge considered that the ISW had not attended the hearing, it does not appear that the ISW had been asked to do so in the light of the appellant appearing unrepresented at the hearing.

59. For those reasons, I accept the submissions made by Mr Lee in relation to grounds 1 and 2 and ground 4 in part and when taken together demonstrate that the errors could have been material to the outcome. Not all the material before the FtT was positive and domestic abuse must be viewed seriously but there were aspects of the evidence as outlined by Mr Lee which were relevant to the overall assessment and had not been taken account of which were relevant both to the issue of risk and to the secondary issue of proportionality. Therefore the decision is to be set aside. In light of that assessment it is not necessary to consider ground 3 which relates to the burden of proof. As to the future disposal of the appeal, I note that the appellant's previous appeal had been allowed in 2019. That decision was set aside at a time when the appellant was unrepresented and the FtTJ proceeded on the basis of the previous material provided in 2019. The appellant now has legal representation. Mr Lee referred to a further addendum report from the ISW from 2021. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. Given the lack of clarity as to the past and present factual circumstances and also the time that has elapsed, there will be a requirement for oral evidence to be given on all issues. The appeal falls

within paragraph 7.2 (b) of the practice statement, and I therefore remit the appeal to the First-tier Tribunal for that hearing to take place.

Decision

The decision of the First-tier Tribunal did involve the making of an error on a point of law; the decision is set aside. The appeal is remitted to the First-tier Tribunal for a hearing.

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

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

Signed Upper Tribunal Judge Reeds
Dated : 31 January 2022