IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005630
First-tier Tribunal No:
HU/05099/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 12 April 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

RAIMUNDAS GELGOTA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Adewoye, Universe Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Heard by remote video at Field House on 23 February 2023

DECISION AND REASONS

1. This is the appellant's appeal against the decision of the First-tier Tribunal (Judge Hatton) promulgated 7.9.22 dismissing his appeal against the respondent's decision of 4.10.21 to refuse his human rights claim, made in further submissions of 14.4.21, and to issue a deportation order against for removal to Lithuania pursuant to the Immigration (EEA) Regulations 2016, as amended.

2. The grounds can be summarises as follows: (i) that the First-tier Tribunal Judge erred in the approach to proportionality, failing to make a Section 55 of the Borders, Citizenship and Immigration Act 2009 assessment and gave no regard to the social worker's report as to the effect of deportation on the minor child; (ii) that the judge erred in finding the appellant had not acquired permanent residence status, ignoring the evidence of 5 years' continuous employment in the UK. It is argued that whilst there was no record showing when the appellant started work in 2009, the judge should have given the appellant the benefit of the doubt rather than finding at [49] that the longest period worked was between April 2009 and February 2014. It is also argued that presence in the UK after

February 2014 was lawful residence, as the appellant was entitled to spend 3 months in the UK without work or looking for work. The point of this second ground is that if the appellant has a right of permanent residence, he cannot be removed except on *serious* grounds of public policy and public security; (iii) that the judge erred in law when finding at [85] that the appellant posed a perceived risk of committing further offences in the future, which is argued to be inconsistent with the correct test in law.

3. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 8.11.22, it being considered arguable that the First-tier Tribunal Judge erred by failing to identify the Section 55 of the Borders, Citizenship and Immigration Act 2009 best interests of the appellant's minor child and the interconnected family relationship. It was also considered arguable that the judge erred in finding that the appellant had retained the status of a worker long enough to acquire a permanent right of residence. The remaining grounds were considered to be less compelling, but permission was granted on all grounds.

4. The Upper Tribunal has received the respondent's Rule 24 reply to the grounds, dated 6.12.22, which submit that the judge directed herself appropriately. It is submitted that whilst the First-tier Tribunal did not signpost consideration of best interests, given her age the presumption must be that these are to remain with both parents. It is suggested that elsewhere in the decision, including paragraphs [126] - [128], and [153] – [154] the judge effectively addressed best interests. It is submitted that on the facts, the judge could not have concluded that the child's wellbeing would be jeopardised, or her best interests compromised by the appellant's deportation. Mr Adewoye had not seen this short document before the hearing but it was sent to him by email and he later confirmed that he had the opportunity to consider and respond to it.

5. The appellant has applied under Rule 15(2)A to adduce evidence not before the First-tier Tribunal at the date of the appeal hearing. However, at this stage I decline to admit such evidence as the Upper Tribunal can only intervene if it is demonstrated that the First-tier Tribunal made an error of law on the evidence that was before it.

6. In relation to best interests of the child, which Mr Adewoye described as the main challenge to the decision, there is reference to the appellant's child between [126] and [127], of the decision. I accept however, that this was in the context of whether the child and/or other factors would serve as a deterrent to further criminal conduct in consideration of whether the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. However, it serves to illustrate that the judge was alive to the issue of the child in the family dynamic. In her submissions, Ms Everett conceded that there was no specific reference to Section 55 of the Borders, Citizenship and Immigration Act 2009 and best interests, but she submitted that all relevant considerations in relation to the child are addressed within the decision, including the interconnectivity between the child and other members of the family. Ms Everett pointed out that at [108] to [109] the judge noted no evidence that the partner's adult children lived in the appellant's home and that neither adult child attended the hearing to give evidence in support of any particularly strong relationship with the child. The respondent also argues that given the facts in relation to the child, the judge could not have concluded that the three-year-old child's best interests would be compromised by going to Lithuania with her parents.

7. It is obvious that given her age the best interests of the young child were to remain with both parents. This is implicit in the findings of the decision. At [140]

the judge was satisfied that the appellant had a genuine and subsisting relationship with both his partner and biological daughter, referencing in support the Independent Social Worker (ISW) report. For reasons given, at [141] the judge did not accept that the appellant's relationship with his two adult stepchildren was such as to engage article 8. Further consideration of the child's best interests and the ISW can be seen at [153], finding that although the child does not speak the language, there was no reason why she could not learn the language. Both parents had family in Lithuania and the child was obviously young enough to adapt to life in Lithuania. Hence, the judge's conclusion at [154] that both partner and child could relocate with the appellant to Lithuania, if they chose. At [155] the judge also pointed out that the partner could maintain contact with her adult children by visits.

8. Whilst the judge should have specifically referenced Section 55 of the Borders, Citizenship and Immigration Act 2009, a reading of the decision as a whole reveals that all relevant considerations in relation to the child were considered and taken into account. There was insufficient evidence of any relationship with the adult siblings beyond the normal emotional ties and in the context of the child's circumstances and age, I accept Ms Everett's submission that the matters complained of by the appellant in respect of this ground could have made no material difference to the outcome of the proportionality assessment and the appeal as a whole.

9. In relation to the second ground and the issue of permanent residence, it is clear that the judge was alive to the protection offered to those having acquired a right of permanent residence, as set out at [32] of the decision. However, the judge went on to address this issue in detail making a finding at [52] of the decision that on the evidence the appellant failed to demonstrate five years' employment in the UK. Mr Adewoye made a two-fold submission. First, that the judge should have inferred employment before April 2009 but in fact, there was no documentary evidence to demonstrate employment began before April 2009. The judge cannot be criticised for adopting this start date. The second limb of the submission is that as an EEA national was entitled to a three-month period of grace in the UK without working or seeking work, the judge should have inferred that work continued beyond February 2014. However, I am not satisfied that such a three-month period can properly be described as the appellant exercising Treaty rights in the UK so as to accrue the right to permanent residence. As Ms Everett submitted, the judge was not entitled to speculate where there was no evidence in support. It was for the appellant to prove his claim to a right to permanent residence and the evidence in support was insufficient and inadequate. Although the appellant wished to adduce further evidence on this issue, that evidence was not before the First-tier Tribunal and cannot demonstrate an error of law in the making of the decision. The judge was entitled to conclude that the appellant was not entitled to a right of permanent residence, for the reasons set out in the decision. Unarguably, these findings were open to the First-tier Tribunal and supported by cogent reasoning. No material error of law is disclosed by this ground.

10. In relation to the third ground and the risk of further offending, the ground engages in semantic argument between 'perceived risk' and 'real risk' that makes no practical sense or difference to the outcome of the appeal. I accept that there may be an error of fact when the judge stated at [105] that there was no supporting evidence to the claim that the partner was working. Contrary to what is stated in that paragraph, the partner's witness statement of 25.8.22 claimed that she worked 15 hours a week in a fish and chip shop. However, as I pointed out to Mr Adewoye, in evidence at the appeal hearing the partner stated only that

she worked in 'social marketing' and appears to have made no reference to working in a fish and chip shop. It is all rather peculiar, particularly when the ISW of 5.4.22 stated that she worked 8 hours a week cleaning in a fish and chip shop, which discrepancy the judge has highlighted at [106] of the decision. I note that the judge devoted a considerable part of the written reasons to addressing the risk of further offending and did so in considerable detail.

11. In any event, I fail to see what difference the error of fact in relation to any employment of the partner, if it is an error, could make to the outcome of the appeal. The point the judge was driving at was the lack of the appellant's employment which was relevant to the risk of further offending, which risk rose with absence of employment, and there was no evidence of any post-release employment. If the partner was working part-time as a cleaner, that would make precious little difference to the family's net income. In reply to my concern as to why the partner did not mention the fish and chip shop employment in her oral evidence, Mr Adeqoye suggested that the 'social marketing' work that the partner referred to was work 'on the side.' However, there is no evidence to support that assertion. In reality, this ground is little more than an attempt to undermine the decision by piece-meal fault-finding rather than a consideration of the decision as a whole. In the alternative, it is a mere disagreement with the finding, suggesting that despite any evidence in support, the judge should have inferred that the appellant and/or his partner were working and had such income as to reduce the risk of further offending. I am satisfied that on the evidence before the First-tier Tribunal, the findings on risk of reoffending were fully open to the judge and is supported by cogent reasoning. No error of law is disclosed by this ground.

12. In the circumstances and for the reasons set out above, no material error of law is disclosed. It follows that the appeal must fail.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands as made.

I make no order for costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 February 2023