



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00333/2019

THE IMMIGRATION ACTS

Heard at North Shields
On 11th December 2019

Decision & Reasons Promulgated
On 27th January 2020

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KASTYTIS [M]

Respondent

Representation:

For the Appellant: Ms Petterson, Senior Home Office Presenting Officer

For the Respondent: Mr Craggs, Counsel instructed on behalf of the respondent

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal (Judge Gumsley) promulgated on 9 September 2019. By its decision, the Tribunal allowed the Appellant's appeal against the Secretary of State's decision, dated, 12th June 2019 (and supplementary decision of 30th August 2019) to deport him from the United Kingdom. The First-tier Tribunal did not make an anonymity order and Mr Craggs confirmed that he did not seek to advance any grounds as to why such an order would be necessary.

2. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to Mr [M] as the appellant, reflecting their positions before the First-tier Tribunal.
3. The decision to deport was made under Regulation 27 of the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”). The appellant’s case was that the decision was not in accordance with Regulation 27 and Schedule 1 of the Regulations, and/or that it was incompatible with his rights under Article 8 of the Convention, and thus unlawful by reason of S.6 of the Human Rights Act 1998.
4. By a decision and reasons promulgated on the 9 September 2019, the FtTJ (Judge Gumsley) allowed the appeal, holding that the decision was not in accordance with the Regulations as he did not find that the respondent had established that the appellant represented a genuine, present and sufficiently serious threat to public policy or security such that his deportation was justified. The judge did not need to, and did not, consider the Convention grounds.
5. The Secretary of State appealed and permission to appeal was refused by the First-tier Tribunal (Judge Landes) but on reconsideration permission was granted by Upper Tribunal Judge Pickup.

Background:

6. The Appellant is a citizen of Lithuania. The key factual background is set out in the decision of the FtTJ, the decision letter and the witness statements filed on behalf of the appellant. He entered the United Kingdom on 3 January 2008 when aged 11 along with his mother and other siblings. It is said that his father had been violent to his mother and that he had had no contact with his father since he, his mother and siblings had left Lithuania. He has remained in United Kingdom since that date having only returned to Lithuania on one occasion.
7. Between 2011 and 2017 he has committed criminal offences. As a juvenile in November 2011 he was convicted of possessing an offensive weapon in a public place and sentenced to a referral order for six months. Also, as a juvenile on 24 April 2013 he was convicted of theft, possessing a controlled drug (class B cannabis) and common assault and was sentenced to a youth rehabilitation order with a supervision requirement valid until 21 May 2014. He was also the subject of a curfew requirement with electronic tagging. On 15 May 2013 whilst on bail, he was convicted at the Juvenile Court for possession of a class B controlled drug (cannabis).
8. On 2 January 2015 he was convicted at the Magistrate’s Court for possessing a sharp pointed article in a public place, driving a motor vehicle excess alcohol, using a vehicle while uninsured, taking a motor vehicle without consent and was sentenced on 25 February 2015 to youth rehabilitation order of 12 months, a curfew requirement for three months with electronic tagging, a supervision requirement and an unpaid work requirement of 60 hours he was also disqualified from driving for 12 months with his licence endorsed.

9. On 7 April 2017, when the appellant was aged 19, he appeared before the Crown Court and was sentenced as follows; for possessing class A drugs with intent to supply (four counts) he was sentenced to 27 months imprisonment on each count concurrent. In respect of arson with intent to endanger life he was sentenced to 56 months consecutive to the above sentence and for arson (five counts) he was sentenced to 6 months on each count to be concurrent to the above sentences. In total this was a sentence of six years and 11 months. The appellant had pleaded guilty to the arson offences at an early opportunity and not pleaded guilty to the drugs matters until the day of his trial.
10. The circumstances of the offences are set out in the sentencing remarks in the respondents bundle at (A1-A10). They are also summarised in the decision of the FtTJ at paragraphs 14 - 18.
11. Following the imposition of the sentence, on 5 January 2018 the appellant was served notice that he was liable for deportation and invited to make any representations as to why this should not take place. Submissions were submitted on his behalf, by letter from his representatives, dated 29 January 2018. Consideration was given to those representations, but the respondent refused those representations in a decision letter of 12 June 2019. This was followed by a supplementary letter dated 30 August 2019.
12. The decision letter set out the appellant's criminal history are set out above. The Secretary of State took into account that he had been living in the UK since the age of 11 (having taken into account the documentary evidence relating to his education and other associated documentation) but did not accept that he had been continuously resident in the United Kingdom for 10 years in accordance with the EEA regulations 2016, noting that having been incarcerated in 2017, the continuity of residents was broken. It was accepted that he had been resident in the United Kingdom in accordance with the EEA regulations 2016 for a continuous period of five years and as such had acquired a permanent right of residence under the EEA regulations and that consideration was given to whether his deportation was justified on "serious grounds of public policy or public security."
13. The decision letter referred to the material, including the judge's sentencing remarks and the circumstances of his offending. It noted that he was being monitored under risk management strategies which indicated that he was considered to pose a continuing risk the public and that other factors such as mental health problems, ongoing issues with drugs and alcohol, accommodation issues and maintaining contact with other known offenders were relevant factors in that assessment. Reference was made to the OASY's assessment and that there were identifiable indicators of risk of serious harm. In the light of the material before the respondent, it was concluded that he demonstrated a propensity to offend, such that the appellant represented a genuine, present and sufficiently serious threat to the public to justify deportation.

14. The decision letter went on to consider the principle of proportionality (regulation 27 (5) (a)). It reviewed his offending history, his age and his health, his connections with Lithuania, his family relationships in the UK, his education and the prospects of rehabilitation, before concluding that his deportation was proportionate and in the public interest. The decision letter also made reference to Article 8 and that it was not accepted that he had a family life with his claimed partner which was genuine and subsisting, nor had it been accepted that he been lawfully resident in the United Kingdom for most of his life or that he was socially and culturally integrated in the United Kingdom in the light of his criminal offending and that he had provided no evidence of making any positive contribution to society. He was considered that there were no very significant obstacles to his reintegration to Lithuania and that there were no very compelling circumstances to outweigh the significant public interest in his deportation.

The applicable legal framework:

15. The deportation of EEA nationals is subject to the regime set out in the Immigration (European Economic Area) Regulations 2016 ("The EEA Regulations") which were made under section 2 of the European Communities Act 1972 by way of implementation of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States. The Directive sets conditions that must be satisfied before a Member State can restrict the rights of free movement and residence provided for by EU law.
16. By virtue of Regulation 23(6) of the 2016 regulations an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if:
 - (a) that person does not have or ceases to have a right to reside under these Regulations; or
 - (b) the Secretary of State has decided that the person's removal is justified on the grounds of public policy, public security or public health in accordance with regulation 27; or
 - (c) the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under regulation 26(3).
17. Regulation 27 of the EEA Regulations provides as follows: -
 - 27.- (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
 - (2) A relevant decision may not be taken to serve economic ends.
 - (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.
 - (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who-

- (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
 - (b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989
- (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles-
- (a) the decision must comply with the principle of proportionality;
 - (b) the decision must be based exclusively on the personal conduct of the person concerned;
 - (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
 - (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
 - (e) a person's previous criminal convictions do not in themselves justify the decision.
 - (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.
- (6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.
- ...
- (8) A court or Tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc).'

SCHEDULE 1

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

Considerations of public policy and public security

1. The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy 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.

The decision of the FtTJ:

18. The FtTJ had the advantage of hearing the oral evidence of the appellant alongside the documentary evidence both in the appellant's bundle and that of the respondent.
19. The FtTJ set out the relevant legal framework at paragraphs 5 - 6 and referred to the legal authorities that had been placed before him. He reminded himself of the general principles which were applicable and that he must decide the case on the "individual circumstances of the appellant". It was common ground before him that as he had a permanent right of residence, he was required to determine whether

there were “serious grounds of public security or public policy” which justified the respondent’s decision to deport the appellant.

20. At paragraph [11] he set out the agreed issues that he was to decide and that the emphasis on his consideration was not on what the appellant had done in the past but rather (i) the effect on society of his continued presence in the United Kingdom, by reference to any present threat, and (b) the proportionality of the interference with the appellant’s rights under the EEA regulations by deportation, in the context of any such threat.”
21. His assessment of the issues and findings are set out at paragraphs 12 – 51. The judge found that both sets of offences were very serious as evidenced by the lengthy sentence imposed upon the appellant, despite his relatively young age and it being his first custodial sentence. He agreed with the sentencing judge and his assessment that the index offence (arson) was an “immensely serious offence of its type” which was “aggravated by the fact that within a very short time of setting the fire, he set fire to no less than five other locations in the area.” The judge found that the offences involving fire setting had the potential of the most serious of consequences. Similarly, as for drugs, those who deal in drugs take part in a trade which causes considerable misery and whilst addiction was an explanation, it was no excuse for being so involved (at [18]).
22. When considering the fundamental interests of society, the judge found that the offences had a wide-ranging and wholly negative effect, not only in individuals but also on the wider community. He concluded that the offences carried out affected the fundamental interests of society (at [19]).
23. He considered that if the appellant engaged in such offending again that he would have no doubt that this would present a threat affecting one or more of the fundamental interests of society. He therefore went on to state “the first issue for me to consider is whether there is a genuine and present in sufficiently serious threat” and observed that “the risk of him reoffending, particularly in relation to offences of this nature and/or seriousness, is therefore a matter of fundamental importance in my consideration this matter. “The judge recorded that he had a number of concerns in this respect which he then referred to.
24. He began by making reference to his previous convictions which he found “do him no credit” and that he had managed to accumulate a number of previous convictions as a juvenile or young person for various offences including theft, possession of class B drugs, possession of an offensive weapon or bladed article, common assault and serious driving offences. Some offences were committed whilst on bail for others. Several non-custodial disposals were imposed but given his reoffending none were ultimately successful, and he continued to offend. The judge found that there were attempted intervention in the appellant’s behaviour during his childhood and youth and that as a child, he had a number of issues and problems as to his behaviour at school, referrals, issues of attendance and effort. The judge concluded “these matters

do, in my judgement go towards the level of entrenchment of his poor behaviour, his attitudes and so his ability to reform” (at [21]).

25. Similarly, at [22] the judge found that the appellant’s plans for his future upon release also gave cause for concern. He recorded that the appellant hoped that he could go home to his mother and whilst the judge understood that desire to go home, the judge found that this had not been a place that had “served him well hitherto”. The judge observed that whilst the appellant’s case was that he would have family support upon release, despite providing evidence and statements, none of the family attended the hearing. Consequently, whilst he was invited to take into account the statements, in the absence of their authors the judge said he found that to be “difficult” and having considered the content of those statements decided that he could only give them limited weight. The judge found that the lack of anyone from the appellant’s family attending the hearing was “troubling.” He therefore concluded that he was not satisfied that the appellant would receive much, if any family support upon release (at 25]).
26. As to his girlfriend, whilst the judge was satisfied that the appellant generally believed he would obtain help and support from his girlfriend, and whilst they had been together for 4½ years, the judge concluded she was unable to exert any form of influence to stop his drug alcohol abuse. Therefore, was not satisfied that she would prove effective in preventing him from relapsing into crime (at [26]).
27. At [27] the judge also set out his concerns in relation to the appellant’s “hope” to return to his home area.
28. As to his employment prospects, the judge considered evidence in the form of a letter but the judge found that it could attach very little weight to it in the light of the appellant’s own evidence that he had worked the company for some time, had felt ill due to taking drugs and alcohol and not attended which went on for a few days and was then dismissed.
29. The judge concluded at [29] that those matters formed the basis for his concern. The judge went on to state that the appellant’s case was based on what was described as his “integration and rehabilitation” and that the appellant is “part of British society and not the same person as he was when he was sentenced” .
30. At paragraphs 30 – 31, the FtTJ referred to the evidence of the appellant, both the written and oral evidence, relevant to his analysis and consideration. In summary, the appellant had spoken of spending the first year of his incarceration processing things that he had been through. When questioned about this, he had spoken of being bullied at school due to his looks and his inability to speak English well. He said that it had mental health issues but was no longer obtaining treatment other than medication; he had completed courses in his action plan and others, including those relating to education, employment, offending and substance abuse. He expressed the view that he wanted, upon release, the stay away from people who took drugs and drink and that he didn’t feel like taking any substances any longer.

He said he would have to help family members and positivity from his girlfriend, and he hoped to work in construction.

31. As to his evidence concerning his links with Lithuania, he said that he returned once to see an aunt but didn't have contact now. His father was a drunk and had been violent his mother and that it was not a good idea him to get in contact his father now as he had shown no interest in him since he and his family members had left Lithuania. As to language, his knowledge was not very good - he could speak Lithuanian although he had difficulties in understanding. He referred to being ashamed of himself and previous behaviour and had decided to turn his life around and wanted a "second chance" start a new life in United Kingdom.
32. Mr Craggs on behalf the appellant had submitted that the appellant was integrated in the UK-based on his length of residence, his English language ability, his education and employment history. At [33] the judge found that is, apart offending did not show a desire to integrate into mainstream society, and that the only evidence of associates/friends related to those who are prepared to feed him free drugs and alcohol. The judge found no evidence of positive contribution to society during that period of his life.
33. At [34] the judge accepted that he had spent his formative years and most of his life in the United Kingdom having left Lithuania at the age of 10. The judge accepted that whilst he could speak some Lithuanian, he had trouble understanding it. The judge rejected the suggestion in the decision letter that he could make contact with his father which he stated was not "viable or sensible" given that had not seen his father since he left, that his father was drunk and was violent and that the vast majority of his family were in United Kingdom.
34. Therefore as to integration, the judge concluded that whilst there was some evidence of integration (length of residence, some education, family members, language ability), it was limited and not particularly positive therefore the weight attached of integration was "also limited".
35. Having set out his concerns in the preceding paragraphs, at paragraphs 36- 51 the FtTJ then went on to consider the positive evidence in favour of the appellant. At [36] he found that there was "much more force in the submission of Mr Craggs that the appellant is a changed man". The FtTJ found that the appellant was a most frank witness who was polite and respectful and that he did not seek to excuse his behaviour in anyway. Whilst mindful of the need for caution when hearing from appellant facing deportation, he did appear to the judge to be "genuinely contrite". The judge recorded his assessment that whilst he appeared to be naïve at times, he did not avoid telling unhelpful truths, such as how he left his employment, which is something he did not need to say and that it provided "additional credibility" for what the judge described as a "remarkably honest and impressive performance in evidence."

36. At [37] the FTT J stated that “more significantly”, he had considered the comments and commendations from those who had been in contact with the appellant whilst he was in custody. The judge then recorded the positive reports that were before the tribunal. They consisted of positive reports from his education tutors, speaking of him progressing well with a positive attitude and being polite and respectful. A report described by the judge as “what I consider to be a most impressive commendation, speaking of seeing at first hand positive change” and the appellant being a pleasure to teach with him “growing from strength to strength” and going to “great lengths to rehabilitate and adopt a new outlook of life.” Further reports described him as “a big change in him as he’s become more open” and that he is “always lighten respectful”. In the author’s opinion it was said “he’s generally sorry that his behaviour got the point it did and is really looking forward to making something of his life.”. The report spoke of him “growing in maturity and showing true remorse for his past behaviour”. Other reports spoke of him to be a good worker and maintaining a positive attitude and the prison officer in the report related to his attitude and behaviour of being a “really good standard and that he comes across in a good manner.”
37. At [38] the judge also referred to the documentation which supported his achievements was in custody including certificates in English, construction, IT as well as alcohol awareness, thinking skills and employability.
38. At [39] the judge referred to his assessment of the evidence from the probation service and is present officer (dated May 2019) who described the appellant as “one of the most pleasant and polite young men that I have on my caseload”. He was described as working on completing an offending behaviour accredited course which he did to a high standard and with much praise of the course leaders. She was of the view that upon release he would likely be MAPPA level I or two (not considering it likely would be higher). She described him as well-behaved, having earned privileges and having interacted well with the staff. She indicated that whilst he had five adjudications, none of them were “particular concerning” and had none since August 2018.
39. The analysis of that evidence is given at [40]. The judge stated that the evidence of good behaviour and efforts of rehabilitation did not appear to him to be “someone who was recently, post-adverse decision (which was not made until June 2019), made an attempt to ingratiate himself with staff for “show”. I am satisfied, both from the evidence he gave, which was supported by the professional view of others, that his commitment to change is genuine. There is no suggestion that his behaviour has anyway regressed since his commendations were written.”
40. As to the issue of rehabilitation, he recorded that the appellant had said that he considered he was now rehabilitated. The judge found that he had “certainly undergone various courses and his present position is positive” and that “I accept that he does genuinely believe he is changed and is reformed.”

41. The judge returned to the appellants offending and that whilst his youth offending (prior to the index offences) was “troubling”, it was “sadly not out of the ordinary in respect of many young people.” The judge went on to state “I am extremely mindful of his young age when committing these offences and that such type of offending is more frequently seen with young people, some of whom do go on to abandon such behaviour in later life.” In his judgement, he considered that “this is an important factor when considering the evidence that the appellant is changing behaviour and become more mature.”
42. The judge considered the evidence advanced by the respondent which was the assessment of the appellant as a medium risk of reoffending and of being a high risk to the public should he do so, but found that this OASY’s assessment had been completed in April 2018 and therefore needed to be considered in the context of the more recent evidence from the probation officer. He also took into account that when dealing with the index offences the sentencing judge did not consider that he should be sentenced within the “dangerousness provisions and that there was no indication that he is a “fire setter” or that he has a propensity towards such offending.
43. As to his mental health, whilst he did not have the psychiatric report prepared for the sentencing hearing, there had been no evidence of psychiatric or psychological issues in the sentencing remarks. He was identified upon arrival to custody as having mental health issues. The judge accepted the appellant’s evidence that they arose from bullying from when he was younger and that he had a violent father in Lithuania and that his mother and been the subject of domestic violence. The judge referred to the more up-to-date evidence from July 2019 which spoke of the appellant continuing to engage with the mental health team and having undergone DBT, CPT, counselling and being prescribed medication. It also spoke of abstaining from drugs and maturing into a very pleasant and decent man during his time in custody. His mental health problems were stable.
44. The judge also considered that his offence relating to arson occurred whilst he was under the influence of drink and drugs and that his drugs offending was motivated by his own addiction. As to the addiction issues, he had address this with the assistance of the DART team (alcohol and drugs) and was referred to as being motivated to his continuing abstention. In the light of that evidence, the judge concluded at [46] that it was “significant that he has now cooperated with mental health services, his mental health issues have been recognised and are being addressed, something which does not seem to have been done from the evidence prior to his incarceration. This is to his credit which also goes towards the issue of whether, having, now had treatment in recognising and accepting help in this regard, he is likely to relapse into criminal. Similarly, his willingness to address his addiction issues also goes to risk of relapse (at [46]).
45. At paragraphs [47 - 51] the judge recorded his overall conclusions. He was satisfied that having considered all the evidence in the round the appellant shown that he had the benefit of being covered by the EEA regulations. He set out at [48] that the case presented a “difficult balancing exercise” in which it highlighted the matters that

gave him cause of concern when assessing risk. He observed that the appellant had asked the second chance but that he had been given several second chances but not taken them and therefore could not say that “there was no risk in this case”. However, having taken into account that he was a child young person at the time of the majority of his offending, his recent incarceration been his first taste of custody, and was approaching his evidence with caution and mindful of his commitment that it had not been tested in the real world, the judge was satisfied that he had done what he could to make use of his positive time in custody and tried to demonstrate a desire to change. The judge stated “I am satisfied that his commitment to change is genuine. I am satisfied that, in the context of this particular young man, with the various issues he clearly had when first detained, he has made impressive steps to what I find is his goal. Having considered all the circumstances in the case, notwithstanding the issues that are undoubtedly troubling, I am not satisfied that the risk of reoffending is properly categorised as serious. Given this finding and bearing in mind the lack of connection the appellant had Lithuanian, amongst the other matter set out above, I consider his deportation would be a disproportionate interference with his rights as an EEA national. In all circumstances, I am not satisfied that the respondent has established that the appellant represents a genuine, present and sufficiently serious threat to public policy or security such that his deportation order is justified. Consequently, it follows that the appeal must succeed.”

The appeal:

46. Before the Upper Tribunal, the Secretary of State was represented by Ms Petterson and the appellant represented by Mr Craggs, who represented him before the FtTJ. Ms Petterson relied upon the grounds as drafted. In addition, she made the following submissions:
1. the FtTJ conflated the test under regulation 27 (5) (c) and 27(3).
 2. That when analysing the decision of the judge there were several areas of concern. At paragraph 37 the judge referred to the positive reports from March – April 2018 and an email dated May 2019 from the probation service at paragraph 39. However, she submitted, the judge did not engage with the OASys’s risk assessment and failed to analyse how the risk had declined and that he needed to give particularly strong reasons as to why the email should weigh against the OASY’s assessment.
 3. She submitted that whilst the judge had found the appeal to be one that was “finely balanced”, he had made findings as to the lack of support from family, his girlfriend and employment prospects as set out at paragraph 29. Whilst the judge had said at paragraph 36 he was cautious of accepting the appellant’s evidence that he was not the same person as he was when he was convicted, the judge did not exercise caution and did not deal with the risk of reoffending.
 4. She submitted that the good behaviour that had been demonstrated was in a custodial setting under controlled conditions and that this did not diminish the risk. She submitted that the judge failed to consider risk outside of prison and whilst at paragraph 49 the judge was satisfied that the appellant had used his

time in custody well, the issue related to being in the community where he has no meaningful relationships and which is untested. There had been no meaningful assessment of this beyond the email.

5. She therefore submitted the decision to be set aside as the FtTJ had erred in his assessment of risk given that he was in a controlled environment and that a true assessment of risk had not been undertaken.
47. Mr Craggs on behalf of the appellant had provided a comprehensive skeleton argument which he invited the court to take it into account as the Rule 24 response.
48. As to the grounds generally, he submitted that it was only the first ground of appeal that really reflected a challenge on a point of law and that the remaining grounds related to matters of fact and arguments against the judge's findings which were matters on which the judge was required to and did adjudicate, and which did not contain factual errors and therefore did not constitute errors of law. In the alternative the grounds had been answered in the skeleton argument.
49. He submitted that the judge properly analysed the issue of degree of risk in the light of the evidence including the work that he had undertaken and on the up-to-date material and evidence. He addressed each of the regulations separately and undertook an in-depth analysis of the issues. He submitted that the grounds of appeal were focused on factual matters raised but that it was clear from the judge's decision that he had carried out an extensive analysis of the factual circumstances and it could not be said that he had failed to take into account any relevant issue relating to assessment of risk.
50. As to risk assessment, the OASY's report was dated April 2018 which was 18 months prior to the decision of the FtTJ and did not take into account his first year in prison and the judge had evidence before him from the appellant stating that he had spent that period of time processing and changing in an effort to address his behaviour. It was therefore not the position that the judge had failed to take account of the OASY's report as set out at paragraph 43. The grounds did not refer to the OASY's report as being 18 months old and was therefore a bare assertion that this was the most cogent evidence.
51. He submitted that the judge did explore the work done in custody and addressed this fully in his judgement. It had been a balancing act and the judge had come to a decision on the specific facts of this case. The judge was satisfied on the evidence that the appellant had carried out sufficient work of a rehabilitative measure to make any risk to the public to be an acceptable one. It was therefore open to the FtTJ on the evidence that he found as set out in his findings of fact to allow the appeal.
52. Mr Craggs submitted that there had been substantial evidence about the absence of links to Lithuanian having left at the age of 10 and that is only relative was a violent and alcoholic father and this was a factor of relevance and that there was non-existent integration compared to the United Kingdom and that he was more likely to be rehabilitated if he remained.

53. As to the major risk of concern, Mr Craggs submitted that this was identified as the use of drugs and alcohol in the OASys's assessment but that the judge accepted that he had engaged with the DART team and this was addressed both in the documentary evidence and in the oral evidence. The judge referred to this at paragraph 45 in the context of being motivated to continuing his abstention. This was also the oral evidence before the judge. The documentary evidence was at page 136 which was a certificate of achievement dated April 2019 relating to relapse prevention and there had been a comprehensive assessment made as to his problems on 6 September 2017 (p149-150).
54. It was submitted that the FtTJ had sufficient evidence before him, both the documentary evidence as to work undertaken but also in the light of the oral evidence which the judge accepted as genuine and honest. He was therefore entitled to consider the date of the OASys' report in the light of the other evidence and the oral evidence upon which he had been cross-examined and was therefore in a position to conduct an analysis of his rehabilitative steps taken whilst in custody. Thus the risk assessment made by the judge was in-depth, it identified the negative issues and he conducted an effective balancing exercise between the positive work undertaken whilst in custody, matters of rehabilitation, lack of links and relatives in Lithuanian, his admissions and motivation to address the issues raised.
55. When looking at the appellant's past behaviour it was influenced through drug and alcohol use at a young age but that it was a major element of the case that the judge had found on the current evidence he was drug and alcohol free and thus had been making significant progress in addressing this issue.
56. In terms of the more recent evidence, the probation officer who had written the email was his offending supervisor and the judge was entitled to take that evidence into account. He therefore submitted that there was no error of law disclosed in the approach taken by the First-tier Tribunal judge.
57. There was no reply to those submissions in behalf of the respondent. At the conclusion of the hearing I reserved my decision which I now give.

Discussion:

59. I am grateful for the submissions made by each of the advocates. I confirm that I have taken them into account and have done so in the light of the decision of the FtTJ and the material that was before him.
60. The grounds relied upon by the Secretary of State set out under the heading "failing to give adequate reasons on material matters/material misdirection." Paragraph 1 is the ground where it is asserted the judge made a material misdirection and the remainder of the paragraphs form the basis of a challenge to the adequacy of the reasons given by the FtTJ in reaching his decision.
61. Dealing with the first ground, it is submitted that the FtTJ erred in law by conflating the regulation 27 (5) (c) test with regulation 27 (3) -the first being a "risk of

reoffending “test and the second is concerned with the potential consequences/seriousness of the offence. No further submissions were made in support of this ground.

62. It is not in dispute that the test under regulation 27 (3) relates to the risk of reoffending and the latter to the consequences of the offences in question. The issue was whether the FtTJ did not appreciate that they were different tests. Having considered the decision of the FtTJ, it is not demonstrated that the judge either misunderstood the legal tests that he was bound to apply or made any material misdirection.
63. The EEA regulations provide enhanced levels of protection against removal for EEA nationals who have become integrated in the host Member State as a consequence of living for a sufficiently lengthy period of time in that Member State. The appellant has a permanent right of residence with the result of the test set out in regulation 27 (3) and in regulation 27 (5) have to be satisfied if the Secretary of State’s decision to deport the appellant is to be upheld. The FtTJ properly directed himself to the applicable law at paragraph [9] where he identified that the question that he had to determine was whether there was serious grounds of public security or public policy which justified the decision to deport the appellant. He went on to state that this was an “evaluative exercise” which was “based on the individual examination of his specific case.”
64. The FtTJ also set out at paragraph [11] that it had been agreed between both parties that he should consider the “effect on society of the appellant’s continued presence in the UK by reference to any present threat and secondly, the proportionality of the interference with the appellant’s rights under the EEA regulations my deportation in the context of any such threat”.
65. In my view those self directions were consistent with the case law he cited at paragraph [9] and whilst those authorities addressed the previous regulations, it is not been argued on behalf of the respondent that the general principles set out in those cases were not of any relevance. In Arranz (EEA regulations - deportation -test) [2017] UKUT 294 the Upper Tribunal held that the burden of proof lay on the SSHD to prove that a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. That the burden of proof lies on the SSHD has recently been accepted by the Inner House of the Court of Session in SA v SSHD [2018] CSIH 28. The person concerned must also be a present threat, Orphanopoulos and Oliveri v Verwaltungsgericht Stuttgart, [2004] ECR 1999 and previous convictions are relevant:

"Only insofar as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy".

It is also relevant to note that in the Secretary of State for the Home Department and Straszewski [2015] EWCA Civ 1245 Moore-Bick LJ at paragraph 13 confirmed that exceptions to the permanent right of residence based on public policy are construed

restrictively and that public revulsion is not generally relevant to decisions to deport under EU law.

66. In Goralczyk [2018] CSIH 60 at paragraph 22:

"22. Moore-Bick LJ's expectation that there should be stringent restrictions on a Member State's ability to remove an EEA national, including a 'foreign criminal', who has acquired the right to reside in the United Kingdom is borne out by the terms of the 2006 Regulations. In particular, a decision to deport an EEA national with a permanent right of residence may not be taken except on serious grounds of public policy or public security: regulation 21(3). Regard has to be had to the word 'serious', a point made by Mr Caskie when explaining the effect of the 2006 Regulations as being to establish three levels of rights and consequent degrees of protection against removal. A decision to remove a person who has resided in the United Kingdom for less than five years may be taken 'on grounds of public policy' but a decision to remove a person who has resided in the United Kingdom for more than five years cannot be taken 'except on serious grounds of public policy'. It follows that 'serious grounds' of public policy must mean something different from "grounds" of public policy, and it follows from that that the decision-maker must identify just what the relevant grounds are and then evaluate them as to their seriousness. Moreover, a relevant decision must be taken in accordance with the principles set out in regulation 21(5). Finally, in terms of regulation 21(6), before taking such a decision the decision-maker must take into account considerations such as the age, state of health, family and economic situation of the person, his length of residence in the United Kingdom and the extent of his links with his country of origin".

67. In his decision, the FTT J was plainly aware that the decision to deport the appellant may not be taken except on serious grounds of public policy or security and that as a consequence he was to identify those relevant factors and evaluate them as to their seriousness. He properly analysed the offences in detail at paragraph 14 – 21 of his decision.

68. Whilst observing that a person's previous convictions do not in themselves justify the decision to deport, he went on to state that "it is necessary to consider these matters when considering the wider tests to be applied" (at [14]).

69. In carrying out his assessment, in my judgement the FtTJ properly had regard to the offences themselves and undertook an analysis of them in some detail as set out at paragraphs 14 – 21. In that analysis he referred to the index offence by reference to the sentencing remarks, the circumstances of the offence themselves and the appellant's own conduct and circumstances (at [15] – [17]). His assessment was that the offences were very serious and at [18] went on to set out why he considered that to be the case. At [19] the FTT J considered the fundamental interests of society, which he stated included maintaining public order, protecting the public and rights and freedom of others, preventing crime, preventing antisocial behaviour and

persistent crime and preventing social harm where offending leads to wider societal harm and against that background made an assessment of the seriousness and the consequences of such offending.

70. It is also right to observe that the FtTJ expressly took into account that any reoffending by the appellant would present a threat affecting one or more of those fundamental interests of society which he then went on to address during his judgement stating “the risk of him reoffending, particularly in relation to offences of this nature and/or seriousness, is therefore a matter of fundamental importance in my consideration of this matter” (at 20)). This not only included the index offences but also the earlier offences committed as a juvenile.
71. Against that background, the FtTJ’s self-directions and his analysis of the issues he was required to consider do not demonstrate in my view any conflation of the tests he was required to apply. I do not find the ground one is made out.
72. Turning to the remaining grounds, at paragraph 3 it is submitted that the FtTJ identified real concerns as to the appellant’s likelihood of reoffending at paragraph 20 - 28 but erred in law by failing to engage with them and finding that the appellant’s commitment to change addressed them. The grounds go on to say, “it is respectfully submitted that it does not and that these concerns remain outstanding”. At paragraph 8, the grounds also assert that it was too soon to find that the appellant was a changed character and at paragraph 7 it is asserted that the FtTJ erred in law in minimising his earlier offending by stating that he was a youth (by reference to paragraph 21 and 24).
73. Insofar as those grounds could be read as challenging the judge’s assessment of risk, the FtTJ’s consideration of the factors relevant to the risk of reoffending demonstrate that he undertook a careful assessment of all the relevant issues. Between paragraphs [21 - 28], the FtTJ undertook an analysis of the issues which plainly counted against the appellant. As summarised in the earlier part of this decision those findings related to his previous convictions and that in the appellant’s case the court had imposed interventions to assist him by way of non-custodial sentences, but none had been successful.
74. Whilst paragraph 7 of the grounds referred to the FtTJ minimising the appellant’s early offending by reference to his age, this is a criticism which is not justified. On a careful reading of the decision the FtTJ’s analysis took into account his age but this should be read alongside the other negative features such as his previous failure to engage with non-custodial sentences offered to him as set out at paragraph 21 but also in the light of the reasoning at [42]. The FtTJ also identified at paragraphs 22 - 25 that in the light of his assessment of the evidence of the appellant he would not receive much by way of family support and also attach little weight to the help his family could provide in obtaining employment.
75. Having identified the matters that counted against the appellant, he turned to the other relevant factors relating to the issue of risk. Those were the ones identified in

the OASY's report relating to his ability to change, his motivation, the work undertaken to bring about the change necessary and the success of the intervention and the work undertaken to address his drug and alcohol dependency which had formed the backdrop to his offending and level of cooperation demonstrated.

76. The FtTJ at [48] observed that the case presented a "difficult balancing exercise" which was supported by the analysis that was undertaken. This does not mean, as the grounds assert, that he failed to address those, the FtTJ did. He reached the conclusion that notwithstanding the negative features identified, they were outweighed by the positive factors. It is plain that the judge attached significant weight to the appellant's evidence and the FtTJ had the advantage of hearing the appellant give evidence and for that to be the subject of cross-examination and therefore was in the position to make an assessment of the appellant's evidence when seen in context. I do not accept the submission made by Miss Petterson that the FtTJ failed to exercise caution in accepting his evidence. In fact, the FtTJ was very alive to the fact that he was required to exercise caution in accepting evidence from someone in the position of the appellant who was facing deportation (see [36]). However, it was open to the FtTJ to place weight upon the appellant's evidence. He gave reasons as to why he found him to be "genuinely contrite" and also set out the appellant had proffered evidence which was adverse to him which in the judge's view provided additional credibility to what he described as a "remarkably honest and impressive performance in evidence". In my view, the FtTJ was entitled to place this evidence alongside the more independent and potentially corroborative evidence from the prison staff, the probation officer and the courses undertaken.
77. As to paragraph 4 of the grounds it asserts that it is a "contradiction" in the FtTJ's findings concerning the appellant as a "reformed character". The grounds point out that at [21] the FtTJ referred to the previous convictions going towards the level of entrenchment of his poor behaviour and that the appeal had been allowed based on his believed changed character. I accept the submission made by Mr Craggs that when the decision is read as a whole there is no contradiction the judge's analysis. At [21] the FtTJ considered the early convictions as a juvenile and that this went "towards" the level of entrenchment behaviour. It was open to the judge to assess his recent behaviour and conduct in the light of that and to consider that he demonstrated positive change which was supported by the other evidence. The FtTJ did not make a finding that the appellant had as a matter-of-fact entrenched behaviour but that the previous conduct was relevant in assessing the present risk.
78. The submissions made on behalf of the respondent as set out in the grounds as drafted and not clearly set out. By way of example, at paragraph 5, there is reference to the FtTJ erring in law by not putting weight on the negative aspects of the probation officers report which had referred to 5 adjudications. Paragraph 5 does not properly identify how the FtTJ made an error of law and fails to properly explain or particularise that submission. Ms Petterson, in her oral submissions put those paragraphs in the context of her submission that the FtTJ failed to properly consider the OASY's report in his analysis of risk. However, the FtTJ was plainly aware of the contents of the OASY's report and at [43] expressly referred to the

conclusions reached in April 2018 as to the medium risk of reoffending and a high risk to the public if he did so. He was equally aware and taken account of the extent of the appellant's criminality. In the FtTJ's analysis considered that risk assessment in the context of when it was made (April 2018) and in the light of the more recent evidence relevant to risk, which included the evidence of his current probation officer given in May 2019. The effect of the FtTJ's reasoning was that he departed from the assessment of the probation officer in the OASY's report for the reasons set out at paragraphs [43-44].

79. The courts have recognised that an OASys Report is a document compiled by a trained Probation Officer and cannot be lightly dismissed (see AM v SSHD [2012] EWCA Civ 163 and the decision of the Upper Tribunal in Secretary of State for the Home Department v Vasconcelos [2013] UKUT 06378). However, it is open to the Tribunal to depart from the findings of such a report if there is evidence upon which to do so and reasons are given. The FtTJ did give reasons for doing so and the weight to be attached to that assessment was a matter for the judge. It was open the judge to place weight on the more recent documentary evidence of probation officer and based on the more recent evidence set out in the courses undertaken which were relevant to addressing the risks identified. He was also entitled to reach the view that the hearing before him had taken place 17 months after the date of the OASY's report. Contrary to the grounds, the FtTJ did take into account the evidence of the adjudications but was entitled to place weight on the evidence of probation officer that they were not "particularly concerning. On the face of it did demonstrate misbehaviour but the judge was also entitled to take into account that the latest incident was said to have taken place in August 2018 and since that time the appellant had engaged in successful work that was relevant to minimising the risks to an acceptable level as identified.
80. As Mr Craggs submitted, the judge found as a fact that the appellant had spent the first year in prison reflecting and processing what occurred and had embarked on rehabilitative work. The FtTJ therefore properly considered the context of the report but did so in the context of the more recent evidence of the probation officer and those who had worked with the appellant. It does not appear that this evidence was the subject of challenge.
81. The submission made at paragraph 8 is that it was too soon to find the appellant was a changed man is not a submission that is properly characterised as "an error of law". This is simply a disagreement with the finding of fact reached by the judge which was open to him. Ms Petterson put the submission on a different footing and on the basis that the appellant was in custody and therefore there was no evidence as to how we would behave in the "real world". Of course, someone in the position of the appellant in custody would not have the opportunity to demonstrate any conduct either positive or negative in the community. However, the decision to deport the appellant was made by the respondent and in consequence of that decision, the FtTJ was required to carry out an assessment based on the evidence as it was at the date of the hearing. This is what the FtTJ did concluding that whilst he had not been released, he had demonstrated sufficient work relating to his previous offending and

that the assessment of risk which demonstrated clear evidence of change and motivation and desire to change therefore minimised the identified risks to an acceptable level. In his skeleton argument Mr Craggs drew a comparison between the instant case and matters heard by the parole board, where offending behaviour work is a highly influential factor in awarding a progressive move and that its importance cannot be overstated and that successful completion of such work is a major indicator that an individual is less likely to reoffend if released. That seems to me to be useful comparison.

82. There is no error as asserted in paragraph 11 of the grounds. The FtTJ plainly acknowledged that the appellant's past conduct was a factor in the assessment of future risk and this was set out as a negative factor that was placed in the balance.
83. Paragraph 9 of the grounds also does not demonstrate any error of law. The FtTJ accurately set out the nature of the drugs offences and the FtTJ took into account the significant impact of such offences on the wider public (see [18]).
84. In summary, the public policy grounds for removal are an exception to the fundamental principles of the free exercise of EU rights and as such an EU citizen should not be expelled as a deterrent to others without the personal conduct of the person concerned giving rise to consider that he will commit other offences that are against the public policy of the state. Furthermore, it is accepted and acknowledged by both advocates that the appellant's deportation could not be justified simply on the basis of his previous criminal conviction, even of such a serious nature as the offences carried out by this appellant and the imposition of the lengthy sentence he received. This is because the legal regime for deporting EU criminals is different and can properly be described as more restrictive than that for foreign national criminals under the UK Borders Act 2007. It must be established that the Appellant represents "a genuine, present or sufficiently serious threat affecting one of the fundamental interests of society". In this context the FtTJ properly considered the future risk of reoffending and did so in the light of all the evidence before him. As the deportation decision cannot be founded upon a previous history of offending alone, and as the decision must be based exclusively on the personal conduct of the person concerned, so that deterrence of others plays no part, for this appellant to represent a genuine, present and sufficiently serious threat to public policy, there must be a real and sufficiently serious threat that he would re-offend.
85. As set out in the decision of SSHID v Straszewski [2015] EWCA Civ 1245 at paragraph [25], it required an evaluation to be made of the likelihood that a person concerned would offend again and the consequences if he did so. In addition, the need for the conduct of the person concerned to represent a "sufficiently serious" threat to one of the fundamental interests of society required the decision maker to balance the risk of future harm against the need to give effect to the right of free movement. This was the evaluation carried out by the FtTJ.
86. I remind myself I can only interfere with the decision of a judge if it has been demonstrated that there was an error of law and in this case, the judge had the

opportunity to hear the oral evidence of the Appellant and for this to be the subject of cross-examination.

87. As set out in the well-known case of Piglowska v Piglowski [1999] UKHL 27, Lord Hoffmann said this:

“...the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. ...”

Then there is a quotation from his own decision in Biogen Inc v Medeva Ltd [1997]

“The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.”

88. As stated in the decision of Straszewski, in any given case an evaluative exercise of this kind may admit of more than one answer. If so, provided all the appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in a sense of falling outside the range of permissible decisions. It has not been advanced on behalf of the Secretary of State that the decision of the judge or his findings of fact were either irrational or perverse and in light of the foregoing, the judge properly considered the appropriate factors and made findings of fact based on the evidence before him.
89. Even if the conduct did represent a genuine and present in sufficiently serious threat affecting one of the fundamental interests of society, before taking a relevant decision the decision-maker must on to take into account the other relevant characteristics including age, length of residence social and cultural integration in the UK, extent of links with the country of origin therefore to consider whether it is proportionate to proceed with removal in all the circumstances and whether it is the least onerous method of achieving a legitimate aim (and see the matters set out in Schedule 1). Specifically, the Tribunal must consider the relative prospects of rehabilitation, that is ceasing to commit crime when considering whether an offender should be deported (see SSHHD v Dumliauskas and Others [2015] EWCA Civ 145. The FtTJ concluded in the alternative that he was not satisfied that his deportation was justified or proportionate based on the factors he had identified on the appellant's side of the balance which included his length of residence in the United Kingdom, the lack of connection that he had with Lithuanian, his commitment to change, the evidence concerning the steps taken towards rehabilitation and the impressive evidence that he had given as to his reform. Those were findings that were open to him to make on the evidence that was before him.

90. The judge indicated that he found the appeal before presented a “difficult balancing exercise” (at [48]) and within his decision set out clearly the factors that weighed against and for the appellant when making his overall assessment. It is plain from reading the determination that he found the Appellant’s oral evidence to be both credible and persuasive and along with the documents that had been produced concerning his efforts to reform, reached a decision that was open to him on the evidence. It may well be that this was not the only outcome possible on the facts in this particular appeal but this judge directed himself correctly in law and that his conclusion, even if properly characterised as one that might be thought to be a generous one, does not disclose any legal error.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal to allow the appeal stands.

Signed

Dated: 21/1/20

Upper Tribunal Judge Reeds