Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Nottingham Magistrates Court	**Determination Promulgated**
on 17 April 2014	**On 8 May 2014**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EGIDIJUS KAJACKAS

Respondent

Representation:

For the Appellant: Mr Mills, Senior Home Office Presenting Officer
For the Respondent: Mr Adewoye, Prime Solicitors

DETERMINATION AND REASONS

The Appeal

1. For the purposes of this determination I refer to Mr Kajackas as the appellant and to the Secretary of State as the respondent, their positions before the First-tier Tribunal.

2. The appellant is a citizen of Lithuania and was born on 28 May 1968.

3. This is a re-making of the appellant's appeal against the respondent's decision dated 8 April 2013 to deport him to Lithuania under the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations).

4. The error of law decision setting aside the determination of First-tier Tribunal Judge Colyer and Dr J O de Barros is appended and I refer to the reasoning below where relevant.

Background

5. The following matters are common ground. The appellant came to the UK in May 2004 and has remained here since then, other than two short holidays in Lithuania. He found work in factories and for a number of agencies. From 2005 to 2010 he was convicted of eleven offences which included theft from shops, driving with excessive alcohol, drunk and disorderly behaviour and using threatening words and behaviour. He received a prison sentence of 16 weeks in 2007 for driving when drunk, disqualified and without insurance but his sentences otherwise comprised fines and conditional discharges.

6. In 2008, the appellant met Tina Kerr, a British national, and began a relationship with her. In November 2011 he inflicted grievous bodily harm and a battery on Ms Kerr and on 22 March 2012 received a sentence of 3 years and 4 months imprisonment respectively, the 4 months being ordered to run consecutively to the 3 years. It is those offences which led the respondent to make the deportation order against the appellant on 8 April 2013. The appellant and Ms Kerr remained in a relationship, however, and married on 23 May 2013.

The Law

7. It is expedient to set out the law here as it is relevant to both the preliminary issue I was asked to determine and the substantive re-making of the appeal.

8. Where the respondent proposes to deport an EEA national, Directive 2004/38/EC provides a hierarchy of levels of protection against expulsion based on criteria of increasing stringency, depending, inter alia, on the extent of residence (see recital 23):

> (i) a Union citizen/ EEA national or their family member who has not acquired permanent residence in the UK may be deported on grounds of public policy or public security or public health (the "basic" level of protection under Article 27(1) and Article 28(1)/ regulation 21(1)) of the Immigration (European Economic Area) Regulations 2006 (hereafter "the 2006 Regulations"));
>
> (ii) a Union citizen/EEA national or their family member with a permanent right of residence may only be deported on "serious grounds of public policy or

public security" (the second-highest level of protection; Article 28(2)/regulation 21(3));

(iii) a Union citizen/ EEA national who has resided in the UK for (at least) a 10 year period previous to the deportation decision may only be deported on "imperative grounds of public security" (the highest level of protection; Article 28(3)(a)/ regulation 21(4)(a)).

2. Article 28 of the Directive provides as follows:

> Article 28
> Protection against expulsion
> 1. Before taking an expulsion decision on the grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
> 2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
> 3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
> (a) have resided in the host Member State for the previous ten years; or
> (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

3. Those provisions are incorporated in domestic law by regulation 21 of the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations). Regulation 21 states:

> Decisions taken on public policy, public security and public health grounds
>
> (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 permanent right of residence under regulation 15 except on serious grounds of public policy or 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 necessary in his best interests, 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) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

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

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

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

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

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

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

Preliminary Issue

6. As the error of law decision appended at the end of this determination indicates at [7] one of the respondent's grounds of appeal to the Upper Tribunal was that the appellant did not have permanent residence so should not benefit from the higher, "serious" level of protection from deportation provided by Regulation 21(3). The respondents arguments at that time were on the basis of what she maintained was an incomplete work record. The Upper Tribunal found no error in that regard at [10] of the error of law decision.

7. By the time of this re-making the Court of Justice of the European Union had issued the decisions of Onuekwere (Case C-378/12) CJEU (Second Chamber), 16 January 2014 and MG (Case C-400/12) (Second Chamber) 16/1/14.

8. Based on Onuekwere and MG the respondent argued at a previous interim hearing that the appellant no longer fell to benefit from Regulation 21(3) as his periods of imprisonment in 2007 and from 2013 onwards broke any 5 year period of residence.

9. In Onuekwere the CJEU found that it was clear from the terms and purpose of Article 16 (2) of Directive 2004/38/EC that periods of imprisonment could not be taken into consideration for the purposes of the acquisition of a right of permanent residence. Such acquisition in terms of a family member of a Union Citizen who was a third country national, i.e. not a national of a Member State, was dependent not only on whether the Union citizen concerned satisfied the conditions laid down in Art 16 (1) but also that the family member had resided legally and continuously with that citizen, for the period in question. In considering the grant of enhanced protection, even where the person concerned resided in the host Member State for the 10 years prior to imprisonment, such a period of residence could however be taken into consideration as part of the overall assessment of whether the integrating links previously forged with the host Member State had been broken.

10. In MG, the CJEU found, as in Onuekwere that time in prison did not count for residence purposes. However, what had been acquired was not lost by a period in prison, if a right of permanent residence had already been established. Conversely, if that right had not yet been acquired, then periods of imprisonment would interrupt the continuity of residence. Of particular importance was the ruling that, unlike the requisite period for acquiring a right of permanent residence, which began when the person concerned commenced lawful residence in the host Member State, the 10 year period of residence necessary for the grant of the enhanced protection provided for in Art 28 (3) (a) must be calculated by counting back from the date of decision ordering that person's expulsion. It had been thought previously that one counted back from the date of that person's conviction and sentence of imprisonment.

11. The relevant chronology for the appellant is as follows:

May 2004	Entered UK and exercised Treaty rights
6 December 2007	Sentence of imprisonment for 16 weeks
14 November 2011	Arrest and remand for index offence
22 March 2012	Sentence of imprisonment for 3 years and 4 months
8 April 2013	Deportation Order

12. As I saw it, the difficulty for the respondent concerning the prison sentences depriving the appellant of permanent residence was not the correctness of the

submission but whether it was justiciable before me, the Upper Tribunal having decided the point against the respondent in terms in the error of law decision.

13. I therefore put the parties on notice in a direction dated 17 March 2014 and requested skeleton arguments from both sides on the point. I was grateful to Mr Mills and Mr Adewoye for their compliance with that direction.

14. Mr Adewoye conceded at [6.5] of his skeleton argument that the effect of Onuekwere and MG was that the appellant had not established permanent residence whilst maintaining that the appellant should benefit from Regulation 21 (3) as the point was no longer at large before me.

15. It was my view, however, that as the parties had good notice of this issue and it being uncontentious that the appellant could no longer be regarded as having established permanent residence, it would not be correct to proceed on an erroneous basis, leaving it open for further decisions and challenges, potentially incurring further public cost and leaving the parties without finality.

16. I determined that the appeal could be decided fairly and justly by applying the lower test, that of "grounds of public policy or public security" and that the appellant did not fall to benefit from higher protection of Regulation 21(3).

Re-making of the Deportation Appeal

17. Following on from my preliminary decision above, I must assess whether the personal conduct of the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. I must consider the factors set out in Regulation 21(5), whether the decision complies with the principle of proportionality, is based exclusively on the personal conduct of the appellant, does not take into account matters isolated from the particulars of the case or which relate to considerations of general prevention and that the previous criminal convictions do not in themselves justify deportation.

18. My decision must also take into account the factors identified in Regulation 21 (6), that is, considerations such as the appellant's age, state of health, family and economic situation, length of residence, social and cultural integration the extent of links with Lithuania.

19. I turn first to the issues that are at the heart of this matter, the appellant's difficulties with alcohol and how those difficulties relate to his offending.

20. The appellant maintains that he does not pose a present risk of re-offending whether medium (as suggested in the National Offender Management (NOMS) report) or otherwise as he has addressed his problem with alcohol and will not offend again. His wife and his mother-in-law gave evidence to the same effect.

21. It remained my view that it has not been shown that the appellant has addressed his problems with alcohol to the extent that I can accept on the balance of probabilities that he will not abuse alcohol again when he leaves prison and that he does not remain at medium risk of reoffending, including offences of violence against his wife.

22. The appellant committed 16 offences prior to the index offence, beginning with theft in 2005, and including driving a motor vehicle with excess alcohol, disorderly behaviour, use of threatening, abusive or insulting words with intent to case fear or provocation of violence, or cause harassment, alarm or distress. The full list of offences is set out at [12] to [13] of the respondent's reasons for deportation letter and the NOMS report.

23. His history of offending after abusing alcohol shows that he has a long standing and serious problem. That history requires cogent evidence to show that the appellant will not return to that pattern of behaviour. I did not find that the evidence before me was sufficient to do so.

24. The sentencing remarks set out the index offences which occurred over 14 May 2011 and 15 May 2011. The appellant attacked his wife and forced her into an airing cupboard. That attack left her with serious damage to her right eye, the natural lens being forced into the vitreous and leaving her needing to use a contact lens. It was not clarified to me whether the possible surgery referred to in the sentencing remarks was required. She sustained numerous other injuries including cuts inside her mouth and a fractured finger and hair being pulled out. She was too afraid to come out of the airing cupboard until the appellant was asleep. After she attended a probation service meeting the next day, on her return home the appellant assaulted her again, striking her on the back of the head.

25. The sentencing remarks show that this was a "dreadful" and "sustained" attack on the appellant's wife. It was far from being the first assault that she suffered, their relationship being "peppered with incident of violence" and the appellant assaulting her "fairly regularly". The sentencing judge stated that "I am quite satisfied that there is a proven history of violence or threats by you towards her".

26. The appellant pleaded guilty to the offences but "very, very late".

27. The NOMS report found that the appellant was at medium risk of reconviction and medium risk of causing serious harm to others. He was assessed as requiring MAPPA level 1 supervision after release. The risk factors were directly linked to the appellant's abuse of alcohol or association with "bad friends".

28. The appellant told the NOMS officer that "he likes a drink but it is not a problem". He drank "mainly beer and only has about 4 cans a week." The report goes on to state, however,

> "With referral to Mr Kajackas' previous conviction records it would imply he had an issue with alcohol before being sentenced which was reinforced by the victim, but this is something that he denies. He does however acknowledge that he drank heavily in the past and that alcohol has played a *major part in his offending history, he appears to minimise his previous offending behaviour saying that it was all to do with bad friends and drink* (my emphasis)."

29. The NOMS report also states that:

> "He appears to minimise his past offending behaviour saying that it is all alcohol related and influenced by these people he no longer has contact with."

30. In stark contrast to the sentencing remarks and information elsewhere in the NOMS report, the appellant told the NOMS officer that "he only struck" Ms Kerr once.

31. The appellant also told the Probation Service that "he only pleaded guilty in court on the direction of his solicitor".

32. The notes from the alcohol course that the appellant undertook in early 2013, a year after being in prison and a year and a half after the index offences, state that he had identified his long-term target as only drinking at weekends and limiting his intake to no more than 23 units per week. He identified his confidence in achieving his aim as only "6 out of 10". He accepted that the real challenge would come when he was released. He identified that in a typical drinking day he would consume 32 units.

33. The appellant's stated aim even at the end of the alcohol awareness course was not to abstain entirely, therefore, but to drink up to 23 units a week, mainly at weekends and he was not overly confident that he could achieve that aim.

34. At the hearing the appellant maintained that his time in prison had changed him and that he would never drink again and would never offend again. He wanted to get a job and look after his wife when he left prison. Friends would help him find a job. He would not start drinking again even if he was earning a wage. He had not had a drink for 2 ½ years. His alcohol course in prison had given him an understanding of his problem and he would not touch alcohol again, it was "poison".

35. The sentencing remarks, NOMS report and alcohol course notes show, however, that the appellant did not fully accept that he had a serious problem with alcohol, denied that he had a long history of violence towards his wife, minimised the index offence, pleaded guilty very late and not because he accepted his guilt but on legal advice, and showed a very different intention as regards using alcohol to that expressed at the hearing.

36. Mr Adewoye was right to point out that the NOMS report is not a recent document. It is the only formal assessment of risk before me, however. When considered

against the evidence as a whole, I found that its contents remained reliable, there being nothing that I could accept as showing that the level of risk of reoffending had changed.

37. In short, I did not find that I could accept the appellant's statements that he would never drink again and would never offend or threaten or harm his wife again. His statements about alcohol and reoffending are, when considered against his history and what he has said the in past, wholly unrealistic and unreliable.

38. I found the evidence of the appellant's wife and mother-in-law to be equally unrealistic and unreliable.

39. I have set out above the information in the sentencing remarks on the history of violence during the relationship of the appellant and Ms Kerr. The sentencing remarks also referred to the appellant's wife having "clearly underplayed the true situation" and "watered down the evidence".

40. The sentencing remarks refer to the "immeasurable" psychological damage from the history of assaults, the index offences and to the appellant's wife as being like other victims of domestic violence, "trapped not only by their situation of sharing a house but also by their feelings for the perpetrator of such violence."

41. The sentencing remarks also comment on the index offence coming to light only because of what was observed when Ms Kerr attended the Probation Service on 15 November 2011, "and but for that it may well be that she would not have said anything to the authorities but the probation officers were becoming more and more concerned about her appearing to do her course having fresh injuries." It refers to other assaults, "unreported or withdrawn, … a common feature in cases of domestic violence."

42. The NOMS report indicates that Ms Kerr stated that "Mr Kajackas has been increasingly violent towards her for 3 ½ years". It also states, as in the sentencing remarks, that it was the Probation Service staff who saw Ms Kerr on 15 November 2011 who referred the matter to the police, not Ms Kerr who went home only to face further attack.

43. The sentencing remarks also referred to:

> "… the statement of the complainant's mother which tells me that you were on occasions very volatile and abusive to Tina and her mother describing Tina as being frightened to death of you when you are in drink and abusive… ."

44. The full statement prepared for the criminal trial of the appellant's mother-in-law, Mrs Pamela Kerr, was before me and stated that the appellant was "very volatile and abusive" at times, "to the extent that I would describe him as a 'mad man'." She saw her daughter after the first index offence on 14 November 2011, stating that she:

> "did not ask what had happened as this is such a regular occurrence and I knew exactly how she had received these injuries as I have been present on many occasions in the past when [the appellant] has punched and beaten her in front of my very eyes."

45. She went on to state:

> "I am very worried about my daughter and the physical abuse she is receiving at the hands of this male. Tina is not the same girl since she met this man and she is frightened to death of him when he is in drink and abusive. I fear that 1 [sic] day this will all go too far and will be too late and I will get a phone call or find my daughter has been killed by the hands of this 'mad man'. "

46. The appellant's wife and her mother gave evidence at the hearing that the appellant had definitely changed in prison, that he was genuinely remorseful and had a genuine intention to abstain from alcohol and from offending. He knew that if he offended again he would have to return to Lithuania and this would act as a significant factor in his good behaviour in future. The index offences and drinking had occurred at a particularly difficult time after the couple had been living on the streets after he had lost his job.

47. The appellant's wife was asked whether he had been violent towards her several times. Her response was that he had been violent towards her twice, the index offences being only the second time.

48. The other evidence before me, however, shows the views expressed by Ms Kerr and her mother to be very different from those of the sentencing judge and NOMS officer and, as regards Mrs Pamela Kerr, very different indeed from her earlier evidence. It was also my view that, as in the criminal proceedings, the appellant's wife downplayed very significantly the seriousness of the appellant's violent behaviour over a period of years. I found that these matters seriously undermined the reliability of their evidence including their statements on the appellant's ability to abstain from alcohol and likely behaviour towards his wife when he is released from prison.

49. Ms Kerr is to be commended for seeking to address her own difficulties with alcohol by attending an organisation called Addaction, a drug and alcohol recovery service. She spoke of having already discussed with them the possibility of the appellant going there on his release from prison. The appellant did not refer to an intention to attend such a programme. Even if he had, it is my view that his history and inconsistent statements concerning his abuse of alcohol and intentions on release did not support such an intention.

50. Both the appellant's wife and her mother spoke of the appellant having had a difficult time when he committed the index offences, having lost his job, having little money, being under stress. Both appeared to me to be unrealistic as to the similarly stressful circumstances the appellant will face on his release on his release, there being less chance of his being employed now that he has a serious criminal record.

51. I must also take into account the other factors contained in Regulation 21 (6). The appellant is now 45 years old. Other than his difficulties with alcohol I had no evidence of any health difficulties. I do not dispute the genuine nature of the marriage. The appellant's wife has made very regular visits and, indeed, married the appellant after he was convicted. I also accept that she would not go to Lithuania as her mother, children and grandchildren are in the UK. If the deportation proceeds, the couple will be separated, therefore.

52. The appellant maintained that his economic situation in Lithuania would be more difficult than in the UK. I had no country evidence to show that to be so and, as above, his employment prospects here can only but be negatively affected by his extensive and serious criminal record.

53. The appellant has been in the UK since approximately May 2004. That is a substantial period of time but it is significantly less than the 36 years that he spent in Lithuania before coming here. There was little evidence before me of social and cultural integration of the appellant in the UK, certainly in a positive sense, other than his work record. I accept that his record in prison is very good and that he has completed other courses, been employed in prison workshops and is an enhanced prisoner.

54. The appellant stated that he had not heard from his family, had lost touch with his mother whom he last saw in 2007 and had no idea how she was and that his father had died last year. I did not find that evidence was not reliable as he later confirmed that he learned of his father's death from his mother, had spoken to her two or three times since going to prison and his wife stated that the appellant's mother would ring when they were living in the flat together and that he would his mother ring from prison. The evidence about contact with his mother having been shown to be unreliable, I did not accept that the appellant would not be able to obtain any support from any other relative or former friends and colleagues in Lithuania. I do not accept that he would be without any family or other contacts or support in Lithuania.

55. The appellant also stated that he would not drink if returned to Lithuania. My views on the likelihood of his abstaining from alcohol are set out above and equally applicable to a return to Lithuania or remaining in the UK. It is my view that he has not shown that he has addressed his difficulties with alcohol and so will be at risk of a relapse and offending whether he is in the UK or Lithuania. It did not appear to me that the prospects for rehabilitation were better in the UK than in Lithuania. There was no country evidence before me on alcohol treatment programmes in Lithuania, and looking at the risk of reoffending pragmatically, at least he will have less opportunity to resume his violent behaviour towards his wife there.

56. I did not find any merit in Mr Adewoye's argument that the matter was less serious as the appellant's offence was against an individual rather than the general public.

The offence is no less serious or less a matter of public concern because it was committed against the appellant's wife in private.

57. It was also suggested that the risk of reoffending was reduced as the appellant's licence did not permit him to live with his wife when he is released from prison. Both he and his wife made it clear that they intend to live together as soon as they are able, are asking for the licence to be varied and that they will see each other a very great deal even if they are not formally residing at the same address. I did not find the risk of reoffending would be significantly reduced as a result of the accommodation proviso contained in the appellant's licence.

58. In conclusion, therefore, I found that the appellant's deportation on the grounds of public policy or public security was justified and proportionate and that he represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

59. I should also indicate that my concerns about the appellant's likelihood of returning to alcohol abuse and the offending that would follow were sufficiently significant that even had I applied the higher, "serious" test from Regulation 21(3), I would have found that he should be deported.

Article 8

60. It was also my view that the matters set out above made the deportation of the appellant proportionate notwithstanding the family life that he has with his wife and his private life in the UK. The public interest carries more significance in the Article 8 assessment as the need to express public revulsion at the offence and to act as a deterrent weigh must be taken into account. Put simply, in the Article 8 proportionality assessment, the index offence is too serious, the history of offending too extensive, the medium risk of reoffending too high and likelihood of continued alcohol abuse such that his family life with Ms Kerr and the limited private life could not show deportation to be disproportionate.

Decision

61. The decision of the First-tier Tribunal disclosed an error on a point of law and was set aside to be re-made.

62. I re-make the appeal as refused under the EEA Regulations 2006 and under Article 8 of the ECHR.

Signed: Date: 6 May 2014
Upper Tribunal Judge Pitt

UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

THE IMMIGRATION ACTS

Heard at: Royal Courts of Justice
On: 9 September 2013 Decision Promulgated:

Before

Upper Tribunal Judge Spencer

Upper Tribunal Judge Pitt

Between

Secretary of State for the Home Department

Appellant

and

Egidijus Kajackas

Respondent

Representation:

For the Appellant: Ms Horsley, Senior Home Office Presenting Officer
For the Respondent: Mr Goldborough of Cleveland & Co Solicitors

ERROR OF LAW DECISION

The Appeal

1. This is an appeal against the decision dated 26 June 2013 of First-tier Tribunal Judge Colyer and Dr J O de Barros which allowed the respondent's appeal against the appellant's decision dated 8 April 2013 refusing his appeal against deportation.

2. For the purposes of this decision, we shall refer to the Secretary of State as the respondent and Mr Kajackas as the appellant, reflecting their positions before the First-tier Tribunal.

Background

3. The appellant is a citizen of Lithuania and he was born on 28 May 1968.

4. The appellant came to the UK in 2004 and has remained here since then. He found work in factories and for a number of agencies. From 2005 to 2010 he was convicted of eleven offences which included theft from shops, driving with excessive alcohol, drunk and disorderly behaviour and using threatening words and behaviour. He received a prison sentence of 16 weeks in 2007 for driving when drunk, disqualified and without insurance but his sentences otherwise comprised fines and conditional discharges.

5. In 2008, the appellant met Tina Kerr, a British national, and began a relationship with her. In November 2011 he inflicted grievous bodily harm and a battery on Ms Kerr and on 22 March 2012 received a sentence of 3 years and 4 months imprisonment respectively, the 4 months being ordered to run consecutively to the 3 years. It is those offences which led the respondent to make the deportation order against the appellant on 8 April 2013. The appellant and Ms Kerr remained in a relationship, however, and married on 23 May 2013.

The Grounds of Appeal

6. The grounds of appeal contained three main challenges to the decision of First-tier Tribunal.

7. The first ground was that the First-tier Tribunal was in error in finding that the appellant had been a qualified person for 5 years in line with the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations) and therefore had permanent residence. It followed that the panel had incorrectly considered the proportionality of his deportation against the more demanding test of "*serious* grounds of public policy or public security" contained in Regulation 21 (3) rather than merely "grounds of public policy, public security or public health" which apply to someone without permanent residence.

8. The second ground maintained that the First-tier Tribunal erred in their assessment of the evidence. The panel failed to take into account the risk of future harm, whether the appellant had addressed his alcohol problem, that his licence would preclude him living with his wife when his sentence ended, that his wife also had alcohol problems, that he was a persistent offender and that the index offence showed an escalation in his offending behaviour.

9. The third ground argued that the panel had failed to take into account whether the appellant and his wife could be expected to relocate to Lithuania and continue their family life there.

Discussion

10. Ms Horsley sought to persuade us that the first ground had merit but without any success.

The First-tier Tribunal clearly addressed the evidence of the appellant's employment at [39]. That evidence included HMRC documents showing national insurance contributions in every year from 2004 to 2011. They also had before them the written and oral evidence of the appellant and his wife which was consistent and to the effect that the appellant had worked continuously bar a few weeks since coming to the UK; see [5], [6] and [9] in particular. The First-tier Tribunal therefore considered the relevant evidence that was before it and was entitled to find that the appellant had worked for 5 years, had been a qualified person for 5 years and had permanent residence as defined in Regulation 15.

11. We also found no merit in the third ground. Ms Kerr is a British national who has lived in the UK all her life. She has never been to Lithuania. Her immediate family are here and her unchallenged evidence was that her mother offered her support after the assault and the appellant's imprisonment. There is clearly an issue in this appeal as to whether the appellant should return to Lithuania. It was not our view that any assessment of his return could reasonably include assessment of whether Ms Kerr could be expected to go with him. She cannot. This is therefore not a factor that could have any materiality in the outcome of the assessment conducted by the First-tier Tribunal.

12. However, quite sensibly in our view, Mr Goldborough conceded that the second ground of appeal had merit. The First-tier Tribunal erred at [43] in stating that the appellant's risk of reoffending was "low" and that "there is little chance of his reoffending". The Probation Service report before the First-tier Tribunal stated on page 4 that the appellant's risk of serious harm to others was "medium", that point being repeated on page 8 together with a statement that the likelihood of reconviction was also "medium". It is now well understood that in EEA deportation cases an assessment of future conduct is of importance, Regulation 21 (5) (e) indicating that a person's previous criminal convictions cannot in themselves justify the decision to deport and Regulation 21 (5) (c) setting down that it is the "present" threat affecting one of the fundamental interests of society that must be assessed.

13. We found an error of law in the incorrect assessment of the appellant's risk of reoffending and causing serious harm, both material matters when considering the proportionality of deportation, that error being such that the assessment of the First-tier Tribunal of the proportionality of the appellant's deportation must be set aside and re-made.

14. For completeness sake, we should indicate that that the other matters raised in the second ground appeared to us to be points of weight or advocacy and therefore disagreement rather than errors of law.

DECISION

15. The decision of the First-tier Tribunal under the EEA Regulations 2006 and Article 8 of the ECHR discloses an error on a point of law such that it is set aside in order to be to be re-made.

Directions:

a. The appeal will be re-made on Monday 14 October.

b. Within 14 days of the date of issue of this direction, the parties must file with the Tribunal and serve on the other party any additional evidence they wish to be considered pursuant to Rule 15(2A). That additional evidence should include updated witness statements for any witness who intends to give evidence.

c. The parties should be aware that the failure to comply with the time limit in this direction may lead the Tribunal to refuse to admit any further evidence.

Signed: Date: 23 September 2013
Upper Tribunal Judge Pitt