



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: DA/00587/2018

**THE IMMIGRATION ACTS**

**On the papers on 3 July 2020**

**Decision & Reasons Promulgated  
On 22<sup>nd</sup> July 2020**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**DK**

(Anonymity direction made)

Respondent

**ERROR OF LAW FINDING AND REASONS**

1. On 20 November 2019 First-tier Tribunal Judge Myers ('the Judge') allowed the appeal of DK under the Immigration (European Economic Area) Regulations 2016 against the order for his deportation from the United Kingdom.
2. DK is a citizen of Lithuania born on 1 October 1986 who entered the UK in 2013.
3. DK is the subject of an order of his deportation from the United Kingdom as a result of his criminality.

**Background**

4. The Judge considered the documentary and oral evidence relied upon by DK before setting out findings of fact from [24] of the decision under challenge.
5. The Judge records that it was conceded on DK's behalf that he could not show that he has a permanent right of residence in the UK meaning he is only entitled to the lowest level of protection. That finding has not been challenged.
6. The Judge records at [26] that DK's last conviction for a violent offence was over two years ago and that both offences for which he was convicted occurred in relation to incidents with his partner J. The Judge found it significant that following each incident the couple reconciled and were said to remain in a supportive relationship.
7. The Judge finds the fact DK lied to Social Services and his repeated contravention of an unpaid work requirement order did not reflect well upon him and that his behaviour in that respect has been persistent.
8. The Judge's core findings are set out at [36 - 40] in the following terms:

36. In my judgement, taking into account the various protective factors in this case, the passage of time since the last offence of violence, and its relative gravity, I find that the Respondent has not shown that the Appellant has a propensity to reoffend. Consequently, I do not find that he presents a genuine present and sufficiently serious threat to one of the fundamental interests of society.

37. Even if he did present such a threat the decision to deport the Appellant would have to be proportionate. This is assessed by reference to the facts set out in regulation 27(6).

38. In the Appellant's case he claims that he has not resided in Lithuania since 2013. He still has family living there but for the reasons given above I find that his return to Lithuania would mean that he would no longer be able to continue his family life with his partner and children by means of face-to-face contact.

39. Having regard to the public interest considerations of section 117B-117C of the Nationality, Immigration and Asylum Act 2002, the Appellant has not received a custodial sentence of sufficient length to engage the foreign offender provisions, nor is there evidence that his offending has caused serious harm or that he could be reasonably considered as a persistent offender. In my judgement his deportation would amount to a disproportionate interference with his right to family life.

40. For these reasons I find that the Appellant does not present a genuine present and sufficiently serious threats to one of the fundamental interests of society and that his deportation is not necessary or proportionate under the EEA regulations and I allowed the appeal.

9. The Secretary of State sought permission to appeal which was granted on a renewed application, the operative part of the grant being in the following terms:

It is arguable that the First-tier Tribunal Judge erred in her assessment of future risk as is averred in ground 1 and points 2 and 3, in that there was likely to be a change of circumstances arising from the evidence that the

appellant and his partner intended to resume cohabitation which had been the situation in which the criminality had arisen. There appears also to have been little attention paid to how “serious harm” is defined in the OASys Manual.

While there is less merit in some of the other grounds, I am nevertheless persuaded that all grounds are arguable, albeit that the error pleaded in ground 2 may not be material.

10. Standard directions were given by the Upper Tribunal and the appeal listed for hearing on 10 March 2020 to enable it to be established whether the Judge had erred in law and whether any errors found were material to the decision to allow the appeal. That hearing was vacated at the request of DK’s representatives who were also granted an extension of time to enable them to file a Rule 24 response, to 9 April 2020. The appeal was relisted for 23 April 2020. That hearing was vacated as a result of the Covid-19 pandemic and directions sent to the parties by email on 29 April 2020 indicating a preliminary view that the error of law issue could be determined without a hearing and inviting the parties to make submissions upon this point within specified time limits.
11. On 26 May 2020, an email was received by the Upper Tribunal from DK’s solicitors confirming that they are no longer instructed by him and asking for their details to be removed from the Tribunal record.
12. Further submissions have been received from the Secretary of State’s representative dated 18 May 2020 maintaining the challenge to the decision and indicating that if an error in law is found it is appropriate for the appeal to be remitted to the First-tier Tribunal.
13. Further communication has been received from DK in the form of an email sent by his partner J confirming a change of his address to that of his partner’s property, indicating that DK and J have recommenced cohabitation, but not making any observation or comment upon the directions.
14. The Overriding Objective is contained in the Upper Tribunal Procedure Rules. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.
15. Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally.
16. Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides:
  - 34.—
  - (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.

- (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
  - (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.(4)Paragraph (3) does not affect the power of the Upper Tribunal to—
    - (a) strike out a party’s case, pursuant to rule 8(1)(b) or 8(2);
    - (b) consent to withdrawal, pursuant to rule 17;
    - (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or
    - (d) make a consent order disposing of proceedings, pursuant to rule 39,without a hearing.
17. The only party to have expressed a view is the Secretary of State. The letter from Wilsons advising they are no longer instructed does not say that have been unable to contact DK or have not informed him of the directions which were sent on 29 April 2020, a month before Wilsons came of the record. Although DK may from 27 May 2020 be a litigant in person it has not been made out on the facts or evidence that he could not have let the Tribunal know his view. It has not been shown to be inappropriate or unfair to exercise the discretion provided in Rule 34 by enabling the error of law question to be determined on the papers. There has been no cooperation from DK in relation to the filing of the Rule 24 response either and nothing on the facts or in law that makes consideration of the issues on the papers not in accordance with overriding objectives at this stage.

### **Grounds and submissions**

18. The Secretary of State asserts the Judge’s findings at [36] are unsustainable and that whilst the ‘protective factor course’ is a relevant consideration it cannot be construed as determinative in light of further errors. The author of the grounds raises five points in Ground 1 which can be summarised in the following terms:
- i. The Judge has inadequately reasoned her reliance on the passage of time in light of the fact that for four out of the five years since DK and J first cohabited DK has repeatedly offended resulting in J having to call the police four times due to DK’s behaviour.
  - ii. The Judge’s reference to violence and its relative gravity fails to take into account not only the lower threshold under regulation 27 but also the Judge inconsistently recognising at [32] that DK’s risk of harm is assessed as medium to known children and adults. Although this could transgress to the potential to cause serious harm it would only do so if there was a change in circumstances such as further relation breakdown. The grounds assert the Judge fails to give adequate reasons for effectively finding the relationship would not break down hence there being

no risk of reoffending. The grounds assert the Judge has failed to properly take into account not only the history of violent/threatening behaviour during the relationship but also its repeated break-ups. There is also inadequate reasoning in light of the OASys risk assessment tool defining 'serious harm'.

- iii. At [26] the Judge found it significant that following each previous incident the couple reconciled which is said to show the Judge evidently recognises the risk of repeat domestic violence even if the couple only cohabit, yet fails to make any findings at all as to the possibility of DK and J resuming cohabitation which is said to be highly material in light of their stated intention that they will cohabit in the future. It is asserted the Judge failed to consider the possibility of resumed cohabitation in the context of the relationship chronology. It is asserted the Judge's comments regarding reconciliation are not properly explained in view of DK's repeat offending and police and social services intervention following previous reconciliations.
  - iv. The Judge fails to consider or make findings in respect of an inconsistency in the evidence in which it is claimed the only incident of domestic violence was in 2015 yet DW was convicted of battery against J for a second time in 2017.
  - v. The Judge finds social services were not supporting the relationship with the parents because they were of the opinion that the children would not be safe due to further incidents of Domestic Violence since the child protection plan ended in 2016 yet rejected this evidence and allegedly irrationally accepts statement by an independent social worker that there had been some confusion on the part of social services that DK had been arrested and imprisoned in July 2018 for domestic violence, failing to take into account that DK was convicted after the protection plan ended in 2016, and gives inadequate reasons as to why the independent social worker's comments undermine certain concerns of Social Services in respect of child safety.
19. Ground 2 argues a misdirection of law/inconsistent findings of fact/inadequate reasons, asserting the Judge's findings in relation to proportionality at [37 - 40] are wholly unsustainable as the Judge has conflated Article 8 ECHR with proportionality under the 2016 Regulations. The grounds assert section 117 has no application to an appeal under the 2016 Regulations under the EU Treaties. The only legal test the Judge should have considered was that under the 2016

Regulations. It is also argued that the Judge's findings at [39] that there was no evidence DK could reasonably be considered a persistent offender was unreasoned in light of DK's offending history and the fact the Judge found at [27] that DK's behaviour had been consistent.

### **Error of law**

20. The Judge noted DK's criminal convictions which are summarised in the following terms:

- 28/4/15 Battery against spouse, Community Order.
  - o 30/10/15 Failure to comply with Community Order, additional unpaid work requirement
- 27/7/17 Battery against spouse, Community Order.
  - o 4/1/18 Failure to comply with Community Order, additional unpaid work requirement.
  - o 8/3/18 Failure to comply with Community Order, suspended 12-week sentence.
  - o 2/7/18 Failure to comply with Community Order, 12-week custodial sentence.

21. So far as the chronology of the relationship in which the domestic violence rose is concerned, as set out in the oral evidence of J, the following is disclosed:

- October 2014 DK, J and J's child A begin cohabiting.
- April 2015 J calls the police leading to DK being convicted of Battery, Social Services intervening, and A being put on the child protection register.
  - o DK and J later reconciled with DK moving back into the property.
- February 2017 J calls police again. This led to Social Services involvement again. J signs agreement with Social Services that she will not have DK back.
- April 2017 despite agreement with Social Services DK and J reconciled.
- November/December 2017 DK moves back into property.
- December 2017 J calls police again and Social Services are informed.

- DK and J reconciled again
    - o DK's evidence was that he moved back in with J before July 2018 but lied to Social Services, telling them that he had moved out in February 2017.
  - July 2018 J calls the police again.
  - DK sent to prison but J visits DK in prison with children.
22. The OASys risk assessment tool defines 'serious harm' as 'a risk which is life-threatening and/or traumatic and from which recovery, whether physical or psychological, can be expected to be difficult or incomplete'. There is clearly a consistent pattern of DK and J reconciling but then separating as a result of domestic incidents involving the police and Social Services. The Judge clearly recorded at [34] that she found DK to be in a supportive relationship with J and that they had both expressed their wish to continue their relationship and cohabitation, a statement which has been borne out by the recent confirmation that DK has his changed address to that of the property in which J lives indicating they have once more become reconciled.
23. At [32] the Judge finds:
32. He is not assessed as posing a risk of deliberate physical harm to his children, rather that it would be inadvertent emotional harm for the children be present at any further incidents of domestic abuse. His risk of harm is assessed at medium known children and adults. Although this could translate to the potential to cause serious harm it would only do so if there was a change in circumstances such as further relationship breakdown. However, the offence focused work would hopefully be protective factors against such a risk.
24. The Judge was aware of the content of the OASys report in relation to the offences which at section 1.2 reads:

"DK assaulted his partner on two different days during the month of February 2017, the assault involved him attempting to strangle her, slapping her about the face, pushing her and preventing her from leaving the house. The offences happened when the children were in the house.

When discussing the offence with DK he stated that in the first instance (14 February), he returned home earlier from work to find his partner at home and "dressed up" which he was not expecting. He remembers saying "what's all this nonsense?" DK reports to asking his partner why she was "dressed up", to which she replied it was not his "business". At this point, he reports to his mother-in-law entering the room and agreeing with her daughter. DK appears to struggle to remember how the situation turned physical, saying "it's been a long time", "I don't remember who pushed who".

CPS documents states that "On the 14<sup>th</sup> she describes being at home when he has grabbed her by the neck and 'pressed really hard'. She describes there

being a 'tussle' and she was 'pushed onto the bed'. She again describes him choking her throat and she states that she grabbed his face. She attempted to leave the address, but her path was blocked as he was stood in the doorway. She began shouting 'help' from the windows".

In reference to the offence of 16 February, CPS documents state that his partner described how DK "again grabbed her by the face and chin. He began screaming at her and she slapped him".

25. The Judge also had evidence indicating DK's attempts to minimise his offending and blame others although a change in such an approach as a result of offender focused work is noted. DK's mother in law suggested in her evidence he needed psychological help but there are no specific findings on this aspect of DK's personality or what caused him to behave in such an unacceptable manner and whether such issues have been properly addressed. What causes a person such as DK to commit acts of domestic violence can be complex requiring the Judge to deal with the issue in sufficient depth. The Judge clearly recognises the risk of further violence albeit this is associated with DK resuming cohabitation with J which he clearly stated he intended to do at the hearing and which he now appears to have done, and the strong possibility of serious harm to both J and the children if there are further incidents of domestic violence.
26. The risk of such consequences was clearly recognised by Doncaster Children's Services Trust who became initially involved on 8 April 2015 when safeguarding concerns were raised, albeit that the parents were informed that no further concerns existed in December 2015 resulting in the closure of a Child Protection Plan on 10 February 2016. Doncaster Social Care did however become further involved following DK being arrested on 16 February 2017. It is recorded in the Independent Social worker's Report that J was informed by the allocated social worker that the children will be removed from her care if DK returned to the property.
27. As a result of the incident in February 2017 a 'Contract of Expectations' was drafted and put in place stating that DK should not have contact with J or come to their house, and if he had contact with the children it must be through a third party, until a risk assessment has been conducted. The agreement included a clause requiring J to inform the social worker if she decides to restart her relationship with DK.
28. At [24] of the Independent Social Worker's Report considered by the Judge it is recorded that the maternal grandmother indicated during interview that DK needed psychological help as he used to be very jealous although he was much calmer following his time in detention. There is no indication in the evidence or findings made by the Judge that DK has received such assistance or interventional which may have been required to ensure that personality or other issues that led to previous offences are no longer relevant factors. The evidence before the Judge clearly indicated that they were.
29. The Independent Social Worker refers to the evidence from Doncaster Social Care at page 43 of the report in the following terms:



"I propose to go briefly through the information received from Doncaster Social Care on 28 August 2019. Doncaster Social Care are not currently supporting the relationship of the parents, due to the impact on the children of domestic abuse, they are of the opinion that the children will not be safe. Since the Child Protection Plan ended in 2016 there have been further incidents of domestic abuse, although not for two years. Father has contact to the children at the maternal grandmother's house. The couple abide by Social Care's "Agreement. Contract of Expectations" which does not allow them to see each other and is in place until a further risk assessment takes place (I could not find a copy of this Agreement the 2018). The couple have said they want to be together with the children, have said they wish a rehabilitation plan to take place at a slow pace. The answer from Social Care is that they are not prepared to assess this until DW's position with the Home Office has been clarified. My opinion is that this is not in the best interests of the couple or their children or very fair to them, as if the Home Office decided he should leave it will be too late to carry out an assessment. There appears to be some confusion on the part of Doncaster Social Care that DW was arrested and imprisoned in July 2018 for domestic violence. This was not the case; he was imprisoned after failing to comply with unpaid work requirements.

DW engaged well with probation and has done well from the courses he attended. Although he did not always comply with all the Community Orders, he learnt a lot from his time with probation. I understand that the Social Workers written response is that they have no intention of taking a Public Law Application. From my investigation it seems there has been very little involvement from Social Care in the last two years. Upon talking with both parents they are confused and not clear what future plans are.

The further information obtained from Doncaster Social Care following my assessment meetings does not alter my view that a plan for the couple to be rehabilitated should be put in place, and to return DW to Lithuania would not be in the best interests of the children, as the children need their father in their lives and this will not be the case if he has to leave the country.

30. As noted in the grounds there was clear evidence before the Judge of the real risk of serious harm as a result of DW's conduct. There is merit in the submission the Judge fails to give any reasons why the concerns of Social Services in respect of the child safety issues are not valid concerns especially in light of DW admitting to lying to social services in relation to his contact with the family, which appears to be contrary to the agreement with them, and their position that for the sake of the children rehabilitation should not occur unless there has been a proper assessment and plan of action agreed.
31. Although post hearing evidence, it is not known whether DW returning to live with J now is as a result of Social Services having undertaken such an assessment or whether DW has just taken it upon himself to do so. It is not known whether Social Services, if they have become further involved, were made aware of the fact that permission to appeal has been granted against the Judge's decision. If DW has recommenced cohabitation with J without such work being undertaken and without Social Services approval a credible real risk of future harm may exist.
32. The Judge recognises that DW and J have recommenced cohabitation in the past after the various incidents as many partners involved in

- domestic violence situations do, but that is itself does not, arguably, reduce the risk of offending or DW presenting a genuine and sufficiently serious threat to the fundamental interests of society. As noted in the grounds the chronology clearly shows that DW's repeat offending and the involvement of the police and social services follows periods of reconciliation. Whilst DW may not present a risk to those with whom he is not cohabiting with the evidence before the Judge clearly showed that he can to those in the same situation as J.
33. Ground 1, point 4, refers to [22] of the decision under challenge asserting the Judge failed to consider or make findings in respect of the tension between J's claim there had only been one incident of domestic violence in 2015 whereas DW was convicted of battery on a second occasion in 2017. There is arguable merit in the claim the Judges failure to make findings as to whether the statements were probative of risk or J seeking to hide the truth from the Judge, such as to amount to legal error. This is clearly an element that was considered by the Judge upon which proper finding should have been made, the failure of which amounts to arguable legal error.
34. I find there is arguable merit in the Secretary of State's position, reflected in the grant of permission to appeal by the Upper Tribunal, that the Judge has erred in law for the reasons set out in Ground 1, when assessing whether the appellant presents a genuine present and sufficiently serious threat to one of the fundamental interests of society bearing in mind DW's history and propensity to offend in the past for reasons that do not appear to have been properly explored or sufficient evidence provided to show that no such concerns will arise in the future, particularly in light of the real likelihood on the evidence before the Judge of a change in circumstances such that DW and J intended to resume cohabitation which recreates the situation in which the previous criminality has arisen and risk of serious harm being experienced by both J and the children.
35. Ground 2 concerns the proportionality assessment. I find legal error in relation to the same in light of my findings concerning Ground 1 as a proper assessment of any risk an individual poses has to be undertaken to enable an assessment of whether the person's removal is proportionate. There is merit in the submission that provisions considered by the Judge are not directly relevant to an EEA appeal albeit that if the outcome is the same under either regime any error would not be material. I find in this case however it has been established that the error is material.
36. I set aside the decision of the Judge. DW's immigration history, criminal history, composition of the family unit, involvement of social services and the police, together with DW's failure to establish a permanent right of residence, meaning his only entitled the lower level of protection, are not points in dispute and therefore do not need to be categorised as specific preserved findings. These matters will form the basis for any future consideration of the appeal.
37. It appears, as noted above, that there has been a fundamental change in DW's situation following his apparent reconciliation with J. It may be

that this has arisen as a result of an assessment by Social Services that it is safe for him to do so. If so there will be considerable additional material that was not before the First-tier Tribunal originally on which substantial factual findings may need to be made in addition to those matters upon which findings were not made as identified in the grounds seeking permission to appeal.

38. Having considered the Presidential Guidance on the Remittance of appeals, I consider it appropriate in all the circumstances to remit this appeal to the First-tier Hearing Centre at Bradford for it to be heard afresh by a judge other than Judge Myers.

**Decision**

39. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to the Bradford Hearing Centre to be heard afresh by a judge other than Judge Myers.**

Anonymity.

40. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Upper Tribunal Judge Hanson

Dated the 3 July 2020