



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/00442/2012

**THE IMMIGRATION ACTS**

Heard at Field House  
On 12 October 2017

Decision Reasons Promulgated  
On 31 October 2017

Before

UPPER TRIBUNAL JUDGE SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ARTURAS DUMBLIAUSKAS

Respondent

**Representation:**

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer

For the Respondent: Ms M Cohen, Counsel instructed by Wilson Solicitors LLP

**DECISION AND REASONS**

**PROCEDURAL BACKGROUND**

1. In light of the somewhat lengthy procedural history to this appeal, it is appropriate that I begin by setting that out. At the outset of the hearings before me, the Appellant is the Secretary of State, the Court of Appeal having found an error of law in the Upper Tribunal's previous decision (see below) and remitted the appeal to the Upper Tribunal for reconsideration. For ease of reference, though, and in light of my decision in relation to whether the original First-tier Tribunal decision contains a

material error of law, it is convenient to refer to the parties throughout as they were in the First-tier Tribunal.

2. The Respondent's decision under appeal is one dated as long ago as 21 December 2011 giving notice of the making of a deportation order against the Appellant under the Immigration ((European Economic Area) Regulations 2006 ("the EEA Regulations"). That decision was supplemented by a decision dated 22 May 2012 confirming the deportation order under the EEA Regulations and also rejecting a human rights' claim under Article 8 ECHR. Although the Appellant has also made an asylum and Article 3 claim, which were the subject of a decision dated 24 February 2012 rejecting those claims and certifying the claims under section 72(2) Nationality, Immigration and Asylum Act 2002, those claims were withdrawn in the course of the First-tier Tribunal appeals and I need say no more about them.
3. By a decision promulgated on 30 August 2012, a panel of the First-tier Tribunal consisting of First-tier Tribunal Glossop and Mr P Bompas dismissed the appeal on all grounds. That decision was set aside by Upper Tribunal Judge McGeachy on 12 December 2012 on the basis that the Appellant had not been brought to the Tribunal hearing (he was at that time in detention) and there were therefore agreed to be procedural errors. The appeal was remitted to the First-tier Tribunal to be heard afresh.
4. By a decision promulgated on 12 June 2013, a panel of the First-tier Tribunal consisting of First-tier Tribunal Judge Bartlett and Ms Emblin formally dismissed the appeal on asylum and Article 3 grounds (as those claims were not by then pursued) but allowed the appeal under the EEA Regulations on the basis that, although the Appellant was found to be a genuine, present and sufficiently serious threat at that time, the decision to deport him was not proportionate, having regard in particular to the lack of prospects of rehabilitation in Lithuania due to the lack of evidence concerning treatment for drug addiction.
5. Permission to appeal was granted by Upper Tribunal Judge Macleman in the following terms:-
 

"It is debatable whether prospective rehabilitation in the UK rules out deportation, under the regulations, of a person not integrated in the UK."
6. The appeal next came before the Upper Tribunal (Judges Warr and O'Connor) on 7 October 2013. By a decision sent on 14 October 2013, they found that the First-tier Tribunal decision did not contain a material error of law and declined to set that decision aside.
7. On 16 April 2014, the Court of Appeal granted permission to the Respondent on the basis that the grounds were clearly arguable and joined the appeal in this case with those in LW (Poland) and ME (Netherlands). Those appeals were heard together on 20 and 21 January 2015 culminating in a judgment of the Court (LJJ Jackson and Floyd and Sir Stanley Burnton) dated 26 February 2015 [2015] EWCA Civ 145. Although the Court held that the prospects of rehabilitation were a relevant

consideration, even if an appellant were not permanently resident in the relevant member state, it accepted the argument that the weight given to this factor by the First-tier Tribunal was “manifestly excessive”. Their judgment in relation to this particular appeal is contained in [57] of the judgment as follows:-

“[57] In AD, the First-tier Tribunal accepted that appropriate medical treatment would be available to him in Lithuania, but found that no rehabilitative programme for him, as a recovering drug addict, would be available in Lithuania. I consider that it erred in so doing. Appropriate medical treatment could well include support for his abstinence from hard drugs, and in any event it should not have been assumed that no support is available for a reforming addict. The Upper Tribunal should not have upheld the First-tier Tribunal’s assessment of proportionality, which was flawed for the reason I have given. The Secretary of State’s appeal should be allowed; the decision of the Upper Tribunal should be set aside, and AD’s appeal remitted to be heard by the Upper Tribunal afresh, in the light of the latest evidence. If, while at liberty, he has been abstinent, that may indicate that there are no longer grounds for his deportation, but that remains to be seen.”

An application for permission to appeal the Court of Appeal’s decision was rejected by the Court of Appeal on 9 July 2015 and the Supreme Court on 3 November 2015.

8. Following remittal, on 21 April 2016, Mr Justice Collins gave directions for the reconsideration of the appeal but recognised at that stage that no steps could be taken to obtain up-to-date evidence unless and until public funding was made available to the Appellant to fund his legal representation. He therefore issued a Note urging the Commission to grant legal aid which it duly did.
9. The appeal first came before me on 19 April 2017 for re-hearing. Prior to that hearing, the Appellant’s solicitors sought an adjournment on the basis that it had not been possible to obtain a medical report envisaged by Mr Justice Collins’ directions. I agreed to adjourn but converted the hearing to a CMR and gave directions which were intended to permit a hearing in August 2017. That hearing, on 8 August 2017, also had to be adjourned due to late service of the Appellant’s evidence. I now have before me an Appellant’s bundle which includes the Appellant’s further evidence to which I will refer so far as necessary, a Respondent’s bundle also including material to which I will need to make some reference and written submissions for both parties.
10. Although it had been agreed at the previous hearing, that the Appellant would only be required to give evidence if the Respondent gave prior notice of a wish to cross-examine him (which was not given), the Appellant’s representatives indicated that the Appellant would be giving oral evidence and was available for cross-examination as they realised that the Respondent ought to be given the opportunity to test his evidence. Given the concerns expressed by the medical experts, particular care was taken when the Appellant gave evidence to ensure that the questioning put to him complied with the suggestions made by the medical expert and that he was not put under stress. The Appellant was ably represented by Ms Cohen and I indicated to her that if she had any concerns about the way in which questioning of the Appellant was proceeding, she should indicate that. She did not express any concerns.

### **Error of Law**

11. Given the rather lengthy procedural history to which I refer above, it appeared to me that there had never been a re-determination by the Upper Tribunal whether the First-tier Tribunal's decision contained an error of law. Both parties agreed that, given what was said by the Court of Appeal in its judgment, it was intended that the First-tier Tribunal's decision should be set aside for material error and the appeal reconsidered on the basis of the further evidence produced. Ms Cohen urged me to uphold the positive credibility findings made by the First-tier Tribunal when considering the evidence. As Mr Melvin pointed out, though, there is little actual dispute about credibility. The only issue which may turn on my assessment of the Appellant's own evidence is the extent to which he is a reformed character and genuinely intends to desist from further offending which depends in very large part on whether he intends to remain free from regular use of hard drugs.
12. In light of the above, I formally find that there is an error of law in the First-tier Tribunal's decision promulgated on 12 June 2013 insofar as concerns the allowing of the appeal under the EEA Regulations. I therefore set aside the decision insofar as it allows the appeal on that ground. The appeal on protection grounds remains dismissed as it was not pursued at that time and the dismissal has not been challenged. I turn then to the re-making of the decision.

### **FACTUAL BACKGROUND AND THE APPELLANT'S EVIDENCE**

13. The Appellant is a national of Lithuania. He arrived in the UK on 22 May 1998 with six months leave as a visitor. On 24 January 1999, he claimed asylum. In 2009, the Respondent invited the Appellant to withdraw his asylum claim following the accession of Lithuania to the European Union in 2004. He did not respond. He was interviewed about his claim in January and February 2012 and that claim was refused. As already noted, that claim is no longer pursued.
14. Prior to coming to the UK, the Appellant suffered a number of traumatic events. He had a difficult childhood due to an alcoholic father and domestic violence in his parents' relationship. On one occasion, his father hung him upside down from a balcony and threatened to allow him to drop in order to torment his mother. Fortunately, his mother was able to enlist the authorities' assistance and separated from and then divorced his father. However, as a result of what occurred, the Appellant suffered panic attacks and was referred for psychiatric help and prescribed anti-depressants. He had though recovered in the main by the age of twelve years and did well in his education.
15. The Appellant suffered what is probably the main traumatic event in his life though, during his national service in 1984 to 1986. He was sent to fight in Afghanistan. During one particular operation, his friend was killed whilst sitting beside the Appellant. The Appellant tried to rescue his friend from underneath a vehicle when the vehicle in which they were travelling was hit by a propeller grenade and overturned. His description of this event in his statement is particularly gruesome

and I do not need to include detail. Suffice it to say, it is entirely understandable that the Appellant would be traumatised by what occurred.

16. After that event and for the remainder of his service in Afghanistan, the Appellant turned to hard drugs to help him cope. He says that everyone in the regiment was taking heroin and he moved on to that from the painkilling medication which he used initially to relax him. After six months, he was addicted to heroin.
17. The Appellant had married in Lithuania immediately prior to his national service. He and his wife had two children, a son born in August 1984 and a daughter born in April 1986. He returned to his family at the end of his national service but remained addicted to drugs. His statement outlines a number of occasions when he has undergone detox attempts, including when in Lithuania. However, those have not in the past worked and he has relapsed. As a result of his addiction, the marriage broke down and he and his wife divorced in 1991. She has since remarried. The Appellant had free accommodation as a war veteran but allowed his wife and children to retain the flat and he moved out.
18. In the meanwhile, the Appellant, following national service, tried to return to work as an electrician. He could not however hold down a job. A friend suggested that they start up a business together and the Appellant agreed. They started the business in 1987. However, they became the target of criminal gangs seeking "protection" money. They refused to pay and the Appellant was attacked. He reported the attacks to the police. The gang members were prosecuted. The Appellant testified against them. They were sent to prison in 1988 but vowed to seek revenge on the Appellant. Two of their number were released in 1997 and the Appellant and others who had testified against the gang were subjected to various threats and harassed.
19. The Appellant's business partner was found hanged in October 1997. The Appellant believes that he was killed. As a result, he moved to stay with friends in Vilnius. Whilst he was living there, his friends moved to the UK and suggested in 1998 that the Appellant should join them. The Appellant did not come to the UK directly but rather travelled round Europe, apparently to avoid exciting suspicion on entry. He arrived in the UK as part of an organised tour in May 1998 since when he has not left.
20. Since his arrival in the UK, the Appellant has amassed a lengthy criminal record comprising one offence against the person, twelve theft and kindred offences, one offence relating to police, courts, prisons, one drugs offence, six firearms and offensive weapons offence. The index offence in respect of which the deportation decision was taken is a conviction for robbery on 8 June 2010 for which the Appellant was sentenced to three years and six months' imprisonment. The following account of that offence is taken from the Judge's sentencing remarks:-

"... you pleaded guilty at the first available opportunity to a robbery of a lady of sixty who was the sole occupant of her shop as she opened it in the morning. She hadn't even managed to open the shutters fully and, indeed, as soon as you got in the front door shut and you could only have got out with her assistance, as you did.

Nonetheless you sought to attack her, pushing her and shoving her and making her give you assistance to help yourself to the till. You took about £150 to £200 from her till, pushing her through the back door and into the storeroom at one stage, but because you couldn't get out you had to get her assistance and as a result you let her out too. Both of you ran out into the market. She got the assistance of the traders who detained you briefly before you managed to escape. You were drunk..."

21. As the Judge observed in sentencing, the majority of the Appellant's offending "possibly arises" from drug abuse. As the Judge also observed though, the Appellant had been given previous opportunities to cease offending including a drug treatment and testing order in 2004. He had however relapsed in 2008 and returned to his offending pattern in 2009. The Appellant in his statement attributes this relapse to the breakdown of a relationship he entered into, it appears, in about 2006.
22. I have already set out in the above section dealing with the procedural history what happened thereafter in terms of the Respondent's decisions and this appeal. Subsequent to the Appellant's conviction and the Respondent's decision, the Appellant was released on bail from immigration detention on 9 December 2013. The Appellant was at the time following a methadone programme (as he has done for most of the period since 1999). He initially moved in with his friend Tony Read. However, his friend sadly died on 8 December 2015. His mother also sadly died on 2 November 2015.
23. The Appellant attributes a lapse into drug taking in December 2015 to those events. However, he says that he only took drugs (heroin and crack cocaine) for a few days. He also lapsed in December 2016. He attributed that lapse to the anniversary of the deaths which I have mentioned and that he was in pain due to arthritis. He said in his oral evidence that he had not paid for the drugs; they were given to him by a friend. He recognised however that even possessing such drugs is contrary to the law in the UK. He said that he very much regretted these lapses. He explained to me, however, that there is a difference between a lapse which is short term and a full-blown relapse into addiction.
24. The Appellant's latest witness statement and his oral evidence indicate that, with the exception of those lapses, he has remained free from hard drug abuse since his release from detention and obviously since his conviction in 2010. I should note though that there has been no further offending since the Appellant's conviction in July 2010 although Mr Melvin did rely, as he was obviously entitled to do, on the fact that the Appellant has broken the law since even if not prosecuted or convicted of offending, by the possession and taking of Class A drugs.
25. One final matter which I need to mention under this heading is the Appellant's relationship with his family and friends. The Appellant's son lives in the UK and is married with a child. At the time of the First-tier Tribunal's decision, the Appellant remained in contact with his son and his desire to re-establish contact with his son and grandchild following his release from prison was one of the factors relied upon by the Tribunal as encouraging the Appellant's rehabilitation. There has though

since that time been a change in circumstances. The Appellant's daughter continues to live in Lithuania and the Appellant says that his relationship with her is not as good as with his son. The last time he spoke to her was before he went to prison in 2010 and she does not reply to text messages.

26. Since the Appellant's mother died in Lithuania, there has been a dispute between the Appellant and his daughter due to the terms of his mother's will. It appears that the Appellant asked his son to intervene in this regard when his son visited Lithuania in 2016 but his son told him that the Appellant's mother had left everything to the Appellant's son and daughter and there was nothing which could be done. Since then, the Appellant says that his son's contact grew less frequent until it stopped at the end of 2016. The Appellant also says that he has lost his phone and has therefore lost all his contact numbers. Although his solicitors had his son's number, his son does not answer the phone.
27. The Appellant also has cousins in Lithuania but he says he cannot turn to them for assistance if he were to return. They do not have enough to live on. One is disabled and cannot look after herself. The other lives with her daughter and grandchild in a one-bedroom flat.
28. The Appellant is currently living with friends. He indicated that both are disabled. He is living in their accommodation. He does not know if they have their landlord's permission for him to live there. He said that if he had to leave that accommodation, though, he has other friends with whom he would be able to stay.
29. The Appellant sells the Big Issue. He indicated in his evidence that he works five to seven days per week and sells thirty to forty magazines. He sells each for £2.50 and pays £1.25 so he earns about £37.50-£50 per week. According to an e mail from the London Regional Manager, the Appellant began selling the Big Issue on 7 December 2016 following a twenty months' absence. The Appellant said in evidence that it was less than that and that there may be a discrepancy in that period because he could not always afford to renew his badge so that central records might not reflect the reality of the situation. Ms Cohen did suggest in submissions that the period could not be twenty months given the Appellant's date of release but I did not follow her logic. The Appellant had been at liberty for about three years when he re-started selling the Big Issue. It could therefore easily be the case that he had stopped doing so for twenty months.
30. The point is not though of any particular importance; it is not for example suggested that this period of employment changes the Appellant's rights under EU law. Mr Melvin sought to suggest in cross-examination that the Appellant has started to sell the Big Issue as a means to asserting that he is employed and is therefore entitled to certain in-work benefits. The Appellant denied this and appeared genuinely confused as to why this should change any benefit entitlement. I am persuaded he was telling the truth about this. I also note that the Appellant is in receipt of the lowest rate of Disability Living Allowance for an indefinite period at the current rate

of £22 per week. I was not though shown any assessment about the reason for this allowance or what any disability entails.

31. The evidence that the Appellant is selling the Big Issue is though relevant to his progress and desire to change. He gave evidence that, through this job, he has made contacts within the community. He talks to others and is able to talk to them about his past. He speaks to some people on a regular basis. He says that people in the community "love" him. He considers that this job is also allowing him to make a contribution to the community. He gave an example of seeing people trying to steal from other people when he is on the streets selling the magazine and intervening to stop them.

### **EXPERT AND OTHER THIRD-PARTY EVIDENCE**

#### **Medical Evidence**

32. The Appellant relies on two medical experts. The first, Dr Jennifer Drife, is a consultant psychiatrist. Her report is dated 15 February 2017 and follows an examination on 20 January 2017. She concurs with the previous mental health diagnosis of Dr Joanna Dow that the Appellant suffers from some symptoms of Post-Traumatic Stress Disorder but does not currently reach diagnostic criteria for the full condition.
33. In terms of previous intervention for his mental health, the Appellant reported to Dr Drife that, in addition to being admitted to a psychiatric hospital in Lithuania for one week when he was aged eight or nine for reasons to which I have already alluded, he was also admitted as an inpatient for around five weeks in Lithuania about two years after he returned from Afghanistan. During that time, he underwent detox treatment for his heroin addiction and his antidepressant medication was changed.
34. The Appellant attended Homerton Hospital for weekly sessions with a psychologist for six or seven months in 2009. This was to tackle his drug abuse and his PTSD symptoms. According to Dr Drife's review of the Appellant's medical records, the Appellant was also seen by a clinical psychologist in 2006 at the Hackney Specialist Addiction Unit and received 22 sessions of cognitive behavioural therapy.
35. The Appellant reported to Dr Drife that he had made three attempts at suicide – twice by an attempted overdose when he returned to Lithuania after national service and once by trying to cut his own throat when on remand in Brixton in 2010.
36. In terms of drug abuse, Dr Drife notes that the Appellant has been treated with methadone since 1999. At the time of her report, the Appellant had reduced his methadone dose to 25mg daily. Although the Appellant had started this treatment in May 1999, he had reduced to zero in August 2000 but restarted in August and then December 2001 and remained on methadone until his arrest and thereafter. In addition to the use of heroin and crack cocaine, the Appellant also records a history of alcohol use.



37. The Appellant has a history of high blood pressure, arthritis and hepatitis C. Dr Drive reports that the Appellant said that his main physical problem is the arthritis. The Appellant has also been prescribed antidepressants and medication to help him sleep.
38. As Mr Melvin observed in submissions, the purpose of Dr Drive's report appears to be to support a claim for unlawful detention which the Appellant has been pursuing.
39. The Appellant also relies on a report of Mr John Cordwell, a forensic psychologist who has prepared a report dated 28 June 2017 following an assessment on 29 April 2017 which lasted for four hours and thirty minutes. Mr Cordwell has also provided a supplementary letter dated 10 October 2017 in response to a request to update his assessment based on changed circumstances and other evidence.
40. Given the reliance placed by the Appellant on Mr Cordwell's evidence, it is worth setting out in full his summary assessment:-

"[1.2] Mr Dumbliauskas is intelligent, resilient, self-reflective and open to understanding his needs. He is however an individual who suffers with depression, and who has a longstanding heroin and alcohol addiction that is currently in remission. He also continues to experience several residual symptoms of post traumatic stress disorder that are closely interlinked with his feelings of low mood, worry and his strong sense of shame and guilt. Mr Dumbliauskas does re-experience his previous trauma from time to time, but more regularly tends to ruminate about his sense of sadness, loss and guilt. His sense of self-worth and self-esteem is fragile, he often feels inadequate and not good enough and has described a sense of shame and guilt about his previous drug use and his previous offending behaviour. This sense of shame and guilt can make him more vulnerable to struggling to tolerate and manage the distress associated with the trauma symptoms, and any difficulties he does have in managing the resurgence of trauma symptoms can make him more vulnerable to using substances, to cope with negative emotional states and life stressors. As such, any relapse into a more frequent or persistent use of substances (ie either street heroin or alcohol misuse) will potentially increase his risk of acquisitive offending to support this need.

[1.3] Mr Dumbliauskas does not currently demonstrate overt criminal thinking styles, although these have been evident in the past. He has not tended to rationalise or justify his actions, and he wants to be able to work towards an offending free and substance free lifestyle with support from professional services. It is a reasonable hypothesis to suggest that his acquisitive offending was financially motivated, driven by a need to purchase substances, but also day to day living because most his finances were spent on heroin. Likewise we can hypothesise that his use of substances was underpinned by a powerful need to cope with and manage intense negative emotional states associated with both this PTSD (ie detachment and avoidance distraction) but also general sadness, shame and guilt often associated with both pervasive depression and also PTSD experiences.

[1.4] Mr Dumbliauskas' current assessment of general (non-violent recidivism) was assessed using the Level of Service Inventory: Case Management Index (LS-CMI; Andrews, Bonta, & Wormith, 2011). This assessment indicates that he is currently a 'Medium Risk' level (ie total LSI-CMI score of 17, with the medium risk range being 11-19) at this time. Notwithstanding, the LS-CMI identifies a number of factors that are regarded as being "strengths" or protective factors, including for Mr Dumbliauskas some positive pro-social friends, few current criminal associates and no current overt/entrenched pro-criminal attitudes or values. Importantly, aspects identified within this assessment that are more likely to be associated with a risk of committing further offences include; (1) his frequent use of substances; (2) employment and financial difficulties and (3) needing to have a more rewarding use of his spare time. This is also further supported by the assessment of there being a moderate to high presence of protective factors, ie as evidenced by the Structured Assessment of Protective Factors (SAPROF; De Vogel et al, 2012). Additionally, the most recent OASys Assessment (dated May 2012) can be used to inform Mr Dumbliauskas' level of risk of reoffending. This Assessment places Mr Dumbliauskas as being a low risk to children and any known others, but a medium risk to the public. In my opinion because of the number of protective factors present, and given that there has been a marked lack of offending behaviour since release from prison (including whilst having taken substances), the OASys and the LS-CMI represent an over estimation of his risk of general offending and of his risk of harm to others.

[1.5] It is important to note that, in my opinion, given the low presence of treatment needs and high relevance of protective factors for him, the potential risk of Mr Dumbliauskas engaging in future acquisitive offending behaviour is low. Any risk would largely be accounted for by a relapse into a more pervasive substance misuse, ie either street heroin use or a more sustained and prolonged alcohol misuse. It is my opinion that his risk will be considerably reduced should he be able to continue manage his alcohol intake, desist from substance use (ie street heroin), maintain contact with substance misuse services, and maintain meaningful vocational and occupational activities.

[1.6] It is my opinion that Mr Dumbliauskas experiences some residual posttraumatic stress related symptoms that are interrelated with symptoms of depression. Importantly, Mr Dumbliauskas is motivated to understand his mental health difficulties and to learn to manage these better, and it is my opinion that he would benefit from psychological treatment to help him to manage his trauma symptoms as well as the interrelated experiences of ongoing depression, and the underlying guilt and shame that perpetuates this. Mr Dumbliauskas would benefit from a referral to his local NHS Adult Mental Health Service (AMHT), or Psychological Therapies Service (IAPT)."

41. Mr Cordwell is well-placed to carry out the assessment which he does not only of the Appellant's mental health condition and what treatment might benefit him but also of the risk which he currently poses. Mr Cordwell has experience in assessing risk within HM Prison system and supervising others carrying out those assessments. He

has worked mainly for the NHS including in providing psychological assessments of risk and treatment need for violent and sexual offenders detained under the Mental Health Act. He also assesses individuals living in secure settings and the community. He works alongside the National Probation Service providing teaching, training and consultancy in complex cases. His opinion based on that experience and expertise, is deserving of significant weight.

42. I do not set out the substance of Mr Cordwell's report but the following elements of the report are worthy of mention. First, it is clear that Mr Cordwell is well aware that the Appellant has suffered the occasional lapse into substance abuse ([5.5.6]). As Mr Cordwell notes at [5.5.15], the Appellant did not commit any further crimes during those lapses and the lapses were short in duration. As also there noted, the Appellant has suffered from financial difficulties since his release but has not turned to crime to obtain money. In short summary of the internal and external protective factors relied upon by Mr Cordwell at [6.2] of his report, it is noted that the Appellant displays empathy, that coping and self-control is partially present although undermined by his lapses, that he is motivated for treatment and seeking out help and medication (such as methadone) to cope with his addiction, that he has friends with whom he is able to stay and that these friends are non-drug users. The risk management factors based on the Appellant's history are antisocial behaviour, substance use and major mental disorder ([6.3.7])
43. As Mr Cordwell records at [6.3.8], the Appellant has never been convicted of a violent offence although there was some violence involved in the index offence. For that reason, Mr Cordwell assesses that the risk of violence is low. It is though recognised that the Appellant has "a marked number of reckless and impulsive pro-criminal acquisitive and general antisocial behaviours, mostly associated with pro-drug use and with pro-criminal peers". Mr Cordwell notes that the Appellant is not an aggressive person, that he expresses remorse for past conduct and has insight into his condition and in particular his addiction as well as a willingness to engage with those helping him, particularly his key worker.
44. Mr Cordwell was also asked to comment on the likely impact of the Appellant's return to Lithuania which he does at [8.5.1] of his report as supplemented in his letter of 10 October 2017. He opines that there will not be the professional and social structures in place there but does not say on what evidence he bases that conclusion. Nor is it clear what experience he has of services in Lithuania on which he bases his opinion that the mental health services, social and psychological support will not be readily available. He relies in his letter of 10 October on the report of Ms Poskeviciute and I will deal with that in further detail when I turn to look at the evidence about availability of treatment in Lithuania.
45. I can though readily accept Mr Cordwell's opinion that return to Lithuania would cause some emotional and psychological disturbance to the Appellant's mental health given the trauma which, at least to some extent, he associates with that country. The point which Mr Cordwell makes in his most recent letter that he would

lack social and family support, accommodation and income on return is also one which I have to consider when looking at the proportionality of return.

46. In his most recent letter, Mr Cordwell has also considered the Appellant's change in living circumstances ie his change in accommodation and whether that would impact on assessment of risk. Although Mr Cordwell records the Appellant's evidence that he did not want to move, he also notes that the Appellant is happy living with the friends with whom he lives with currently. Mr Cordwell assesses that there is no escalation of risk associated with the move; indeed, he considers that the move "seems to represent an adaptive problem-solving strategy, and one where [the Appellant] has aimed to keep himself safe".

#### Key Worker: Theresa Hibbert

47. Ms Hibbert is a Recovery Practitioner working for Hackney Recovery Service and the Appellant's key worker in relation to his drug and alcohol use. She has provided evidence in the form of two letters dated 22 August 2016 and 11 October 2017. The first confirms simply that she has been the Appellant's key worker for two years and that during that time, the Appellant has gained employment and has been reducing his methadone dose. She says that this is "an indication that he is doing well".
48. The second letter contains greater detail. Ms Hibbert confirms that the Appellant meets with her once every four weeks to discuss his situation and review his progress. Ms Hibbert refers to the Appellant's lapse in December 2016 but confirms that he has not relapsed into intravenous drug use and has remained abstinent since that time and continued to engage with the recovery service. The Appellant remains on methadone but his dosage is now 22ml per day and that is being reduced by 1ml following each meeting with the aim to reduce it to 20ml after which it is intended that he will attend a "Low Dose group" for support in reducing it further. The remainder of that letter deals with a point about medication in Lithuania and I will therefore deal with that below under that head.
49. Under cover of Ms Hibbert's first letter, she attaches a risk assessment review carried out on 14 December 2016. That sets out the historic factors which contribute to the risk which the Appellant posed and may continue to pose. Mr Melvin also expressly directed my attention to the reference to the lapse which the Appellant reports as follows:-

"Reports his arthritis is causing pain which has led to lapse in drug use. Iv heroin smoke crack."

It is noted that the Appellant refused an urine screen.

#### Medication and support services in Lithuania

50. No doubt as a result of what was said by the Court of Appeal about the lack of evidence of what treatment might be available to the Appellant in Lithuania, both parties have produced evidence about this.

51. The Respondent relies on an e mail exchange with Ms R Cizauskaite, who is a worker with the charity, Caritas. That charity was recommended by the British Embassy in Vilnius as being able to answer the queries about the availability of social benefits and treatment for deportees from the UK. Caritas is said by the Embassy official to be one which specialises in “reintegration of convicts who have served their sentence in prison and are facing all kind of social, psychological, health and financial difficulties when starting their new life after imprisonment.”

52. Mr Melvin’s e mail to Ms Cizauskaite sets out the circumstances of the Appellant’s case including his mental health, alcohol and drug dependency issues, that he has a criminal history for mainly minor offences and has been in and out of prison and that although he has family in Lithuania, he claims that they will not be able to support him. Ms Cizauskaite was asked a number of questions which I set out below along with her answers (underlined):-

“1. What support and treatment is available in Lithuania to a returning national in these circumstances?

There are no special programmes in Lithuania concerning these particular issues.

2. Would he be able to access methadone/substitution treatment?

There is a possibility to have access to methadone (a person must pay for health insurance every month or be registered in Lithuanian Labour Exchange to be able to use free medical care). For more information, check the link below.

<http://vplc.lt/farmakoterapija>

3. Given his absence from Lithuania for a considerable time would he be able to access healthcare and social welfare?

After he is registered to Lithuanian Labour Exchange, he will be able to use social benefits.

4. Would there be any support to enable him to access accommodation?

Temporary accommodation would be provided by CARITAS.

5. He has a limited employment history in the UK on account of his methadone treatment but appears keen to be employed.

If he has motivation, CARITAS and Lithuanian Labour Exchange would help him find a job that would suit his abilities.”

53. The Respondent has also provided an extract from the website of the Vilnius Center for Addictive Disorders. That centre is said to be the country’s “largest healthcare and psychosocial support centre for people whose lives are affected by drug, alcohol or tobacco addiction issues”. The centre has professionals working for it – medical doctors, psychologists and social workers. It is said to have a “wide range of treatment and rehabilitation services” in three different locations within Vilnius. The centre also provides education and training. It has the status of “Regional United

Nations Office on Drugs and Crime (UNODC) Training Centre for the Baltic countries". It is also an associate member of TREATNET – International Network of Drug Dependence Treatment and Rehabilitation Resource Centres.

54. According to a further extract from its website, treatment is offered to outpatients in the following way:-

"After registering for treatment patients are referred to the Outpatient Unit. A team of psychiatrists, psychologists and social workers provide the patient with primary medical assessment, consult and discuss options of treatment, draft an individual treatment and support plan based on the patient's preferences and doctor's recommendations. Referrals to other Units are also issued here. There is a number of other services available in the Unit, such as outpatient treatment of alcohol withdrawal syndrome, medication-assisted opioid addiction treatment and drug testing for adolescents, which is available 24 hours a day."

55. The centre also has a Psychosocial Rehabilitation Unit, Day Care Centre which provides the following services:-

"Day Care centre specialises in treatment of substance addictions and patients' social adaptation. A team of psychiatrist, psychologist, social worker and a nurse work with our patients throughout the opioid withdrawal, seeking to motivate them for further treatment and to prevent relapse. Patients receive information on symptoms of addiction, the course of the disorder and possible treatment options, they also learn to better understand their emotions and reinforce positive behaviour. Family involvement is important in substance abuse treatment, thus consultations with emphasis on relapse prevention are available. The treatment is available to patients 18 years old and older. Length of treatment is 30 successive days. *Services are free of charge unless stated otherwise...*"

56. The Social Support Unit offers medication and psychosocial counselling. There is an alcohol withdrawal treatment unit which offers an inpatient service for up to 14 days. The drug withdrawal treatment and psychosocial rehabilitation unit also offers inpatient medication-assisted withdrawal for up to 15 days and psychosocial rehabilitation up to 50 hours. All treatment is said to be free.
57. Ms Cohen criticised Ms Cizauskaite's evidence because it comes in the form of an e mail and is not therefore a report compliant with the practice direction on expert evidence. I do not accept that submission for two reasons. The first is that her evidence is mainly a matter of fact about what treatment is available rather than a report of an expert about this particular Appellant. Second, as Mr Melvin points out in his e mail, the information sought was at the direction of this Tribunal. That did not require the evidence to come in any particular form. The evidence about what is available in Lithuania is necessary for the Tribunal to form a view about what the situation would be for the Appellant if deported, as the Court of Appeal made clear.
58. Turning then to the evidence produced on behalf of the Appellant, that is in the form of an expert report of Ms J Poskeviciute. She is the Director of Administration and

Seminar Coordinator of the “I Can Live” Coalition based in Vilnius. That is said to be a “leading advocacy group of NGOs and experts working on drug policy, access to services and rights of vulnerable populations such as drug users....inmates and recently released from detention places”. The Coalition is said to have “more than 10 years of advocacy experience in analysing and influencing national regulations in drug policy, working with all levels of decision makers, professionals, media and public opinion leaders in advocating for effective state drug policy approaches.”

59. Ms Poskeviciute was asked to comment on a number of issues. She points out that drug dependence diagnostics and treatment are the function and responsibility of licensed psychiatrists. Psychiatrists specialising in dependence treatment are employed in five public regional centres for addictive disorders (which chimes with the Respondent’s evidence about the Vilnius centre). Mental health care services are said to be “readily available in the primary level mental health care centres in every municipality and in mental health hospitals or mental health units of certain hospitals in several cities” (although not the Appellant’s home area). If a person has mandatory health insurance, the services are funded by the State and although mental health care can be funded by the State without that insurance, Ms Poskeviciute says that this is usually medication-based only other than in exceptional circumstances.
60. Ms Poskeviciute provides a list of requirements for state health insurance. If the Appellant were not employed or self-employed, it appears from her evidence that the Appellant could access health insurance if he were registered unemployed, diagnosed as dependent on drugs and/or based on his previous national service in Afghanistan.
61. Ms Poskeviciute’s evidence confirms that the Vilnius Centre for Addictive Disorders provides “the full range of psycho-social services that constitute a part of the methadone treatment”, the quality of treatment in the other centres being “rather poor”. Unfortunately, the Appellant’s solicitor has focussed in the questioning of Ms Poskeviciute on the availability of treatment in the Appellant’s home area, based on an assumption that this is the place to which he would return. However, as already noted, the Appellant’s evidence is that he would not return to his family as he is either estranged from them or they would be unable to assist him. It is not entirely clear in any event whether the relatives from whom he is not estranged – his maternal cousins – still live in his home area.
62. If one removes from Ms Poskeviciute’s evidence the assumption about the place of return, which could easily be Vilnius, the only other barrier seems to be that there is a waiting list for access to the methadone programme in all the regional centres which would mean the Appellant discontinuing his treatment and having a period of abstinence before regaining access to methadone. In this regard, Ms Poskeviciute says that “it would be unrealistic to expect a faster admittance to a methadone program than within one month, given that the appellant would need to obtain health insurance before he could join the waiting list at the clinic.”

63. It is that evidence which has prompted further evidence from Ms Hibbert who in her letter dated 11 October 2017 canvasses the suggestion that the Appellant could be given a supply of methadone to tide him over that period. I can readily accept her evidence that there would be risks to simply giving the Appellant himself one month's supply of methadone given his drug dependency history and also his previous suicide attempts (and particularly at a time when he would be about to be deported against his will to Lithuania). I discussed however with Ms Cohen why it had apparently not been considered whether an arrangement could be reached with a pharmacy in Lithuania or even the charity CARITAS or one of the regional health centres to supply the Appellant with regular prescriptions over the period of one month until the Appellant could access the programme. Although I accept Ms Cohen's response that there is no evidence that this could be done, I cannot accept that this does not mean that it could not be.
64. I do not need to go through the detail of the remainder of Ms Poskeviciute's report. She accepts that the services which she is asked about do exist in Lithuania but there is a charge or other requirements. She also accepts that in principle the Appellant can access benefits if the Appellant registers as unemployed and that housing is available in temporary municipal shelters. The benefits are only available for a limited time and lack of a residential address may cause problems in accessing those benefits. The amount of benefits is also low (102-114 Euros per month). I note however that the Appellant is living on a very limited amount of money in the UK.
65. Helpfully, Ms Poskeviciute accepts in her more recent letter, following Ms Cizauskaite's e mail, that her evidence is consistent with that of Ms Cizauskaite so far as the first three questions are concerned (that is to say that the Appellant would be able to access methadone treatment, healthcare and social benefits). Ms Poskeviciute has contacted Ms Cizauskaite following sight of the latter's e mail and summarises her discussions in response to the remaining questions. In relation to question [4] concerning accommodation where Ms Cizauskaite says that CARITAS would provide temporary accommodation, Ms Poskeviciute says this:-
- “...she has informed me that Caritas is able to provide temporary housing services. However, their services are oriented to preparing people for employment and are not really geared to people whose ability to work is affected by disability or health problems so they would have to assess whether an individual was suitable for this. The Caritas temporary accommodation is different to the municipal overnight shelters which I referred to in paragraphs 25(c) and 26(d) of my report. However, the requirement for a 'clean' TB certificate would also apply in order to access the Caritas accommodation, as this requirement is set out in the law which regulates temporary shelters.”
66. I am mystified by the reference to TB. I have read the medical reports carefully as well as the Appellant's statements. I can find absolutely no reference to the Appellant ever having contracted tuberculosis so I cannot understand why Ms Poskeviciute would think this a barrier. There is also a heavy assumption in what she says that the Appellant is prevented from working by his medical conditions.



Yet that runs contrary to the Appellant's own evidence that he is working five or seven days per week presently selling the Big Issue. I recognise that this may not be a "nine to five" job but, although the Appellant has health conditions and is not assisted in employment prospects by his drug dependency, I understood the Appellant to say that he would like to work. I also note that Ms Cizauskaite was informed in the questions posed by Mr Melvin's e mail that the Appellant is on a methadone programme and it must therefore be clear that the Appellant is a recovering drug addict. I do not therefore consider that what Ms Poskeviciute says in any way undermines Ms Cizauskaite's evidence that temporary accommodation could be arranged by CARITAS. This is in addition to the possibility of accommodation in temporary shelters noted in Ms Poskeviciute's report.

67. In relation to question [5] asked of Ms Cizauskaite, Ms Poskeviciute's letter continues as follows:-

"... I also asked Ms Cizauskaite to confirm what assistance the Lithuanian Labour Exchange and Caritas would be able to provide in helping Mr Dumbliuskas to find a job. Ms Cizauskaite has confirmed that the assistance that they provide is oriented towards people who are capable of fully independent living and if a person is officially determined as only having a partial ability to work (defined as a percentage of a working day that they are capable to work) or he/she does not have a formal disability, but (as is often the case for people with a drug dependency) he/she has difficulties working full time or keeping regular hours, this would be seen as a barrier to the ability of Caritas and the Labour Exchange to help the person."

68. Again, these comments make a number of assumptions about the Appellant which are not borne out on the evidence and/or Ms Cizauskaite was made aware of the Appellant's position by the questions posed. True it is that the Appellant is in receipt of disability living allowance but that is at the lowest level and I have not been shown any assessment which suggests that the Appellant cannot work full-time. I recognise that selling the Big Issue is not a full-time job but the Appellant's own evidence is that he sells the magazine regularly on most days of the week. Similarly, although it is certainly true that the Appellant has lived with friends for the period since his release from detention, that is no doubt by reason of financial circumstances as much as anything else. I note Mr Cordwell's remarks in his more recent letter that the Appellant's current living circumstances provide him with his own room which "affords him more personal space and privacy".
69. I do not understand the medical evidence to be that the Appellant could not live alone if circumstances required or permitted. There is no evidence that the friends with whom the Appellant lives have to care for him. Indeed, it is his evidence that those friends are both disabled and no doubt have their own care to consider.
70. I do not therefore read the evidence as suggesting that the Appellant is not capable of "fully independent living" or could not work full time or regular hours if the opportunity to do so presented itself. For those reasons, I can give little weight to Ms Poskeviciute's evidence on the point whether CARITAS and the Lithuanian

authorities would assist the Appellant to find work. I prefer Ms Cizauskaite's evidence that they would, provided the Appellant is motivated to seek it. Based on the oral evidence which I heard from the Appellant, I have no reason to think that he would lack that motivation.

71. Having set out the evidence before me, I set out below the legal provisions and case-law which applies before turning to reach my decision on the legal issues which arise for consideration.

## **RELEVANT LAW**

72. I start by considering the relevant provisions of the EEA Regulations. Before I do so, it is necessary to confirm which version of the EEA Regulations apply. Although Ms Cohen's skeleton argument refers to those regulations as amended by the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"), she accepted in discussion at the hearing that those might not be the applicable version. She was right to do so. The transitional arrangements in relation to the 2016 Regulations provide that those apply to all decisions made after the coming into force of those regulations (on 1 February 2017). However, the EEA Regulations (2006) are preserved for the purposes of appeals which are pending as at the coming into force of the 2016 Regulations by paragraph 3 of Schedule 4 to the Immigration (European Economic Area) (Amendment) Regulations 2017

### **"3. Appeals**

- (1) Notwithstanding the revocation of the 2006 Regulations by paragraph 1(1), those Regulations continue to apply –

(a) in respect of an appeal under those Regulations against an EEA decision which is pending (within the meaning of regulation 25(2) of the 2006 Regulations) on 31st January 2017;

(b) in a case where a person has, on 31st January 2017, a right under those Regulations to appeal against an EEA decision.

- (2) For the purposes of this paragraph, "EEA decision" has the meaning given in regulation 2 of the 2006 Regulations and the definition of "EEA decision" in regulation 2 of these Regulations does not apply"

The background to those changes is set out in TM (EEA nationals - meaning; NI practitioners) Zimbabwe [2017] UKUT 165 (IAC) and I do not therefore need to deal with this point in any more detail.

73. I can also deal very shortly with the level of protection against deportation which applies in this case. It is accepted that the Appellant cannot show that he is permanently resident in the UK. Although he has been in the UK now for over nineteen years, he has not been exercising Treaty rights for most of that period. Ms Cohen accepted that, although the Appellant is currently selling the Big Issue, which she says amounts to employment for these purposes, he cannot show that he has resided in the UK for a continuous period of five years in accordance with the 2006

Regulations. He is not therefore entitled to the protection of Regulation 21(3) of the EEA Regulations.

74. The argument pursued before the First-tier Tribunal that the Appellant had integrated prior to his imprisonment in 2010 and that he was therefore entitled to benefit from regulation 21(4)(a) of the EEA Regulations was rejected by the Tribunal on the basis that the Appellant is not integrated in the UK. That argument is not repeated before me. There was no cross-appeal by the Appellant in relation to that finding and nor was it said in the Rule 24 reply that there was any error in that regard. I therefore need say no more about this point.

75. The issue which arises for determination is therefore whether the decision to deport the Appellant meets the requirements of Regulation 21(1), (5) and (6) of the EEA Regulations. Regulation 21 is set out below, so far as relevant, for ease of reference:-

“21(1) In this regulation a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.

...

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles –

- (a) the decision must comply with the principle of proportionality;
- (b) the decision must be based exclusively on the personal conduct of the person concerned;
- (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
- (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.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person’s length of residence in the United Kingdom, the person’s social and cultural integration into the United Kingdom and the extent of the person’s links with his country of origin.”

76. Ms Cohen raised in her skeleton argument an issue whether the Appellant’s most recent conviction (for the index offence) is spent by reference to the Rehabilitation of Offenders Act 1974. She accepted however that it could not be and abandoned this submission at the hearing. I do not therefore need to deal with this issue.

77. Ms Cohen referred me in particular to the case of Essa (EEA: rehabilitation/integration) [2013] UKUT 316 at [32] and [33] as follows:-

“[32] We observe that for any deportation of an EEA national or family member of such national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending. In such a case, if there is acceptable evidence of rehabilitation, the prospects of future rehabilitation do not enter the balance, save possibly as future protective factors to ensure that the rehabilitation remains durable.

[33] It is only where rehabilitation is incomplete or uncertain that future prospects may play a role in the overall assessment ...”

78. Reference is also made to Vasconcelos (risk-rehabilitation) [2013] UKUT 00378 (IAC) as follows:-

“[3] For those who at the time of determination are or remain a present threat to public policy but where the factors relevant to integration suggest that there are reasonable prospects of rehabilitation, those prospects can be a substantial relevant factor in the proportionality balance as to whether deportation is justified. If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation.

[4] At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, it cannot be seen how in the prospects of rehabilitation could constitute a significant factor in the balance. Thus, recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with propensity to commit sexual or violent offences and the like may well fall into this category.”

79. Finally, in relation to rehabilitation, Ms Cohen draws my attention to MC (Essa principles recast) Portugal [2015] UKUT 00520 (IAC) at [29]:-

“ ...

(d) Rehabilitation is not an issue to be addressed in every EEA deportation or removal decision taken under regulation 21; it will not be relevant, for example, if rehabilitation has already been completed (Essa (2013) at [32]-[33]).

(e) Reference to prospects of rehabilitation concerns *reasonable* prospects of a person ceasing to commit crime (Essa (2013) at [35]), not the mere possibility of rehabilitation.”

80. Article 8 ECHR was also faintly canvassed in the Appellant’s skeleton argument. This was not dealt with in oral submissions in any detail and, in my view, rightly so. As I discussed with Ms Cohen, this appears to me to be something of a makeweight submission. If the Appellant does not succeed in his appeal under the EEA

Regulations it will be on the basis that he is a genuine, present and sufficiently serious threat and that his deportation is proportionate applying EU law. The criteria which apply to determination of risk and proportionality of deportation are if anything more favourable to the Appellant under EU law. It is inconceivable that, having regard to Section 117C Nationality, Immigration and Asylum Act 2002 as I would be bound to do, I could reach a different conclusion applying Article 8 ECHR if I were to find that the Appellant can be deported under the EEA Regulations. I need say no more about this submission in any event in light of my conclusions below.

## **DISCUSSION AND CONCLUSIONS**

### **Genuine, Present and Sufficiently Serious Threat**

81. I begin by setting out the Respondent's conclusions about the Appellant's risk of reoffending in her letter dated 19 May 2012 as follows:-

"[37] In completing your NOMS 1 assessment the offender manager found that you posed a low risk of re-offending. In reaching this conclusion your offender manager has taken into consideration those factors which originally led to your offending behaviour and whether those same factors continue to exist. However, the overall score given on your report is in conflict with the written comments of the offender manager, in particular the following issues have been highlighted within the NOMS 1 report.

[38] Your offender manager has stated that your crime was financially motivated and at the time you were under the influence of drugs and alcohol. You have admitted that your drug misuse has had a considerable effect on your financial situation which could result in you re-offending and this is borne out by the considerable number of offences that you have committed since 2000, mainly for theft, all fuelled by the need to obtain money to finance your substance abuse.

[39] It was noted by the sentencing Judge when you were convicted at Snaresbrook Crown Court on 8 June 2010 that since 2000 you had committed numerous offences related to your abuse of drugs, originally to you holding weaponry, but generally related to dishonesty and stealing and that your last offence was considered to be a considerable step up in its severity fuelled by the need to obtain money to finance your alcohol and drug habits. It is unacceptable to leave the public vulnerable to the disturbing escalation in your criminal behaviour and pattern of re-offending whilst on bail.

[40] You have clearly been afforded many opportunities by the courts to address your health issues and have in the past relapsed. Although you are currently receiving drug therapy in prison in the form of daily methadone, there is no evidence that you have tried to identify the issues surrounding your substance abuse which would assist you in breaking the cycle of your addiction which inevitably results in your pattern of re-offending. Taking these factors

into consideration it has been concluded that you present a high risk of re-offending and subsequent harm to the public.”

82. The NOMS assessments in this case are now somewhat out of date, having been completed on 1-8 May 2012. They also relate to a period when the Appellant was and had been for some time in detention. I was not taken to them by either representative. It is for that reason that I do not find it necessary to set out those assessments. It is however useful to set out the First-tier Tribunal’s record of the evidence which it had as to risk and its findings in that regard. Although I have set aside that decision, the Tribunal’s findings on this issue were not the subject of challenge by either party in this Tribunal and they provide a useful synopsis of the evidence as existed on this topic at that time (in 2013 - when the Appellant remained in detention):-

“[121] There are a number of difficult factors in assessing whether the personal conduct of the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. We note in accordance with High Court authority that a threat must be a present threat. In this regard we have to give careful assessment to the likelihood of the appellant committing further offences. We have previously in our determination summarised the attitude of the consultant psychiatrist in this regard. We have also referred to the observations made in the respondent’s refusal letter. The refusal letter indicated that the appellant was subject to the minimum level of Multi-Agency Public Protection Arrangements and that in the risk assessment the offender manager had found that the appellant posed a medium risk of harm to the public. It was also noted that in the NOMS1 assessment, the offender manager had found that the appellant posed a low risk of reoffending. The objective report of the consultant psychiatrist referred to the risk of reoffending in the next year if returned to the community in the UK and medium and the risk of serious offending as low.

[122] The essential factor in all these assessments relates to whether the appellant would relapse into his heroin addiction. It is clear from documentation as a whole that if the appellant did not relapse and attended all the assistance programmes specified in the Probation Officer’s letter of 27 December 2012 – that the risk of reoffending would be very substantially reduced. We have found that the appellant is genuine and credible in his assertion that he has successfully abstained from drug and alcohol use for the three years he has been in custody. We have carefully noted the consultant psychiatrist’s observation that this is in a controlled environment – it is nevertheless an aspect which had previously not been achieved by the appellant. The courses the appellant has undertaken in prison would be of substantial assistance in helping him to avoid relapsing – as would the support programmes referred to in the Probation Officer’s report. As against that the appellant has committed a substantial number (some fourteen) offences in the period 2000-2010. It is not disputed that all this criminal conduct related to the appellant fuelling his drug dependence. The history of the offending prior to the robbery offence although not minor could not be described as particularly

serious from the nature of the sentences imposed. The appellant had not spent more than three months in prison in respect of any of the previous offences – prior to the robbery conviction. It is common cause that as stated by the sentencing Judge the appellant's robbery offence marked a very substantial step up in the nature of his criminal offending. We are satisfied that the appellant is genuinely remorseful for this offence – which was committed to fuel his drug addiction. We would also note that although the 60 year old victim was subjected to a frightening experience which would have caused considerable mental anguish – no physical harm was suffered. The appellant also, as described by the sentencing Judge, on discovering he could not leave the premises without the assistance of the victim, allowed her to also leave – and she immediately raised the alarm, resulting in the appellant's arrest at the scene.

[123] The line to be drawn in assessing the requirements of Regulation 21(5)(c) is a difficult one. The personal conduct of the appellant has certainly represented a genuine and sufficiently serious threat affecting one of the fundamental interests of society in the past. The appellant's conduct would constitute a present threat – unless he were able to properly rehabilitate himself and not relapse into drug addiction. Whether the appellant does that depends on his future conduct. The appellant has the advantage of having been drug and alcohol free for three years whilst in custody. He has the advantage of what we have assessed is a genuine determination to avoid relapsing – to concentrate on rebuilding his health in view of the serious health problems he is facing and of building a relationship with his son and grandson (who was born in December 2012). Everything depends on the appellant's ability to fulfil his hopes and not to relapse. It cannot, however, be stated that the appellant's personal conduct does not represent a present threat. The threat is present because it is a hope for the future that the appellant will not relapse into his previous conduct. We reiterate our finding of the genuine nature of the appellant's determination – but it will depend on future conduct."

83. Of course, that assessment and the observations there made are in no way binding on me. Indeed, I have set aside that decision and as such it is for me to assess afresh the question of the risk which this Appellant poses. They are though useful as a statement of what is really the central focus of that risk and that is the Appellant's drug dependency and his offending to finance that dependency. At the time of the First-tier Tribunal's decision, the Appellant remained in detention and so that Tribunal could not know what the impact of release would be. I have the benefit of seeing how the Appellant has adjusted to his liberty and the extent to which his risk has reduced as a result of his behaviour throughout that period. I do of course also take into account that, throughout the period since his release, the Appellant has been subject to deportation action which may have provided him with an added incentive not to resort to drug abuse and not to offend.
84. On the one hand, it is to the Appellant's credit that he has continued to engage with drug recovery services, has undertaken a methadone programme and now takes a

dosage of methadone to control his drug dependency which is assessed by the professionals to be low. I cannot though ignore on the other hand the two lapses which the Appellant has suffered. I say lapses advisedly because, as the Appellant himself pointed out, there is a difference between an occasional lapse which may involve taking substances for a very short period of a few days and a full-blown relapse which leads back to regular substance abuse. That is not what has happened in the case of this Appellant.

85. The two lapses, whilst very unfortunate and not to the Appellant's credit, were triggered by the death of his mother and his close friend in a very short space of time and then in the following year at the same time, in part due to the anniversary of their deaths and in part because the Appellant was in pain due to his arthritis. It is understandable given the Appellant's mental health problems that the deaths of a close friend and his mother in close succession might have a significant impact on him. As I say, though, it is not in his favour that he again resorted to hard drug use to cope. I also note though that the Appellant has had to cope with other events which would have been difficult for him, such as when the Court of Appeal effectively overturned the allowing of his appeal. He has also had to move between accommodation which would have been unsettling for him. It is worth noting that, when those difficulties have arisen, the Appellant has not returned to drug use.
86. There is one additional observation which I need to make about the two lapses. Although the Appellant lapsed, he did not commit any offences. I accept Mr Melvin's submission that the Appellant's use of Class A drugs is in itself a criminal offence (as the Appellant himself accepted in evidence) but that cannot be said to be an offence which causes risk to the public unless the Appellant does something in consequence of the taking of those drugs which impacts on others. He did not do so on either occasion.
87. Mr Cordwell in his report makes the point that, although the Appellant was assessed in 2012 as a medium risk, that risk is lowered if the Appellant does not use substances, continues to engage with support services and engages in meaningful activities. Mr Cordwell makes clear that the risk associated with drug use is one of relapse into frequent or persistent use rather than a very small number of short lapses.
88. When asked why he would not relapse into persistent drug use in the future, the Appellant said that he now has a very good relationship with his key worker, Ms Hibbert, and that, if he "is in a bad place", he can speak with her. I cannot ignore though that Ms Hibbert has been his key worker since 2014 and the Appellant's ability to speak with her did not prevent the lapses in December 2015 or December 2016. It is the case though that the Appellant has continued to engage with the drug recovery service throughout the period since he has left detention. Ms Hibbert notes that he meets with her regularly. He has also continued successfully to pursue a methadone programme. His dosage has reduced (or will shortly reduce) to what is assessed to be low.



89. In terms of other positive or negative factors which might influence risk, one of the positive factors noted by the First-tier Tribunal was the possibility of the Appellant building a relationship with his son and grandson. That has not materialised and the Appellant is now estranged from both his children. On the positive side, though, the Appellant has a number of friends in the UK who have been prepared to come to his assistance by providing him with accommodation. Mr Melvin asked the Appellant why those persons had not written letters of support for him or come to provide testimony at the hearing. It is true that there is no such evidence. However, the way in which the case is presented is largely a matter for the Appellant's solicitors and I do not draw any adverse inferences from the fact that these friends have not provided statements or oral testimony. The fact which is not disputed is that various friends have provided the Appellant with help since he left detention and that he has friends therefore who have been willing to support him.
90. Mr Cordwell also points as a risk reducing factor to the need for the Appellant to find a meaningful and rewarding use of his time. In this connection, I was impressed by the Appellant's evidence about the contribution which he feels his work for Big Issue is having. I recognise that he has only been selling the magazine since December 2016 following a period of absence, however long that period. However, it was clear from his oral evidence that the Appellant is proud of his own endeavour and of the contribution which he feels he is making to the community as well as the social engagement which this work is enabling him to form. I was impressed by that evidence.
91. As the Court of Appeal recognised in its judgment in this case, the passage of time since release and the Appellant's behaviour during that period are important factors in the assessment of the risk which the Appellant poses. That risk, as I have said, is not whether the Appellant continues to take drugs on isolated occasions or indeed whether he is completely cured of his drug addiction (which he clearly is not since he remains on a methadone programme). The issue is the risk which he poses to the public and not to himself.
92. Whilst as the preceding paragraphs make clear, assessment of the risk which the Appellant now poses is finely balanced, I am satisfied that he is not a present risk. Although as I have said, it is not to the Appellant's credit that there have been two lapses into drug taking, they were triggered by an emotional response to particularly difficult circumstances. What is to the Appellant's credit is that on neither occasion has he committed an offence or at least not one which has posed a danger to anyone but himself. He has not lapsed at other times when he has faced difficulties. In that regard, the Appellant presented as a truthful witness. He did not try to hide these lapses and I am therefore satisfied that, when he gave evidence that these were the only two lapses he was telling the truth.
93. The Appellant has also been motivated to find employment albeit he has only recently resumed that employment. The need to find employment and a meaningful existence were two of the factors which Mr Cordwell noted as capable of reducing the risk posed by the Appellant. That the Appellant finds his employment

rewarding was evident from the way he spoke about it and the contribution which he considers he is now able to make to the community.

94. I recognise that low risk does not mean no risk but the issue for me is whether the risk is both present and sufficiently serious. Based on the evidence, in particular that of Mr Cordwell and the Appellant's own evidence, including in particular his evidence given orally and for the reasons given above, I am satisfied that the Appellant no longer poses a genuine, present and sufficiently serious threat. The Appellant will no doubt be aware though that, if he were to reoffend whether to fund his drug use or otherwise, the consequences for him could be very serious.

### Proportionality

95. Since I have found that the Appellant does not satisfy the criteria for deportation due to the lack of a present threat posed by him, it is not strictly necessary for me to say anything about proportionality. However, since this was the reason that the Court of Appeal found there to be an error of law, marked also by my setting aside the previous First-tier Tribunal decision and since I have been presented with evidence which the previous Court/Tribunals did not have when making an assessment about proportionality, I make some observations about this aspect.
96. Regulation 21(6) of the EEA Regulations requires the taking into account of the Appellant's age, state of health, family and economic situation, his length of residence in the UK, his social and cultural integration into the UK and the extent of his links with Lithuania.
97. The Appellant has been in the UK for just under twenty years. He had leave only for the first six months but of course since Lithuania acceded to the European Union in 2004, he has not required leave. He claimed asylum but that claim was not pursued on appeal. The Appellant was aged thirty-two when he came to the UK. He is now aged fifty-two years. He grew up in Lithuania, was educated there and has worked there.
98. By contrast, since coming to the UK, the Appellant has worked only intermittently. Although as I indicate above, I was impressed by the Appellant's evidence about the contribution which he is now making to society in the UK and that is something which it is to be hoped he will develop moving forward, there is no doubt that his past history shows a detrimental impact on society here rather than a positive contribution.
99. It cannot be said either that the Appellant has forged strong ties in the UK. He has formed one relationship with a partner but that has broken down. He has friends but, as Mr Melvin observed, those friends have not provided statements in support his case or attended to give oral evidence. Whilst, therefore, as I have found, their support is a positive factor in terms of reducing the risk which the Appellant poses, there is little evidence of the Appellant becoming socially and culturally integrated.

100. The Appellant has few ties in Lithuania. He has a daughter there but is estranged from her. His mother has died. He has some family members from whom he is not estranged and, even though the evidence is that they would not be able to support him financially, there is no suggestion that they could not emotionally support him if he were to return to Lithuania. Equally, in any event, he has few if any ties in the UK. He has a son here who has a family including the Appellant's grandchild. However, the Appellant's evidence is that he has also lost contact with his son. There is no evidence about friends that the Appellant may still have in Lithuania. His evidence about his past history is that such close friends as he once had have either died or moved away. As I say, though, there is limited evidence about friends in the UK either.
101. There can be no doubt that the Appellant has health issues, most notably mental health issues. However, the Appellant has not provided evidence that medication to control those issues is not available in Lithuania. Further, he has provided evidence that he was treated for mental health issues in Lithuania before he came to the UK.
102. The factor which impressed the previous Tribunals and on which their positive decision was founded is that treatment is not available in Lithuania (or not to a sufficient extent) to assist the Appellant with his drug dependency and that this would adversely impact on his prospects of rehabilitation so as to render deportation disproportionate.
103. I have set out the evidence in relation to treatment available in Lithuania at [51] to [70] above. The evidence comes from two women both involved in assisting those with drug dependency. As I have explained, however, I was more impressed with the evidence of Ms Cizauskaite for the Respondent. Ms Cizauskaite works for a charity operating on the ground in Lithuania. Ms Poskeviciute is a director of a leading advocacy group. As such, I do not assess from her evidence that she has the same level of daily operational involvement with those like the Appellant who are adversely affected by drug dependency.
104. Further, as Ms Poskeviciute herself points out, there is little disagreement between the evidence of the two women. However, the points of distinction which she draws between her evidence and that of Ms Cizauskaite appear to me to be founded on assumptions which are not borne out on the evidence in this case, such as that the Appellant would return to his home town or that he would be unable to work and so would not be assisted by the charity for which Ms Cizauskaite works.
105. I have also set out at [53] to [56] above, the evidence taken from the websites to which I was referred which show that, particularly in Vilnius, there is drug recovery treatment available of much the same type as the Appellant receives in the UK.
106. The highpoint of the Appellant's case in this regard is that he would be returned to Lithuania without a supply of methadone and that he would not be able to access that medication for about four weeks following return. As a result, it is said, his drug rehabilitation would suffer a major setback.

107. I intend no offence to Ms Hibbert who has provided evidence about what could (or more accurately could not) be done to overcome this problem. She is a key worker with a drug treatment centre. She does not profess to have experience of dealing with deportation of those with drug dependency to other countries. However, the problem identified by her evidence (in conjunction with that of Ms Poskeviciute) is not one which could, as a matter of common sense, be insurmountable. Contact has been made, via the Respondent's evidence, with a charity operating on the ground in Lithuania. I see no reason why contact could not be made at an individual level between that charity and the Appellant or those representing him (either solicitors or medics) to find a solution such as collection of a regular prescription from a pharmacy in Lithuania during that period. It might even be possible for the Appellant to sign up with the authorities in Lithuania to obtain the necessary paperwork to access healthcare even before he returns and/or to register with one of the health care centres dealing with those with drug dependency issues.
108. I recognise that this is to a degree speculative and this is not a case where the UK authorities have obtained (or been asked to obtain) assurances about what could be done in this individual case to assist. The problem does not arise given my conclusion about the risk which the Appellant poses since he will not be deported but, had I not reached the conclusion which I have, I would not have found deportation to be disproportionate on this account.
109. For the reasons set out above, though, I conclude that the Appellant cannot be deported as he does not pose a genuine, present or sufficiently serious threat. For that reason, his appeal is allowed.

## **DECISION**

**For the reasons given at [11] to [12] above, the decision of the First-tier Tribunal (FTTJ Bartlett and Ms Emblin) contains a material error of law in relation to the allowing of the appeal under the EEA Regulations. I therefore set aside that part of that decision. I re-make the decision allowing the Appellant's appeal under the Immigration (European Economic Area) Regulations 2006 on the basis that the Appellant does not pose a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.**



Signed  
Upper Tribunal Judge Smith

Dated 30 October 2017