Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00264/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 25 April 2018	**On 14 May 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR LEONIDAS [P]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P. Haywood, Counsel
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASSONS

1. This appeal comes back before me after a hearing on 27 November 2017 whereby I set aside a decision of the First-tier Tribunal for error of law. The resumed hearing was for the re-making of the decision. I have included the error of law decision (entitled Decision and Directions) as an annex to this decision and to which reference should be made for the full background to the appeal, the findings of the First-tier Tribunal Judge ("the FtJ") and my reasons for setting the decision aside.

2. For immediate context, I repeat some paragraphs of what I said in the error of law decision.

3. The appellant is a citizen of Lithuania, born in 1990. He arrived in the UK in 1998 as a dependant on a claim for asylum made by his mother. That asylum claim was refused but the appellant was nevertheless granted indefinite leave to remain ("ILR") on 11 November 2004.

4. A decision was made by the respondent on 18 April 2017 to make a deportation order against him pursuant to the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), prompted by his criminal offending. His last conviction was on 22 December 2016 at West London Magistrates' Court for an offence of burglary and theft (non-dwelling), and was an offence committed whilst a community order was in force. He received a sentence of 26 weeks' imprisonment, with a victim surcharge of £115.

5. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge C. J. Woolley at a hearing on 15 June 2017 which resulted in Judge Woolley allowing the appeal with reference to the EEA Regulations. It was that decision that I set aside.

6. At the re-making hearing, oral evidence was called from the appellant and the appellant's partner/girlfriend whom I shall identify as NS. The following is a summary of their oral evidence.

The oral evidence

7. In examination-in-chief the appellant adopted his most recent witness statement dated 12 April 2018.

8. In cross-examination he said that he was released from detention at the end of September 2017. He lives with his mother and five year old stepsister. However, he does not stay there all the time, but most of the time. His grandmother lives elsewhere.

9. He is taking medication, prescribed by his GP: Olanzapine for "voices" and Venlafaxine. It was over a month ago that he went to his GP and then he went to the Claybrook Centre in Hammersmith where he stayed for a month, because he wanted to commit suicide. As to whether he had any documentary evidence in relation to those matters, he produced a letter from West London NHS Mental Health Trust stating that he had been referred by his GP, and asking the appellant to contact them. As to the date of his stay in the hospital, he said that his memory has been quite bad because he has been quite depressed. He does not know why his girlfriend's witness statement does not refer to his hospital admission but she knew that he was in a bad state.

10. He met his girlfriend in a park, through a friend. That was roughly five or six months ago, about a month or so after he came out of detention. It was definitely October or before that. He and his girlfriend spent Christmas together.

11. She is a mother and looking for part-time work. Her child is aged three. Her home in Chesham is the last stop on the Metropolitan line. He lives in Northolt and it takes him about an hour or an hour and a half to get there. She is on housing and child benefit. She is Hungarian but speaks English.

12. He does not live with her. That is partly because she is on benefits but also because he does not want to intrude in her life too much and be a bother. However, they do want to start a family. They had lost twins over two months ago, in February, although he is not sure of the date. The birth was complicated.

13. He has not had any difficulty with drugs since he was released from detention in September. He does not attend anywhere for drug testing and does not take any drug substitutes, such as methadone.

14. As to why neither his mother nor grandmother had provided any letter (or statement) for the court, his mother did not understand how it works. She thought that she could just come to court. In relation to the last hearing, he was living in Walthamstow and he excluded himself from his family a bit. As to why there is no statement from her in relation to this hearing, he has not been staying with her for nearly a month. Although he had said earlier that he was living with his mother and stepdaughter, he was not staying there all the time. He stays with his girlfriend and friends sometimes.

15. Although that did not prevent him from asking them for a statement, he repeated his earlier evidence and added that his mother was also not sure if she would be able to attend as she has a child who has to go to school. Also, she does not write English very well.

16. In re-examination, asked why he maintained that he would not commit more offences, he said that previously he was very vulnerable and was homeless. He had no hope, no girlfriend and had mental health problems. Now he has looked at his thoughts and understands himself and how to live a good life. He has everything he needs. He is a changed person and will never go back to that. Drugs took five or six years of his life but it is not too late to start (again) now.

17. NS adopted her undated witness statement in examination-in-chief. In cross-examination she said that she and the appellant had been together for about six or seven months. They first met in Northolt when she was visiting his mother who was/is her friend. They were just sitting and talking when they first met. They then went out to the park. They did not meet in the park for the first time but at his mother's house, and they then went to the park where they talked properly.

18. She has a three-year old child. At the moment she is being supported by social services. The council have put her in temporary accommodation. She does not live

with the appellant although sometimes he stays over. She would say that he normally lives at his mother's, his grandmother's or with friends, and sometimes at her place.

19. He takes medication. She knows that he went to the hospital and they gave him medication but she does not know what it is called. She knows that he had depression. He was in a hospital in Hammersmith during their relationship and she visited him there. She thinks he was there roughly two or three months ago. She does not remember exactly because that was the time that she lost the baby. It was a rough time for her. She is really in a relationship with him.

Submissions

20. I am grateful to both parties for their very helpful written submissions.

21. Mr Melvin relied on the decision letter and his written submissions. It was argued that the evidence given by the appellant and his girlfriend needed to be treated with caution. There was little evidence of any mental health problems and the letter from the NHS Trust was not medical evidence that he was suffering from depression or that there was any risk of suicide. There was no evidence from the hospital or from his GP.

22. Conflicting evidence had been given by the appellant and his girlfriend in relation to what was said to have been a hospital admission, notwithstanding the fact that that is said to have taken place only one or two months ago. It was submitted that the claim of a relationship was nothing more than a ruse to give the appearance of some form of family life.

23. Further, there was little evidence of the appellant abstaining from taking illicit drugs. That drug taking was the cause of his offences, and the reoffending after the 2015 appeal hearing. Although there was no evidence that he had committed any offences since September 2017 (when he was released from detention) there was nevertheless a serious risk of reoffending.

24. He is not in any better position than he was at the time of the hearing before Judge Woolley. He is flitting from place to place, living with his mother, grandmother, girlfriend or friends. He does not have a proper residence from where he would be able to find employment, or charity work or to show that he was properly integrated.

25. He had previously done drug rehabilitation courses in prison but went on to commit further offences and take drugs again. There is no genuine relationship or anything like genuine family support. He had not shown that he had turned his life around as claimed.

26. He is aged 27 years, is in relatively good health, and has language and cultural links to Lithuania. His family members in the UK could assist him with integration in Lithuania.

27. Mr Haywood relied on his skeleton argument. He referred to various aspects of it in terms of the relevant legal framework and authorities. I need not summarise those submissions which, it seems to me, were uncontroversial in terms of the legal principles to be applied.

28. As regards the oral evidence, it was accepted that the relationship was of short duration but there was no question of it being a ruse to secure the appellant's stay in the UK. NS knew about his hospital admission, and referred to their speaking to each other in the park on their first meeting. Both gave evidence about her miscarriage a couple of months ago.

29. The key issues are the previous findings and the types of offences that he had been convicted of; theft by shoplifting and opportunistic burglary. The appellant had said that he was no longer taking drugs and had been clean for a year. That coincides with his time in custody and his release. The only question in cross-examination which touched on this issue was in terms of whether he was receiving any drug substitutes. There was no evidence that he had reoffended.

30. The question also was whether in any event the nature of the offending was such as to establish the necessary serious grounds. Even if it does, the evidence does not establish that he represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. There needs to be a current propensity to offend and in terms of a risk to society.

31. Mr Haywood contrasted the appellant's offending with offences of, for example, serious violence. Given that he has a permanent right of residence, the offending would have to be more serious. Even if the required level of threat was established, in the balancing exercise one would then have to consider integration and factors such as his long residence.

Assessment and Conclusions

32. The most relevant aspects of the applicable legal framework within the EEA Regulations are reg 27 and Schedule 1.

33. Reg 27 provides as follows:

> **Decisions taken on grounds of public policy, public security and public health**
>
> 27.- (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.
>
> (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.
>
> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

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

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

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

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

…

(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.).

34. Schedule 1 to the EEA Regulations states as follows:

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

Considerations of public policy and public security

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

standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.

Application of paragraph 1 to the United Kingdom

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

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

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

(a) the commission of a criminal offence;

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

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

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

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

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

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

The fundamental interests of society

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

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

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

(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.

35. In assessing the appellant's evidence I bear in mind that his evidence was that he had mental health problems and was receiving treatment. However, it was not suggested on his behalf, either before or during the hearing, in his witness statement or in the skeleton argument provided on his behalf, that he would have any particular difficulty answering questions or that his evidence may be unreliable because of his mental health condition. Nothing was said in submissions on his behalf in that regard either. It is nevertheless a matter that I have borne in mind in considering his evidence.

36. At the hearing I discussed with the parties the issue of what findings of fact made by the Judge Woolley could be preserved. Those preserved findings are as follows:

- The appellant has acquired a permanent right of residence.
- He arrived in the UK aged 7 years.
- He spoke English and had been educated in the UK.
- He had been of good character until the age of 24 years.
- He has few, if any, ties to Lithuania.

37. Mr Melvin contended in opening submissions, and indeed in his written submissions, that the appellant had not established that he has a permanent right of residence. However, Judge Woolley concluded at [14] that the appellant had acquired a permanent right of residence, the matter having been conceded by the Presenting Officer at that hearing. Furthermore, Judge Rodger, who heard an appeal by the appellant in 2015, had previously concluded that the appellant had acquired a permanent right of residence on the basis of being a worker or jobseeker. Further,

this was not an aspect of the Judge Woolley's decision that was challenged in the grounds seeking permission.

38. The acquisition of a permanent right of residence is a preserved finding and I consider the appeal on that basis.

39. There is no specific order in which the relevant legal considerations need to be approached, but clearly if it is possible to identify or isolate what seems immediately apparent as a, or the, central issue in the assessment, it is reasonable to consider that or those matters first. Thus, in this case such issues are the extent to which it could be said that there are serious grounds of public policy and public security, and whether the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. I deal with the latter first.

40. That question involves deciding whether the appellant is likely to reoffend. The appellant says no, the respondent says yes. In my view the answer is yes, he is likely to reoffend.

41. I take into account that he has not been convicted of any criminal offences since his release from detention in September 2017, and (almost) necessarily whilst detained. I also bear in mind his written and oral evidence as to his commitment not to reoffend, as well as the evidence of his girlfriend. However, the appellant has given that assurance before, during his appeal in 2015 before Judge Rodger, but he committed further offences after his appeal was allowed. This is what I said in my error of law decision at [29]:

> "In addition, I consider that it was irrational of the FtJ to conclude that the appellant does not have a propensity to re-offend and that he does not represent "an unacceptably high risk of re-offending". The appellant has been convicted of a number of offences, starting in October 2014. His appeal was allowed by Judge Rodger who was optimistic as to the appellant's prospects of not re-offending. The appellant re-offended within about a year of his successful appeal, and committed a more serious offence (burglary) than he had committed in the past. The evidence did not support Judge Woolley's conclusion that the appellant would have the support of his family, who are unaware of his most recent offending. Thus, the conclusion that the appellant did not represent a risk of re-offending was flawed."

42. I do not see that anything, or anything much, has changed since I came to the conclusion that Judge Woolley's decision in this respect was irrational. I have already referred to the fact that the appellant has not in fact reoffended since his release from detention, but in the scheme of the appellant's offending history it is relatively early days.

43. I do not consider that there is much to be said for the proposition that he would have family support or the support of his girlfriend or that the relationship with his girlfriend would provide a significant protective factor in terms of the risk of reoffending.

44. I agree with the sentiment behind Mr Melvin's contention that the appellant was "flitting from place to place", thus implying to some extent a lack of stability. The appellant's evidence was not altogether consistent on the issue of where he was staying. He said at first that he lived with his mother and stepsister, and that he stayed there most of the time but not all the time. When asked questions about why there was no written evidence from his mother or grandmother, his evidence was then that for the past month he had not been staying with his mother, then repeating what he had earlier said about staying with his girlfriend and friends.

45. What the appellant said about where he was living may not on the face of it seem to be very inconsistent but as I heard the evidence the impression I formed was one of some tailoring of the answer to suit the question. I do not wish to overemphasise that impression; that is why I said in the previous paragraph that his evidence was not "altogether consistent".

46. The main point about this aspect of the evidence however, is that it may reveal the appellant still to be vulnerable because of a lack of consistent or stable positive influences in his life. That vulnerability and lack of stability as a matter of common sense is relevant to whether he is likely to resort again to the use of illicit drugs which is said to be, and I accept is, the cause of his offending.

47. On the same topic, I was wholly unconvinced by the appellant's evidence about why there was no written evidence from his mother or grandmother. Both of them attended the hearing before me but neither gave oral evidence. No point was made on behalf of the respondent about their not having given evidence and therefore nor do I, without the opportunity for any response on behalf of the appellant. However, none of the reasons given by the appellant, either alone or cumulatively, for no written evidence being available from either of them was credible. He has had legal representation during the course of the proceedings before the Upper Tribunal, so the reason could not be a lack of knowledge or guidance on the matter. It is not as if he does not see his mother at all. On the face of it, it would have been a relatively simple exercise to obtain something at least in writing from her, and from his grandmother for that matter. A lack of English language ability could be overcome by a translation.

48. As regards his relationship with NS, I do not agree with the suggestion that the claim of a relationship was nothing more than a ruse to give the appearance of some form of family life. Likewise, I do not think that there is much to be said for the contention that there was significant inconsistency between the appellant's evidence and hers. For example, she was aware that the appellant had had a relatively recent hospital admission. She explained why she was unable to remember exactly when that was, in the context of her having had a miscarriage at about that time and the effect that that had on her. There was some arguable inconsistency in relation to their first meeting (park or house) but their accounts were consistent enough such that I do not consider that the inconsistency is significant.

49. The evidence was that they want to start a family. I accept the evidence that NS suffered a miscarriage. The implication from their evidence is that the appellant was the father. I have no reason to doubt that evidence. It is not for me to say whether what is said to be a plan to start a family is realistic, because relationships exist in many different forms and in many different circumstances. However, it is for me to come to a view about whether there is in fact a considered, concrete or actual plan to start a family and to be a family, as opposed to that being something that is simply an idea of something that may be possible in the future.

50. I am of the view that it is the latter; namely just an idea and not a concrete plan. It seems to me that the evidence points clearly in the direction of that conclusion. In the first place, the evidence is that the relationship has only existed for a matter of months. The appellant's evidence was that they met five or six months ago and NS said that they had been together for six or seven months. The relationship appears to have started from more or less when they first met. What that means is that this is not a relationship between people who had known each other before for any period of time at all.

51. Secondly, they do not live together. That alone does not mean much in terms of any assessment of their relationship. What is significant however, is the appellant's explanation for that. He gave an explanation about NS living on state benefits but also said that he does not want to intrude in her life too much and be a bother. That is hardly consistent with what he next said about their wanting to start a family, or consistent with the contention that they are in a stable and committed relationship.

52. I am not satisfied that the evidence establishes that the appellant's relationship with NS forms much of a protective factor in terms of reducing or eliminating the risk of his reoffending. My assessment of his relationships in the UK leads me to conclude that none of those relationships are such as would help much in reducing the risk of his reoffending.

53. I do accept that the appellant has, and continues to suffer from, mental health problems. I also accept that he had a short admission to hospital relatively recently. He and NS both referred to it. The appellant named the hospital. His evidence was that he is receiving treatment for his mental health condition(s) and he was able to name the medication that he is receiving and explain what one of the medications was for. However, there was no medical evidence before me and therefore it is not possible on the evidence to conclude that because he is receiving treatment now and he was not before, he is less likely to reoffend. There is little, if anything, to support such a contention in terms of such medical treatment that he is receiving.

54. The appellant's offending and the risk in relation to future offending, is likely to be in terms of offences of dishonesty. This has to date, almost exclusively, involved stealing from shops, since October 2014 up to his last conviction on 22 December 2016 which was a burglary and theft in relation to non-residential premises. He has had eight court appearances in relation to 12 offences. Apart from the burglary, the other exception from the general pattern of his offending, is a conviction in April

2015 for failing to provide a sample to ascertain whether he had a class A drug in his system.

55. In the assessment of whether the appellant's conduct affects one the fundamental interests of society, paragraph 7 of Schedule 1 of the EEA Regulations states that the fundamental interests of society *include* under subparagraph (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)".

56. It seems to me that the appellant's offending is persistent. However, I am also of the view that his offending is unlikely to meet the requirements of reg 27, that is to say being justified on serious grounds of public policy and public security, which is what is required given that he has a permanent right of residence. The offences are not, or even approaching, those at the most serious end of the spectrum of offending. Offences of dishonesty of the type that the appellant has been involved in, and which represents the future risk in terms of type of offence, can achieve the level of seriousness required, for example where it is organised or involving high value goods, which is not the case with this appellant's offences.

57. However, combating the effects of persistent offending is described in Schedule 1 as a matter that affects one of the fundamental interests of society. Nevertheless, that is not the same thing as saying that a persistent offender is, by definition, a person whose conduct affects the fundamental interests of society. The nature of the offending plainly must be taken into account. In addition, the degree of persistence is relevant. It is clearly possible to conceive of types of persistent offending at a low level and at a frequency that is more serious than others.

58. I have carefully considered all those factors in relation to this appellant. I do not regard reference to other cases in terms of their facts to be of much assistance in circumstances where each case needs to be decided on its own facts once the issues of principle are established. I am not satisfied that the appellant's offending, "taken in isolation" (Schedule 1, para 7(h)), could be said to justify his removal on serious grounds of public policy or public security. That is not to minimise his offending, but simply to recognise it for what it is in terms of seriousness relative to the public policy or public security interests at stake.

59. Nor do I consider that the persistence of his offending 'converts' it, as it were, to offending that comes within reg 27. Between October 2014 and April 2015 was the period within which the appellant's offending was most frequent. After the sentence of nine weeks imprisonment in April 2015 his next conviction was on 11 November 2016 and then on 22 December 2016, the last and most serious conviction (and sentence).

60. Since his release in September 2017 there is no evidence that he has committed any further offences. That is not the longest period that he has been free of offending but it is a period which reflects on the degree of persistence in his offending.

61. I bear in mind that Schedule 1(3) provides that 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.

62. I have said that in my view Schedule 1 does not equate persistent offending with offending that comes within reg 27. It is a matter of fact and degree. In all the circumstances, I am not satisfied that the appellant's removal is justified on serious grounds of public policy or public security. Nor do consider that his personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In this I bear in mind that reg 27(5)(c) does not require that the threat must be imminent.

63. In the light of those conclusions, it is not necessary for me to go on to consider the other aspects of reg 27 which require consideration in cases of removal of EEA nationals, such as the principle of proportionality or the several matters set out at reg 27(6) in terms of the appellant's particular circumstances such as age, length of residence and so forth.

64. The appeal is allowed with reference to the EEA Regulations. Article 8 of the ECHR needs no separate consideration in the circumstances.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, I re-make the decision by allowing the appeal under the EEA Regulations.

Upper Tribunal Judge Kopieczek 9/05/18

ANNEX

IAC-FH-WYL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00264/2017

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice
On 27 November 2017

Promulgated

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Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR LEONIDAS [P]

Respondent

Representation:
For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Mr A Khan, Counsel instructed by Thompson & Co Solicitors

DECISION AND DIRECTIONS

1. Although the appellant in these proceedings is the Secretary of State, I continue to refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of Lithuania, born in 1990. He arrived in the UK in 1998 as a dependant on a claim for asylum made by his mother. That asylum claim was

refused but the appellant was nevertheless granted indefinite leave to remain on ("ILR") 11 November 2004.

3. A decision was made by the respondent on 18 April 2017 to make a deportation order against him pursuant to the Immigration (European Economic Area) Regulations 2016, prompted by his criminal offending. His last conviction was on 22 December 2016 at West London Magistrates' Court for an offence of burglary and theft (non-dwelling), and was an offence committed whilst a community order was in force. He received a sentence of 26 weeks' imprisonment, with a victim surcharge of £115.

4. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge C. J. Woolley at a hearing on 15 June 2017 which resulted in the FtJ allowing the appeal with reference to the EEA Regulations.

The grounds of appeal and submissions

5. The respondent's grounds point out that the appellant has been convicted of offences between 7 October 2014 and 22 April 2015 for various offences which resulted in deportation proceedings which the appellant appealed. His appeal was successful after a hearing before the FtT on 23 October 2015. However, since that hearing the appellant had continued to commit offences and had been convicted on 11 November 2016 for two offences of theft (shoplifting) for which he received a community order, and on 22 December 2016 for burglary and theft for which he received a sentence of 26 weeks' imprisonment, offences committed whilst a community order was in force, for which he received four weeks' imprisonment concurrent.

6. It is argued that the appeal was allowed by First-tier Tribunal Judge Rodger after the hearing in 2015 to a large extent because of the belief that the appellant had overcome the reasons for offending, such that he no longer posed a risk. Extracts from Judge Rodger's decision are set out in the grounds. However, the FtJ in the instant appeal concluded that the most recent offending did not represent a marked escalation over previous offending, but that conclusion failed to take into account that the latest conviction for burglary resulted in a 26-week custodial sentence, and represented a "significant step up" in seriousness from the previous longest sentence of nine weeks' imprisonment.

7. Although the FtJ had concluded that the family support that the appellant received in the UK would help his prospects of rehabilitation, even if that was a sustainable conclusion in 2015 the evidence points against that conclusion now. The appellant had not said why he cannot live with his mother or the grandmother he is also said to be close to in the UK. None of the family attended the hearing because the appellant did not tell them about his recent offending, his 26-week sentence or the deportation proceedings, because he said it would depress them. If the family were close to the appellant they would have noticed his absence and further, if the appellant hid his offending from his family, how could it be said that they can be

expected to help him. The evidence suggested that his family have no influence over his rehabilitation and that they do not have a very close relationship.

8. At [30] Judge Woolley had acknowledged that on release from prison the appellant had returned to drug abuse despite completion of a drug awareness course. However, the appellant did not undertake any courses during his latest stay in prison, and thus had not dealt with the causes of his offending. This is a matter not addressed by Judge Woolley, it is argued.

9. Furthermore, the judge was wrong to state that he had stayed out of trouble for a year, thus concluding that he did not have a propensity to reoffend. The appellant was detained under immigration control from his earlier release date of May 2015 until at least the date of the hearing.

10. It is argued that the appellant had continued to show a disregard for the law by reoffending whilst a community order was in force, and whilst in prison misbehaved by downloading pornography, as the judge had noted at [25].

11. The judge had "preserved" findings (from the previous appeal decision) but those findings have been "invalidated" by subsequent events, and the FtJ had made inadequately reasoned fresh findings.

12. In submissions on behalf of the respondent, Mr Wilding relied on the grounds of appeal. It was suggested that the judge's decision indicated a flawed structural approach to the issues to be determined, judging by what he said at [19] about the order of consideration of the various issues. The judge was wrong, it was submitted, to approach the appeal in terms of any prescribed order of the assessment of issues. The point was illustrated with reference to various aspects of the decision. For example, it was submitted that it was wrong to consider proportionality without reference to the question of whether the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

13. It was submitted that it was not clear as to why it was concluded that the appellant's conduct did not represent an escalation of offending given the length of sentence imposed for the most recent offence which was much longer than the previous sentence of nine weeks' imprisonment. The conclusion in this respect appeared to represent a mitigating approach to the appellant's behaviour and failed to take account of the criminal court's view of his offending.

14. Likewise, the conclusions at [29]–[30] about the risk that the appellant represented failed to take into account the fact that the appellant undoubtedly got into more trouble after 2015 when his appeal was allowed. Judge Rodger said at [48] that he was satisfied that the appellant had successfully addressed his behaviour and drug misuse and did not represent a present threat; but the appellant had re-offended.

15. Judge Woolley had concluded that the appellant's family would have been in a position to help him, and to assist with rehabilitation, but the family did not attend the hearing before him and on the appellant's own evidence he had not told them

about his latest convictions. Judge Woolley was not entitled to make the finding that he did therefore. The decision at [24] that he should continue to follow the conclusions of Judge Rodger in holding that he has close family ties in the UK could not be sustained. The support his family could give was, on the facts, highly questionable. None of that was considered by Judge Woolley. He had, in effect, simply adopted Judger Rodger's reasoning.

16. On behalf of the appellant, Mr Khan did not refer to the appellant's 'rule 24' response, but I have taken it into account. Mr Khan submitted that Judge Woolley was entitled to make the findings that he did. He had started with the findings of Judge Rodger. He pointed out at [17] that the respondent's decision is remarkably brief. He had resolved the 'serious grounds' issue in favour of the appellant and cemented his findings with reference to his consideration of proportionality.

17. The grounds were wrong to suggest that the judge had made an error at [31] in terms of the appellant having been out of trouble for a year. He looked at the relevant period and what offences had been committed. Whilst he was in prison he was a good prisoner, although he had downloaded pornography whilst serving his sentence.

18. It was true that minor offences could be serious but the judge had resolved the issues in relation to his offending in his favour. The respondent's criticisms are no more than a suggestion that there could have been an alternative conclusion.

Assessment

19. At the conclusion of the hearing I announced that I was satisfied that Judge Woolley's decision did involve the making of an error on a point of law, requiring his decision to be set aside. I now briefly set out my reasons.

20. At the hearing before Judge Rodger (in 2015) he recorded the appellant's evidence that his grandmother and aunt had called him to say that they could not attend the hearing. He found that the appellant was truthful in his evidence about having a grandmother, an aunt and cousins in the UK, as well as his mother. The appellant apparently told Judge Rodger that his family had told him that they had been informed by the Tribunal that the hearing was a "closed hearing" and that they could not attend or see him, and Judge Rodger accepted the appellant's evidence about that and drew no adverse inferences from the fact that there were no family members at the hearing. He further concluded that the appellant does not have any family members in Lithuania and that all his family are in the UK. He found the appellant's evidence credible that his family in the UK would try to assist him in any way that they could if he returned to Lithuania.

21. At [48] Judge Rodger said that he was not satisfied that the appellant represented a present threat, that his offending was clearly linked to his use of drugs, and he had appropriately addressed his drug abuse and was awarded a completion certificate of a drugs awareness course whilst detained at HMP Thameside. The appellant did not represent a threat as he would no longer need to feed a drug habit, he said. There

was no mention of any ongoing risks in the Serco Release Plan. He said that he accepted the appellant's evidence that he was rehabilitated and was likely to have support from his family which would be an important part of his ongoing future rehabilitation.

22. He went on to say in the next paragraph that he was satisfied that his close family ties and integration in UK cultural ways and society, and his work history in the UK was such that his prospects of rehabilitation were greater in the UK than in Lithuania where he did not have family support, experience of working there or educational qualifications obtained there. He concluded that future rehabilitation prospects in the UK were a weighty factor in the balance. He found that he had now addressed his behaviour and he was not satisfied that he had an ongoing propensity to re-offend.

23. That decision was promulgated on 9 November 2015 after a hearing on 23 October 2015.

24. The Magistrates' Court register (in the respondent's bundle) shows the following. On 11 November 2016 the appellant was convicted of theft from a shop, of goods to the value of £79, that offence having occurred on 5 November 2016 in West London. That resulted in a community order. Then, on 20 December 2016 he was convicted of the burglary for which he received a sentence of 26 weeks' imprisonment. The value of the goods stolen was £1,000. The appellant committed the offences a year after his appeal was allowed by Judge Rodger.

25. Judge Woolley said at [31] that the appellant had remained trouble free for a year since his release from his first sentence of imprisonment. In fact, as can be seen from [12] of Judge Rodger's decision, on his release from HMP Thameside in May 2015, which was his first sentence of imprisonment, the appellant had been detained under immigration control, at least up until the date of the hearing (and probably up to the date of promulgation) before Judge Rodger. Judge Woolley was correct about his having been out of trouble for a year since the date of Judge Rodger's decision until the most recent offending

26. In my judgement there is merit in the respondent's contention that Judge Woolley's decision represented an over reliance on Judge Rodger's decision. At [20] Judge Woolley said that in the appeal before him he was "presented with much the same matrix of offending as was Judge Rodger". He noted the further offence of theft (shoplifting) and burglary and said that the burglary was more in the nature of opportunistic theft rather than a "breaking and entering" type of burglary. He concluded that the two further offences were "in essence low level crimes punished with relatively short sentences". In that paragraph, and elsewhere, he referred to the fact that the appellant had never committed an offence of violence, or a sexual offence, and that all his offending had been of "theft-type" offences. He noted at [22] that the magistrates considered that it was within their sentencing powers to deal with him for the offence of burglary.

27. However, as was pointed out to me on behalf of the respondent, the appellant's previous sentence of imprisonment had been one of nine weeks. The sentence for the burglary was 26 weeks' imprisonment. Furthermore, the value of the goods taken was £1,000. The appellant had never previously been convicted of burglary. In my judgement, it was irrational to conclude that this offence of burglary, albeit that it related to non-residential premises, did not represent a marked escalation in his offending.

28. Furthermore, whilst the FtJ noted that no family member had attended the hearing before Judge Rodger, and none had attended before him, he nevertheless concluded that he should find, as Judge Rodger did, that he has close family ties in the UK and that those family ties would assist in his rehabilitation. However, it is difficult, if not impossible, to see how that conclusion can be sustained in the absence of any evidence from his family in relation to the most recent offences, and how they would assist the appellant in becoming rehabilitated, and in circumstances where their efforts, whatever they were, had not been successful after the appeal was allowed by Judge Rodger. Furthermore, the fact of the matter is the appellant had not disclosed his most recent offending or his incarceration to his family. In those circumstances, there is little if anything to support Judge Woolley's conclusion that his family would be able to assist in his rehabilitation.

29. In addition, I consider that it was irrational of the FtJ to conclude that the appellant does not have a propensity to re-offend and that he does not represent "an unacceptably high risk of re-offending". The appellant has been convicted of a number of offences, starting in October 2014. His appeal was allowed by Judge Rodger who was optimistic as to the appellant's prospects of not re-offending. The appellant re-offended within about a year of his successful appeal, and committed a more serious offence (burglary) than he had committed in the past. The evidence did not support Judge Woolley's conclusion that the appellant would have the support of his family, who are unaware of his most recent offending. Thus, the conclusion that the appellant did not represent a risk of re-offending was flawed.

30. In the light of the matters I have set out above, I am satisfied that Judge Woolley's decision must be set aside for error of law. However, certain findings of fact can be preserved and in those circumstances, and given the limited extent of the further fact finding necessary, this is a matter which ought to be retained in the Upper Tribunal for the re-making of the decision.

31. Accordingly, there will be a further hearing in the Upper Tribunal and in respect of which the parties must have careful regard to the directions set out below.

DIRECTIONS

1. In relation to any further evidence relied on by either party, there must be a paginated and indexed bundle of documents, filed and served no later than seven days before the next hearing.

2. In relation to any person whom is proposed to call to give oral evidence on behalf of the appellant, there must be a witness statement drawn in sufficient detail to stand as evidence-in-chief, such that there is no need for any further examination-in-chief. That witness statement must be filed and served no later than seven days before the next hearing.

3. At the next hearing the parties must be in a position to make submissions as to what findings of fact made by Judge Woolley can be preserved.

Upper Tribunal Judge Kopieczek Dated 15/01/18