



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Ce-File Number: UI-2022-  
002033**  
**First-tier Tribunal No:  
HU/05005/2021**

**THE IMMIGRATION ACTS**

**Heard at Field House IAC  
On the 14 December 2022**

**Decision & Reasons Promulgated  
On the 21 February 2023**

**Before**

**THE HON. MRS JUSTICE THORNTON DBE  
UPPER TRIBUNAL JUDGE KAMARA**

**Between**

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

Appellant

**and**

**DARIUS PAVLIUKOVAS**  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer  
For the Respondent: Mr M Marziano, Senior Associate, Westkin Associates

**DECISION AND REASONS**

## Introduction

- 1.** This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Brewer, promulgated on 4 May 2022.
- 2.** For ease of reference the parties will be referred to as they were before the First-tier Tribunal.
- 3.** Permission to appeal was granted by Upper Tribunal Judge Jackson on 14 August 2022.

## Anonymity

- 4.** No direction has been made previously, and there is no reason for one now.

## Background

- 5.** The appellant is a national of Lithuania. He states that he first entered the United Kingdom during June 2001. He was granted leave to remain from 5 July 2001 until 30 August 2002 and this was extended until 31 August 2003. Thereafter he was granted leave to remain as a student until 31 October 2004. On 1 May 2004, Lithuania became a member of the European Union.
- 6.** The appellant has committed a number of criminal offences. On 3 July 2006 he was convicted of obtaining property by deception, possessing a listed false instrument with intent, and handling stolen goods. On 17 August 2006, he was convicted of driving whilst disqualified and uninsured. He received community punishments for the aforementioned offences. Thereafter, the appellant left the United Kingdom in 2007 to live in Thailand with his former partner. He returned to the United Kingdom in 2016.
- 7.** On 6 September 2019, the appellant was sentenced to five years' imprisonment following his conviction, on 11 July 2019, for conspiring to fraudulently evade the payment of duty.
- 8.** On 16 September 2019, the respondent informed the appellant that he was liable to deportation. That was followed up with a notice of decision to deport letter dated 3 June 2021. In response, the appellant sent representations on 15 June 2021 and 26 July 2021. In those representations, the appellant relied upon his family life with his partner and the child of their relationship, the two children he had with his former partner as well as the private life he had established in the United Kingdom. The appellant raised concerns that his two older children would be subject to racism in Lithuania on account of their mixed Thai-Lithuanian heritage.

- 9.** By way of a letter dated 4 October 2021, the Secretary of State rejected the appellant's representations and decided to make a deportation order. This is the decision under challenge. In that decision, the respondent decided that the appellant had not acquired the right of permanent residence in the United Kingdom and that the Immigration (European Economic Area) Regulations 2016 did not apply to him because there was no evidence that 'immediately prior to 2300 GMT on 31 December 2020' the appellant was lawfully resident in the United Kingdom by virtue of those regulations.
- 10.** Nor did the Secretary of State accept that the appellant was otherwise a relevant person within the meaning of regulation 3 of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020. The respondent accordingly considered the appellant's circumstances with reference to section 32(5) of the UK Borders Act 2007 as well as the exceptions to deportation set out in paragraphs 399 and 399A of the Immigration Rules. In short, the respondent found there to be no very compelling circumstances
- 11.** The deportation order was signed on 4 October 2021.
- 12.** The appellant gave notice of appeal on 15 October 2021

#### The decision of the First-tier Tribunal

- 13.** At the hearing before the First-tier Tribunal, there was no issue as to the credibility of the witnesses nor challenge to the expertise of the author of an independent social work report. The judge found that it would be unduly harsh for the appellant's older non-qualifying children to remain in the United Kingdom if he was deported as well as if they were to accompany the appellant to Lithuania. The judge also took into consideration the impact of the appellant's deportation on his sister who was currently caring for the older children. The First-tier Tribunal concluded there were very compelling circumstances over and above the exceptions which overrode the public interest in requiring the appellant's deportation.

#### The grounds of appeal

- 14.** The grounds of appeal raised one matter, that the judge failed to give adequate reasons on a material matter. In summary, it was argued that the judge's findings were based on an error as the children were not qualifying children; that the judge failed to state how the findings of the independent social worker amounted to unduly harsh circumstances and that she failed to have regard to the established high threshold as set out in the caselaw. In addition, the judge's reasoning had not established that there were very compelling circumstances.
- 15.** Permission to appeal was granted on the following basis.

Whilst the First-tier Tribunal has given clear reasons why the Appellant's deportation would be unduly harsh on his two eldest children (albeit not

qualifying children), it is just arguable that there are inadequate reasons and/or the correct threshold for very exceptional circumstances has not been applied, in particular because the Judge appears in paragraph 80 to find that the findings in relation to undue harshness would alone be sufficient to establish very exceptional circumstances; albeit there is then additional consideration of the impact of deportation on the Appellant's sister.

- 16.** The Rule 24 response included an application for an extension of time. It was contended that the comments in the grounds regarding the unduly harsh test had been dismissed, albeit it was accepted that there was no limit to the grant of permission. In the alternative, the grounds were opposed.

### The hearing

- 17.** At the outset, we granted Mr Marziano an extension of time for filing the Rule 24 response, there being no objection from Mr Clarke.
- 18.** We then heard submissions from both representatives. Mr Clarke relied on his colleague's skeleton argument dated 6 December 2022. In addition, he accepted that the judge had recognised that the children were non-qualifying, but he submitted that it was not open to her to find that the unduly harsh test was met. This was a material error as the consideration of the position of the children should have been restricted to the very compelling circumstances test. Referring to *NA (Pakistan)* [2016] EWCA Civ 662, Mr Clarke accepted that the consideration of Exceptions 1 and 2 could inform the assessment of very compelling circumstances, however the children could not meet the test of undue harshness. The judge found that the very compelling circumstances were established based on the unduly harsh test which did not apply. This meant that the judge's public interest consideration and proportionality assessment was flawed.
- 19.** Mr Marziano relied on his Rule 24 response and described the respondent's arguments as misconceived for suggesting that the unduly harsh test did not apply to children, as opposed to Exception 2. He referred us to *HA (Iraq)*[2022] UKSC 22, arguing that the undue harsh effect on the children was a relevant factor in the overall assessment. The judge had directed herself properly and undertaken a full proportionality assessment, placing great weight on the public interest. The judge had applied the balance sheet approach. At [80], the judge distinguished the facts of this case from the bare case referred to in *Hesham Ali* [2016] UKSC 60 and looked at the impact on the appellant's sister. It was a very balanced assessment which took into account the legal framework. Mr Clarke was invited to respond but had nothing to add.

### Decision on error of law

- 20.** The sole issue argued before us is whether the judge erred in her assessment of very compelling circumstances. In addition, the respondent's skeleton argument is focused on this matter. While the grounds went beyond this issue, the comments of the judge granting

permission indicate that there was no merit in the other matters mentioned in the grounds, albeit the grant of permission was not restricted.

- 21.** At [48] of the decision, the judge records the concession of the appellant's representative that the appellant's older children had pre-settled status and were not qualifying children for the purposes of section 117C(5) of the 2002 Act. At [49], the judge emphasises that the children are not qualifying children for the purposes of Exception 2 and directs herself appropriately that she is entitled to have regard to any features of the case which fall within the exceptions, applying *NA (Pakistan)*. While none of the evidence relied upon by the appellant was challenged by the respondent before the First-tier Tribunal, as accepted in the respondent's skeleton argument, the judge thoroughly assessed that evidence prior to finding that it would be unduly harsh for the children to remain in the United Kingdom without the appellant or accompany him to Lithuania [54-72]
- 22.** The respondent takes issue with what the judge said at [80] of the decision.

*I take into account my findings at [54] to [71] above. On these findings alone, for the reasons already given, I find that very compelling circumstances are established in this case. I place significant weight on the consequences for Minnee and Mario to their emotional, physical and educational development if separated from their father. All these consequences are long lasting and significant and must be viewed through the prism of their childhood experiences to date. Further, I place significant weight on what Minnee and Mario have already experienced during their unstable childhood with absentee parents and conclude that there are very compelling circumstances why they should not re-locate to Lithuania (see reasons at 68-71 above).*

- 23.** The global finding the judge made prior to concluding that there were very compelling circumstances were as follows.

*Therefore, taking into account all of the evidence before me, and having had the benefit of hearing unchallenged oral evidence from the witnesses I do find that the children's relocation to Lithuania would have a significant detrimental emotional impact on Minnee and Mario. In the light of the challenges experienced by them to date, I find that their ability to reach their potential will be significantly adversely impacted if they relocated to Lithuania for the reasons set out in the preceding paragraphs.*

- 24.** The judge did not err in finding that the specific consequences facing the appellant's older children, as set out in a report of an independent social worker as well as the evidence of the witnesses, were unduly harsh to the extent they amounted to compelling circumstances. If we are wrong in this, the judge also took account of the impact on the appellant's sister in reaching her overall finding. She found that if the appellant was deported the sister would, once more, put the children's needs before her own,

which would lead to a further deterioration of her mental health, having to give up her degree studies and having to manage the deterioration in the emotional well-being of the children. The judge also considered the impact on the sister of witnessing the 'significant adverse emotional impact' of the previous separation of the children from their father.

- 25.** We do not accept the respondent's assertion that the judge misdirected herself by finding that the appellant could meet Exception 2 to deportation. On numerous occasions throughout the decision, the judge emphasises that Exception 2 is not available to the appellant owing to the length of his sentence as well as the fact that the children were not qualifying in any event. There is no error in the judge simultaneously finding that the discrete test of undue harshness was met, with reference to *HA (Iraq)* and taking this finding into consideration while carrying out a holistic assessment as to whether there were very compelling circumstances. It would have been an error for the judge to have done otherwise. The respondent's argument, that something more compelling was required than the effect upon the children, is misconceived as it was not only the effect upon the children which informed the judge's conclusion, but also the likely serious impact upon the appellant's sister should the appellant be deported.
- 26.** This was a careful and highly detailed decision. The judge adopted a balance sheet approach, placing considerable weight on the public interest in deportation [48] and [82].
- 27.** The judge obviously understood the high threshold required for the very compelling circumstances test and that this necessitated circumstances going beyond the unduly harsh test. She said as much at [73] and applied this self-direction throughout.
- 28.** Lastly, the judge recognised that the appellant's case involved a 'very finely balanced decision' [82]. We could detect no material error of law in the decision of the First-tier Tribunal.

## **Decision**

**The making of 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 is upheld.**

**No anonymity direction is made.**

Signed: T Kamara

Date: 20 December 2022

Upper Tribunal Judge Kamara

---

### NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A **“working day”** means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is **“sent”** is that appearing on the covering letter or covering email