



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001472

First-tier Tribunal No:
DA/00068/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

22nd February 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

Mr Viktor Lastovka
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr I Ricca-Richardson, instructed by Turpin Miller Solicitors
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 7 February 2024

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the Secretary of State to make a deportation order against him on 10 June 2022 on the basis of his criminal offending. That appeal is under the Immigration (European Economic Area) Regulations 2016 as preserved; and on human rights grounds under section 82 of the Nationality, Immigration and Asylum Act 2002.

Background

2. The appellant was born in 1985 and came to the UK in 2016 with AB. He had previously worked as an electrician in a nuclear power plant and he continued for a time to work in the UK after coming here.
3. The appellant has however had issues with alcohol and drug use for many years.
 - (i) On his own account, he started using alcohol at about age 17 or 18 and drugs shortly thereafter when he was at university. He accepts developing an addiction to tramadol during this period.
 - (ii) In 2008, after moving back to Lithuania after a stint in Germany, the appellant started using heroin. He says that he then moved to Helsinki for a period of 14 months during which he did not use drugs at all. However on returning to Lithuania, his use of drugs worsened. By 2013 he was addicted to both heroin and crack cocaine.
 - (iii) In 2014, the appellant decided to go into rehab. There he met AB, who was there for troubles with her alcohol use.
4. AB's sister suggested that the couple move to the UK, where she was already living. They did so in 2016. The appellant and AB got married in 2018. They struggled to get pregnant and, on his account, this led him to him becoming addicted to drugs again. He sought medical help and got a prescription for Subutex. However, he soon began taking drugs again and was socialising with other drug users.
5. At about this time, on 11 October 2018, the appellant was convicted for driving under the influence of a controlled drug. He was fined and disqualified from driving for 12 months.
6. On 13 August 2019, he was convicted of driving whilst disqualified and whilst uninsured. He was fined and disqualified for a further 8 months.
7. On 19 January 2020, the appellant was granted limited leave to remain under the EU settlement scheme.
8. By 2020, the appellant candidly states that he was taking drugs every day and his whole life was centred around his addiction. He lost his job as a result. As is set out in the attached error of law decision, he began to commit crimes and to harass AB.
9. On 25 January 2021, Mr Lastovka was sentenced to a total of 3 years' imprisonment for his offending from October to December 2020. The Judge also imposed a restraining order on Mr Lastovka prohibiting him from contacting AB save by phone, text or internet message-based service and from attending her home or workplace for a period of five years. The Judge

appears to have accepted that all of the offending was a result of Mr Lastovka's drug dependency and noted that it seemed that he was taking every advantage of the resources available to him in prison.

10. The Secretary of State's case, set out in the refusal letter, is that the appellant, as a result of his offending, presents a genuine, present and sufficiently serious threat to the United Kingdom, such that his removal is justified and proportionate given the risks identified in his OASys Report and the risk of him relapsing into drug use.
11. The appellant appealed against the decision to deport him. On 14 February 2023, the First-tier Tribunal allowed the appeal. The respondent was granted permission to appeal to the Upper Tribunal. For the reasons set out its decision (a copy of which is annexed) dated 10 August 2023, the Upper Tribunal set aside the decision of the FtT.

Hearing On 7 July

12. I had before me and have taken into account the following bundles of documents:
 - (i) Respondent's bundle.
 - (ii) Appellant's first bundle.
 - (iii) Appellant's supplementary bundle.
 - (iv) Supplementary bundle 2.
 - (v) Supplementary bundle 3.
 - (vi) Skeleton argument.
13. The appellant gave evidence with the assistance of an interpreter who was present online. Although there were at times difficulties understanding the interpreter, owing to technical difficulties, these were resolved and there is no indication and no representations were made that the appellant's evidence had not been properly given or that there was any other prejudice to the hearing.
14. The appellant adopted his first witness statement, dated August 2022, and his additional witness statements dated 3 January 2023, 3 August 2023, 26 September 2023 and 31 January 2024. He was then cross-examined.
15. In cross-examination the appellant said that he had been to rehabilitation in Lithuania, which he had completed successfully. He had relapsed when the personal tragedy had happened to him. He said there had been an incident which had happened to him in Lithuania which led him to using drugs and that he had relapsed. Asked why he said that addiction was very difficult and complicated. Having a job or not is not necessarily what

causes it but the whole feeling psychologically and it is very difficult for him. It was put to him he was likely to relapse into drug addiction again. He said at present he was working and having had spent two years in prison he realised his life could be ruined easily and he had learned his lesson, which is why he was working. He accepted he had used heroin twice since his release, but he was trying to take an overdose to kill himself.

16. He accepted that the most recent letter from his substance misuse were, Ms Ahmed said that he had tested positively for cocaine in the last five occasions. He said he did not take it regularly and what had happened on occasion being due to occasional use over the weekend, maybe a couple of times. He said he denied saying that he was clear from drugs and that he had never said he was completely sober. He was aware of the issue and had been to talk to his support worker about it. She had said that it takes time. She said he was making progress.
17. The appellant said he had visited Lithuania three times since coming to the United Kingdom. The first had been to a parents-in-law's anniversary and then a funeral and then finally holiday break. He had spent time with horses, which was his passion. This had taken place before prison.
18. He had no family anymore in Lithuania. The only family is in this United Kingdom is his wife, with whom he is separated. He said that his parents had now moved to Belarus and did not have a choice because they were ethnically Russian. He said there was no corroborative evidence of them moving because at present this had just happened last week. He said that he was an engineer and had worked all his life.
19. In re-examination he said that he had talked to his support worker and asked for support. He had said he was grateful to her and he told her about his motivation and she had helped him to find groups including his supporter who is now fifteen years sober. He had gone to college and he was grateful to his friends who had helped him to start a business. That friend was very serious and takes the issue seriously and, in the past, had isolated him for his protection when he had had a breakdown and helped make things go better. He said that he speaks to his sponsor almost every day as he runs the shop where he gets bread and milk.
20. In my response to asking about the situation to which he got himself, where he had ended up take cocaine, he said that he was still in love with his wife and could not imagine being not in love with her and being with another woman. He had found it difficult to be distanced from her and had ended up using prostitutes and it was in that context he had ended up taking cocaine. He said that he now understood that he needs to forget his estranged wife and doing so would allow him to progress.
21. I asked the appellant if he had any strategies to avoid that kind of situation. He said the situation now is completely different. He had started his own workshop and own business and was looking forward to a

better life and that perhaps maybe he would meet somebody else and would not end up seeing prostitutes.

Submissions

22. Ms Rushforth relied on the refusal letter, submitting the appellant continues to be a serious threat related to his drug use. Although he had made some progress with his addiction to heroin, there had been lapses in the past which had led to a spate of offending. She submitted that the progress was overstated, noting the two positive tests for heroin and the recent five positive tests for cocaine. She submitted that the consistent five month test positive for cocaine was not consistent with occasional use and there was a danger of the appellant falling down a slippery slope escalating into reoffending. She submitted the ongoing drug use indicates a continuing risk and that in the past his being motivated by a job and home etc did not prevent a relapse. Ms Rushforth submitted further that there was a risk of escalation.
23. Ms Rushforth submitted that if the appellant is at risk then his deportation is proportionate. The only family he has in the United Kingdom is his wife with whom he cannot have contact. There was no evidence he would be unable to continue rehabilitation in Lithuania.
24. Mr Ricca-Richardson relied on his skeleton argument submitting that the appellant's deportation was not justified as genuine, present and sufficiently serious, nor was it proportionate. He submitted that at present the appellant no longer presents a threat and whilst the offending was serious, the sentencing remarks indicated the appellant had accepted he needed to go to prison. He said it was important to note the appellant was recovering from his heroin addiction and was now seven months free and that he had been candid about the relapses. That was confirmed by his support worker, with whom he was fully engaged and whilst weight could be attached to the relapses these were outweighed by other factors. The appellant had fought a battle with his addiction since 2015, had worked hard to recover and that rehabilitation is not always easy. The appellant has now put in place protective factors such that he is at no risk.
25. Mr Ricca-Richardson submitted that addiction was primarily a mental health issue, a complex health disorder which was treatable, but not a moral failure. He submitted that there was no evidence to show that the appellant will resort to reoffending if he relapses, given that not least the lack of evidence of this since his release. That was confirmed by his probation officer.
26. Mr Ricca-Richardson pointed to the fact the probation officer's view was the risk has not increased despite the relapses (see page 10 of ASB2) and the appellant was engaged with services the. Once his licence comes to an end he will continue to get support from Dyfodol in the community.

27. Dealing with the baseline of the risk, which had not increased, the OASys Report had shown a dynamic risk of 0.46% of serious harm and between eight to 31% of other risks. Given that these were dynamic risks and there has now been two years outside, the risk might be thought to be lower. It was accepted that there was a medium risk of serious harm but (see page 68 of the OASys Report, respondent's bundle) it is unlikely that he will cause serious harm unless there is an adverse change in the circumstances. There was, however, no indication or behaviour that was it was said would introduce it. The risk of serious harm was a static fact issue and needed to be considered in that light. The appellant had put in a significant amount of work into avoiding reoffending. He was on note also that the appellant had been on an enhanced regime since 2021 which indicated that he has complied and there were now other supporting factors, including the existence of a Narcotics Anonymous sponsor, who supports him, as confirmed by the Probation Service and he is now in a stable place in terms of work. It was evident that the appellant had avoided return to habitual heroin use, which was what had caused the previous behaviour spiralling out of control and was the main driver of his criminality and that both heroin relapses were explained. The first was difficulties with housing and the second due to a suicidal ideation.
28. It was submitted that the appellant had been candid about his cocaine use and how it had arisen. Whilst it was accepted that there was a nexus with criminality this was not sufficient to demonstrate that the appellant was a genuine, present and sufficiently serious threat to society.
29. With respect to proportionality, it was submitted that if there was a reasonable chance of rehabilitation in terms of both avoidance of drug use and no longer being likely to commit crime, this weighs in his favour. His length of residence in the United Kingdom of seven years was relevant and he had a good employment history. He was socially integrated into the United Kingdom and now has limited links with Lithuania. He has a network of friends here and there is some evidence of adverse consequences on return as an ethnic Russian, given the hostility to people in that position and on his evidence, the effect of return to Lithuanian would put him at risk in his recovery from drug use.

The Law

30. The EEA Regulations were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, but were preserved (as amended) for the purposes of this appeal by reg 2(2) of the Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations. The EEA Regulations (as amended by those regulations) provide as follows, so far as they are relevant.
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) ...
- (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) ...
- (7) ...
- (8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

31. I am also bound to take into account Schedule 1 of the 2016 Regulations which provided as follows, so far as is relevant:

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

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.

...

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);

...

(j) protecting the public;

32. It is important to bear in mind the context in which the EEA Regulations were to be interpreted and applied, which is that the right of free movement is a fundamental right and curtailment of that must be proportionate. That is the overriding consideration implicit in the phrase “sufficiently serious”. It follows from the jurisprudence that restrictions on the right of free movement are to be narrowly construed even though there are parameters within which a state can choose what its fundamental interests are.

33. In Straszewski v SSHD [2015] EWCA Civ 1245 Moore-Bick LJ held:

13. Given the fundamental difference between the position of an alien and that of an EEA national, one would expect that interference with the permanent right of residence would be subject to more stringent restrictions than those which govern the deportation of nationals of other states. Moreover, since the right of free movement is regarded as a fundamental aspect of the Union, it is not surprising that the Court of Justice has held that exceptions to that right based on public policy are to be construed restrictively: see, for example *Van Duyn v Home Office* (Case 41/71) [1975] 1 C.M.L.R. 1 and *Bonsignore v Oberstadtdirektor der Stadt Köln* (Case 67/74) [1975] 1 C.M.L.R. 472.

14. Regulations 21(5)(b) and (d) provide that a decision to remove an EEA national who enjoys a permanent right of residence must be based exclusively on the personal conduct of the person concerned and that matters that do not directly relate to the particular case or which relate to considerations of general prevention do not justify a decision to remove him. On the face of it, therefore, deterrence, in the sense of measures designed to deter others from committing similar offences, has of itself no part to play in a decision to remove the individual offender. Similarly, it is difficult to see how a desire to reflect public revulsion at the particular offence can properly have any part to play, save, perhaps, in exceptionally serious cases. As far as deterrence is concerned, the CJEU has held as much in *Bonsignore v Oberstadtdirektor der Stadt Köln*.

34. In assessing the issues arising under the EEA Regulations, I bear in mind also the findings of the Court of Appeal in SSHD v AA(Poland) [2024] EWCA Civ 22, particularly as to the weight to be attached to integration.

Assessment of Risk

35. In assessing the risk the appellant poses, it is appropriate to start with the sentencing remarks of His Honour Judge Fuller QC on 25 January 2021. Having set out the circumstances of the offending, the judge said as follows:

“You are 35 years of age, and you have no relevant convictions either here or in your home country. Mr Price-Smith has said everything he can on your behalf. I take into account your plea of guilty, and you get full credit for your pleas. He points out that all these offences are a result of your drug dependency on heroin and crack and that the offences were motivated by the need for money for drugs and food. In your favour, it seems that you

are taking every advantage of the resources available to you in prison, and you are making the most of your time in custody.”

36. I now turn to the OASys Report, which was completed on 4 May 2021. In doing so, I note that the risk of serious recidivism is said to be 0.46%. That, however, is unsurprising given the lack the lack of convictions for serious offences of a violent or sexual nature. The OGRS score, that is a chance of a general offending within a year of community sentence of discharge, is given at 8% and 16% within two years.

37. The analysis of the offences is Section 2 and in respect of the question “Why did it happen - evidence of motivation and triggers” (2.8) the officer stated:

“it is evident that all the offences are linked to his dependency upon heroin and crack cocaine. Mr Lastovka has suffered with heroin addiction in the past, and was able to maintain abstinence for some 5 years. However, he relapsed into heroin some time prior to the current offences. Mr Lastovka was unable to tell me specifics as he said he could not explain in English. However, I have noted from the PSR [Pre Sentencing Report] that he had approached his GP in the community who prescribed him buprenorphine (Subutex), although then he started taking crack cocaine.

It appears to me that Mr Lastovka’s lifestyle had become fairly chaotic and thus his life became consumed by drug misuse. The acquisitive offences suggest that Mr Lastovka was seeking to fund his drug addiction, however he maintains that his employment was sufficient income.

It is my assessment that Mr Lastovka's offending highlights deficits with his impulsivity, problem solving skills and decision-making.”

38. It is also observed that Mr Lastovka lacks insight into the seriousness of his behaviours and does not acknowledge the long-term effects on the victim. It is indicated that there is further work required regarding victim empathy and recognition of the impact of his offending, particularly with regard to his wife. It is observed that although he had been convicted of offences, including physically, financially and emotionally abusing his partner by way of harassment, this was insufficient to cause significant harm, as defined, but the officer was of the opinion that Mr Lastovka’s behaviour has indicated capacity to inflict serious harm against him, which if he continued to misuse illicit substances and his wife did not comply with his demands. It is stated “There has been an escalation in seriousness to Mr Lastovka’s offending and there is a risk that, should he relapse on his release, Mr Lastovka may go on to commit further violent offences to fund this.” It is observed also (3.6) that there are issues associated with accommodation, which contributed to an overall chaotic lifestyle, but that there was no evidence to suggest the accommodation problems are directly linked to current offences of risk of causing serious harm. It is noted that in custody he is motivated to gain employment and that:

“It is my assessment that employment problems are not linked to offending behaviour and risk of causing serious harm to the public. Although Mr Lastovka reports that he had not been working for a few months leading up to his imprisonment, he had been employed prior to this and was able to maintain a stable income. It is evident that he relied on crime for financial gain and due to his drug addiction, however this was not due to lack of legitimate income or stable employment.”

39. At Section 5.6 it is indicated that financial problems appear to be a factor directly linked to the offending behaviour.

40. It is, however, noted (6.11) that the decline in his marriage occurred when he had relapsed into heavy substance misuse causing him to prioritise drug taking, triggering a change in his behaviour. It is noted that Mr Lastovka is compliant with a terms of the restraining order, in respect of his wife, although they communicate by phone. It is also stated that he lacks insight into the seriousness of his offending and “it is a concern that he has disregarded the events in the past, instead choosing to focus on the fact him and his wife are back in contact and their relationship has improved”.

41. It is observed (7.5) that:

“Mr Lastovka states that he has no friends, and his wife is his main support, however he says that his has a number of negative peers who increased his risk of drug use. Although Mr Lastovka takes responsibility for his drug habit, it is fair to say that his peers encourage his behaviour and lead him to think it was ‘normal’.”

“In my assessment, Mr Lastovka was leading a chaotic lifestyle and this has directly contributed to offending and causing serious harm to the public”

42. In the section drug misuse – Section 8 – it is noted that there are significant problems with class A use and obtaining drugs. Drugs were taken at least twice weekly. It is said as follows:

“Mr Lastovka began using drugs as an adolescent, initially cannabis. He began misusing tramadol which escalated into opiate drugs. Mr Lastovka was dependent on heroin and crack cocaine for a number of years, although he was eventually able to address this. It is reported that Mr Lastovka possesses a high level of insight and understanding into his drug problem and this emanates from therapeutic drug interventions he has been privy to in the past in Lithuania, which has enabled his recovery periods of time. This residential rehabilitation was funded by both himself and his parents. As his drug recovery experiences have been so intense in the past, he believes the support he received (at the time of the offences) was insufficient to control his dependency.

I am unaware of the specific trigger into relapse on this occasion, and Mr Lastovka was unable to explain the reasons behind it due to limited English speaking. However, this relapse into heroin and crack cocaine use is a clear trigger to Mr Lastovka’s offending behaviour. Whilst his drug use has influenced his behaviour, Mr Lastovka has also committed offences for

financial gain to fund his drug habit. In doing so, Mr Lastovka has demonstrated a risk of causing serious harm.

It is to Mr Lastovka's credit that he has addressed his drug misuse issues in custody, records from HMP Winchester indicate that he engaged well whilst on remand, and this motivated has continued since he transferred to HMP Guys Marsh. Mr Lastovka has completed numerous incell workbooks and attends appointments with his recovery worker. Mr Lastovka reports to me that he is focussed on maintaining abstinence and he shows good recognition to the problems associated with his drug problem.

Mr Lastovka is currently prescribed methadone in custody and says he intends to reduce this and cease taking the medication in 4 months time."

43. It is observed at 11.10 in dealing with emotional issues that there are difficulties with impulsivity, problem solving and decision making. It is also of concern that the appellant had turned to acquisitive offending for monetary gain yet showed no acknowledgement for the offences and an intervention to address problem solving and concrete thinking and controlling behaviours is also recommended. It is also clear (12.9) that the appellant did not present as having a pro-criminal attitude and had been very motivated to address his offending behaviour problems, but there are some concerns regarding his ability to comply with licence on release due to commission of further offences whilst subject to bail in the past. It is said that the completeness with regard to the bail conditions and negative attitude to ending the relationship is linked to offending behaviour and the risk of causing serious harm.
44. In the assessment of the risk of serious harm, and I bear in mind how high a threshold that is, the nature of the risk to known adults is to AB and the risk of serious, emotional and psychological harm caused by violation of safety through burglaries and fear in one's own home. The risk is said to be at its greatest (R10.3). It is considered unlikely that he would commit a further act of serious harm in the immediate future, although the risk will be greatly increased if he relapses into class A drug misuse, as this negatively impacts his thinking and behaviour; the risk to the public would be on release into the community if the appellant relapsed into heroin and crack cocaine use and has no legitimate income to fund his habit.
45. Of particular note at R10.4 and R10.5 are the factors likely to increase risk or reduce risk. In terms of negative factors, those that are relevant here are a relapse back into heroin and crack cocaine use. The other factors - failure to comply with the restraining order, continuation of entitlement attitudes and intimate family relationships, absence of stable employment and financial income or relationship breakdown, do not appear to be applicable here now on the facts as established.
46. In terms of positive factors the factors likely to reduced risk are maintaining abstinence from class A drugs, increasing understanding and control of how entitlement attitudes might lead to abusive conduct, compliance of the restraining order and licence conditions in addressing

thinking and behaviour problems in custody as well as engaging with professionals to challenge attitudes and securing stable accommodation and employment. Again, several of these are potentially engaged.

47. The risk of serious harm was gauged as at the point of an immediate release into the community, as at 4 August 2021. There was a risk in the community to the public and not at a medium level, which is defined as:

“There are identifiable factors of risk of serious harm. The offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse.”

48. Finally, while the risk of serious harm is assessed as medium, the risk of reoffending is said to be low. The OGRS score indicates 8% within twelve months, sixteen between twelve months, OGP respectively 20% and 31% and OVP as in violent type offending, was 10 and 17% respectively.

49. I turn next to the subsequent information from probation and similar authorities. The letter from the probation officer dated 19 August 2022, appellant’s offender supervisor, dated 19 August 2022 states that the appellant had complied very well with his licence, had attended all appointments and that the sessions had been focused on supporting him in integrating with the community and adjusting to life outside. It is noted also that he had been attempting to gain employment, is engaging well with the Job Centre and Universal Credit and that he has been engaging with external agents who support his accommodation and employment needs.

50. With respect to the relapse, which is dealt with in detail above, the Barry Probation Office states that he had since returned, citing that he did not want to be around people with drug and alcohol issues and had returned to Dyfydol, is engaging with housing to address his attention to find property. This said that there are no reported issues to indicate any change in his risks, that he had fully complied with the reporting instructions and has engaged with work which aims to reduce his risks and address any underlying issues around drug misuse. Also of note is a letter from the Barry Probation Officer to the appellant’s solicitors dated 17 January 2023, where it is said that the appellant had been warned that he would be without a script if he went to Southampton as he had not provided enough time for that to be transferred and that he had declined a Buvidal injection for the interim. He had received support from the Dyfydol staff and had been encouraged to return for a Buvidal injection, so that arrangements could be made for a transfer to be completed, but that there as no change of the risk.

51. In a further email from the probation officer, it is stated:

“So Viktor has failed some drug tests previously but has been open and honest about using. He has also engaged well with Dyfydol, so as he is

working well with agencies even though he has tested positive for drugs previously that he doesn't warrant a recall.

There has been no increase risk since Mr Lastovka's release and he hasn't been subject to any arrests or any police reports and has not committed any further offences since being in the community.

...

Only concern I have is that he is homeless. He is working with housing and will continue to do so when his license is finished. He can also continue working with Dyfodol so he will have support still when his probation is over."

52. Finally, there is a further email from the appellant's probation officer dated 31 January 2024 confirming that he is no longer under supervision or on licence. It is stated:

"Since I have been Viktor's probation officer he has come on very well since I first started working with him. He has secured a good job and is privately renting stable accommodation.

It is recorded he has always attended appointments and that 'he engaged well and was honestly no trouble to work with'."

53. In an email from his worker at Dyfodol, dated 1 February 2024, it is stated that the appellant has continued to engage fully, has completed the necessary worker and relapse prevention and has ceased his use of heroin. This said that he had abstained from heroin for seven months, and since September had completed five urine drug tests, all of which were positive to Buvidal (opiate substitute injection) and cocaine only. It is said that the appellant describes his cocaine use as occasional, not problematic, and he continues to engage in sessions around his cocaine use, focusing on harm reduction. He said "Viktor has demonstrated motivation for change and is continuing to make positive progress and his recovery and rehabilitation. Viktor is due to transfer over to Newlands Drug & Alcohol Service and continue to need care."
54. In terms of the appellant's own evidence, in his first witness statement he states that he is keeping away from drug taking and from any environments and individuals where drug taking is a possibility [42], has found a narcotics anonymous group in Cardiff and has spoken to his probation officer about attending the group every week. He says also [44] he had secured a full-time position at a local car wash working ten hours a day, and that he has continued doing yoga and meditation every day, which helps him keep calm and relaxed.
55. It is of note that the appellant's explanation in his first statement was starting to get involved with drugs is that he had been under stress and that he and his partner were unable to conceive a child and after meeting with an old friend from Lithuania who had suggested that he takes drugs again to cope with how he was feeling, he initially said no, but on the

second time he met him, began to take drugs again, which precipitated his decline. This led to him losing his job and his habit worsened. In his supplementary statement, dated 2 September 2022, 13 January 2023, the appellant says that he does attend Narcotics Anonymous groups, which he has found useful and he is surrounded by likeminded people who understand what he has been through. He has been again working in a car wash for his boss. Ahmed is very supported and he is working to get a CSCS card and is currently on the waiting list to take the course (construction skills certification scheme) and he believes that working in the construction industry would better suit his skills. He states also that being at work has increased his self-confidence, that he knows he won't ever offend again and having security in his life such as a job and accommodation makes it better to stay on the right path.

56. In his statement of 31 August 2023, the appellant maintains that he is still working at a car wash, which he is trusted to open and work and has continued meetings with Narcotics Anonymous, participating in the 12-step programme. At this point, he expressed the situation in Lithuania given the difficulties, and the historic tension, with the position of Russian speakers or "ethnic" Russians. He expressed his fears of return. In his further statement of 26 September 2023, the appellant said that he had been more or less continuously employed thanks to Mr Karim, a local businessman, who has been supportive of his situation. He sets up carwash businesses and sells them on and the appellant was now helping him to take car wash equipment like pressure washers and other machinery, given his background as an electrical engineer. He also manages contract work, such as power washing at other locations and he was now helped by Mr Karim to get a new tenancy of a house in Barry.
57. The appellant also says that he continues to have monthly Subutex injections to prevent the use of heroin, which he had not used for more than a year, the last time being before he went to Southampton in November 2022. He accepts (16) that he had relapsed into taking drugs, some five or six times that year, usually when feeling low and he has difficulties with housing and other problems, the last relapse being about three weeks ago when he had wanted everything. He went to somebody who sold him drugs. He took cocaine and Temezapam with alcohol and could not remember how he fell asleep but woke up the next morning and was still alive. He states [18] that he was honest about this with Dyfodol.
58. Finally, in his witness statement of 31 January 2024, the appellant confirmed he continues to work in a carwash business and has now been given shop space where he uses electrical engineering skills to service and repair car wash equipment as well as items of household electrical equipment for members of the public, a business which he is helping to build on for the coming months. He states he continues to see his drug counsellor at Dyfodol and that he had found Christmas and New Year difficult because he was on his own, it brought back a lot of distressing feelings about his relationship with AB, which he was finding difficult to

cope with. He had been to the GP in January because he was depressed and suicidal and he had been prescribed Mirtazapine.

59. He also describes that the situation for his parents had been very difficult, owing to anti-Russian feeling and they had made the decision to return to Belarus, despite their long life in Lithuania.
60. On his own evidence, the appellant has a long history of drug abuse. He first tried heroin whilst living and working in Germany between 2006 and 2008 and by 2013, was addicted to heroin and crack cocaine, taking both regularly. He successfully recovered after a year and a half in rehabilitation and after that he moved to the United Kingdom with his then wife, AB. On his own account he spiralled back into addiction and habitual drug taking, which he attempted to stop by taking Subutex, but by 2020 he was taking drugs daily in his life whilst, in his own words, centred around his addiction. The relationship with AB broke down, as a result of his drug use and the fact that he had sold their property to feed his drug habit and she asked him to leave.
61. I accept on the basis of the evidence before me that the appellant did take significant steps to try to conquer his habit whilst in prison. He took methadone before moving to Subutex and then moving on to Buvidal, an alternative opiate substitute. I accept also that he had engaged with Narcotics Anonymous moving on to the 12-step programme and that he had tried to repair his relationship with AB, although in his evidence to me, which was not challenged, he now accepts that that relationship is over and although he still loves her, he will need to find someone else.
62. The appellant's progress since release from prison has been not entirely straightforward. His decision to go to Southampton does, in the context of the material referred above, appear somewhat impetuous, although perhaps driven by an attempt to get away from the antisocial and drug using background he had had in the past. He has been compliant with appointments with probation in Dyfodol and I am satisfied on the basis of the unchallenged evidence before me that he has stable employment working primarily from a local businessman, who has now given him his own shop space to provide electrical engineering and repair skills. The unchallenged evidence of the appellant's employment is that he has steadily worked with increasing levels of responsibility for Mr Karim since his release from prison. That is, I consider, a significant positive factor.
63. It is also significant positive factor that he has sorted out his housing and this has been described as stable by the Probation Service. It is, perhaps significant, that AB has given some support by way of a witness statement in this case, again evidence which is unchallenged. She too has recovered from addiction, in her case alcohol and despite everything that happened in the past, is generally supportive of the appellant. There is still a restraining order in place, there is no evidence that he has broken it. In view of the evidence on that issue as a whole, and the absence of any incidents since release, I consider that there is no longer a significant risk

to AB from the appellant. He does, finally, now appear to have realised that he needs to move on into another relationship.

64. What does cause me concern is the continued drug use. On the positive side, the appellant has continued to be free of heroin usage, supported no doubt by the opiate substitute injections he received. But the use of cocaine, be it crack cocaine or some other form, is worrying. The use was explained to me, and I accept the appellant's candid explanation that was because of his use of prostitutes in a situation where one thing leads to another. This is not evidence which is prefigured in the witness statements, but it is nonetheless worrying as it indicates a lack of proper decision making and it is perhaps telling that the attitude of the probation officer in addressing the cocaine use in terms of harm reduction.
65. That said, I am satisfied that addiction is to be seen as an illness and it is the case that those on the path to abstinence may relapse. I do, however, consider that the appellant has sought to minimise his continuing abuse of drugs. Five successive monthly tests were positive for cocaine is a cause for concern.
66. Despite these lapses, there is no real indication that the appellant's life is on a downward slope. Unlike in the past where he lapsed into heroin addiction, he is in stable employment, he is in accommodation and he is not in the stressful situation for a relationship breakdown. These factors have been in place, and he has been stable despite five successive positive tests for cocaine.
67. Whilst I note the concerns in the OASys Report, that the appellant's burglaries were acquisitive these were based on the opinion that he was not financially distressed at the time. That appears, however, not to be the case from the other evidence. On several occasions it is evident from the notes that the officer interviewing the appellant by a telephone without the assistance of an interpreter was having difficulty in obtaining details. There was no effective challenge to the appellant's evidence that he lost his job owing to addiction and ended up having to get part-time work, which did not work properly, hence the financial distress. Equally, the downward slope took place over a significant period of time of over two years, in which he was not getting support. That is not the case now.
68. The appellant's continued drug use is clearly a concern and there is a risk that in certain circumstances it would cause him to relapse, with the likely result that he would lose his income, accommodation and things would spiral out of control again. Viewing the evidence as a whole I concluded the risk through criminality is likely to occur only if that happens, rather than at present where there is no indication of any criminal activity of the type in which he was involved before. In effect, the criminal behaviour is likely to occur only when the drug misuse is not controlled, but at present that appears to be the case.

69. That is not to say he is not involved with criminal scenarios, which is how he has been able to obtain drugs and he had been supplying them, but it was not submitted by the Secretary of State that this constituted a criminal offence, or that this came within para 7 (c) of Schedule 1 to the EEA Regulations, or how. Nor was it suggested that that in itself would be sufficient to engage the genuine, present and sufficiently serious test.
70. Does the appellant's continued drug taking in itself presented a threat to society? The Home Office did not make such a submission, and the burden is on the Secretary of State to make out his case.
71. It is evident, as Mr Ricca-Richardson submitted, that the appellant has not committed crimes within the first two years of his release, indicating that the risks assessed when he was in detention were perhaps seen at the high end. The risks were, as he submitted, largely dynamic and likely to change.
72. Drawing all these factors together, I accept that a medium risk of harm is now unlikely given the lapse of time in which there has been no such offending nor any significant adverse change in circumstances and in the light of the positive reports from probation in Dyfodol. As was submitted, the serious harm assessment is static, that is based on the risk of an immediate release into the community in 2021 and did not, of necessity, take account of work towards rehabilitation since. I bear in mind that the imposition of a licence was an indicator that he did, at the time it was imposed, present a risk which needed to be managed, but that licence has now come to an end and the risk he presents has diminished.
73. In the light of that, and the light of the other factors, I consider that the Secretary of State has failed to satisfy me that the appellant presents a genuine, present and sufficiently serious threat to society. In doing so, I have taken full account of Schedule 1 of the EEA Regulations.
74. In the light of that, and as Ms Rushforth accepted, it is unnecessary to consider further the question of proportionality. Were I to have done so, there are numbers of significant factors in this account, not least of which is the fact that he has been mostly steadily employed in the United Kingdom and that there is a chance of rehabilitation if permitted to remain in the United Kingdom. He has limited links now with Lithuania, and I accept, and whilst I accept that he fears mistreatment and discrimination if returned in light of the evidence presented to me regarding the situation of Russians in Lithuania, not least the consequences of the invasion of the Ukraine, that is likely to be a factor in his favour.
75. Accordingly, for these reasons, I consider that the Secretary of State has not shown the appellant presents a genuine, present and sufficiently serious threat. I accordingly allow the appeal under the Immigration EEA Regulations 2016.

76. In assessing the Human Rights aspect of the appeal, I note that in AA(Poland) at [67] Warby LJ held:

67. The SSHD accepts that the Judge was right to find that removal would represent an interference with AA's Article 8 rights. The Judge considered it followed from his finding that removal was contrary to the 2016 Regulations that the interference was "incapable of justification". In one sense he was right. An interference can only be justified under Article 8(2) if it is "in accordance with the law". If deportation could not be justified under the 2016 Regulations it could not have been justified by reference to s 32 of the 2002 Act either, and it would have had no lawful basis. That would be the end of the human rights argument. But that is not how the Judge approached the matter. It is clear from paragraphs [20] and [55] that he went on to consider the public interest question and concluded that it was answered by the proportionality assessment he had already conducted for the purposes of the 2016 Regulations.

77. He held, further, at [72]:

72. The public interest question will not necessarily arise. Although deportation will commonly interfere with Article 8 rights that will not invariably be the case. If it is, the second question arises: whether deportation would be in accordance with the law. That will not be so if deportation would be contrary to the 2016 Regulations. In such a case the human rights analysis need go no further

78. In the light of these observations, and noting also that the appellant falls within Exception 7 within section 33 of the UK Borders Act 2007, I am satisfied that insofar as there is an appeal on human rights grounds, it falls to be allowed in line with the appeal under the EEA Regulations.

Notice of Decision

- (1) The decision of the First-tier Tribunal involved the making of an error of law and it is set aside.
- (2) I remake the appeal by allowing it under the EEA Regulations and on human rights grounds.

Signed

Date: 20 February 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal