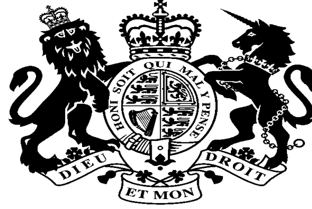

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Nos: UI-2023-000225 and UI-2023-000226

First Tier: HU/00927/2022 EA/06012/2022

THE IMMIGRATION ACTS

Decision and Reasons Issued: On 29 December 2023

Before
Upper Tribunal Judge BLUNDELL
Deputy Upper Tribunal Judge MANUELL

Between

Mr KESTUTIS LEVICKAS
(NO ANONYMITY DIRECTION MADE)

Appellant
and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Heard at FIELD HOUSE On 1 December 2023

Representation:
For the Appellant: Ms A Patnya, Counsel (instructed by Wilsons LLP)

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For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is a national of Lithuania, born on 30 March 1984. He has two linked appeals, (a) a human rights appeal against the Respondent's decision dated 14 April 2022 to deport him and (b) an appeal against the Respondent's decision dated 6 April 2022 (as amended on 29 April 2022) to refuse him leave to remain under the EU Settlement Scheme. The linked appeals were previously dismissed by the First-tier Tribunal however material errors of law were found by the Upper Tribunal which ordered that both appeals should be reheard in the Upper Tribunal. Certain findings were preserved, as explained below at [11]. A copy of the Upper Tribunal's first decision is appended to this one.

The Respondent's decision

2. The Appellant entered the United Kingdom on 28 April 2005, and exercised free movement rights in a variety of employments. Between 9 September 2008 and 27 September 2013, the Appellant was convicted of 21 criminal offences. He was sentenced to the following terms of imprisonment (excluding suspended sentences): 90 days (24 July 2009); 120 days (21 October 2010); 20 days (19 March 2012); 60 days (19 March 2012); 24 days (28 May 2012) and 120 days (27 September 2013). On 20 December 2013 the Appellant was warned by the Home Office that he might face deportation in the event of further criminal offending.

3. On 23 March 2020, the Appellant was convicted of supplying controlled class A drugs (crack and heroin). He was sentenced to two concurrent terms of 3 years' imprisonment. On 14 June 2002 a deportation order was made against the Appellant under section 32(5) of the UK Borders Act 2007. It was considered that the Appellant had not shown that he had been residing in the United Kingdom in accordance with the EEA Regulations 2016. His deportation was conducive to the public good and in the public interest. It was not accepted that he was socially and culturally

integrated into the United Kingdom. His private life interests under Article 8 ECHR were outweighed by the public interest.

4. His application under the EU Settlement Scheme made on 26 September 2021 was refused on 6 April 2022. It was considered that the Appellant was not eligible as he was subject to a decision to make a deportation order against him, dated 12 May 2020, meaning that his application was refused on suitability grounds under rule EU15 of Appendix EU to the Immigration Rules. It was considered that the Appellant presented a serious threat to the fundamental interests of society, as set out in Schedule 1 of the EEA Regulations 2016. The Appellant had shown a propensity to reoffend. The decision complied with the principles of proportionality explained in Regulation 27 of the EEA Regulations 2016. The Appellant could reintegrate into Lithuania where he had been brought up. His rehabilitation could continue there.

The law

5. The Appellant had the right to reside in the United Kingdom on 31 December 2020 so benefits from Article 21 of the Withdrawal Agreement, which continued the safeguards of the Citizens' Directive (2004/38/EC) of 29 April 2004. These include that a person's residence rights may only be restricted on grounds of public policy, security or public health and must comply with the principle of proportionality.

6. Article 27 of the Citizens' Directive states that measures taken on the above grounds shall be based on exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Thus, As Ms Patyna notes at [42] of her skeleton argument, further punishment and deterrence are impermissible factors.

7. Regulation 27 of the EEA Regulations 2016 provides that an EEA decision (i.e., an EEA decision taken on the grounds of public policy, public security or public health) may not be taken in respect of a person with a right of permanent residence under Regulation 15 except on serious grounds of public policy and public security. This includes restricting rights otherwise conferred by the Regulations in order to protect the fundamental interests of society. Where a relevant decision is taken on grounds of public

policy or public security it must also be taken in accordance with the principles of (a) proportionality; (b) be based exclusively on the personal conduct of the person concerned; (c) the personal conduct must present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account the past conduct of the person and that the threat does not need to be imminent; (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; and (f) the decision may be taken on preventative grounds, even in the absence of previous criminal convictions, provided that the grounds are specific to the person.

8. Article 28 of the Citizens' Directive requires that, before making a decision, the decision maker must take into account considerations such as the person's age, state of health, family and economic situation, length of residence in the United Kingdom, social and cultural integration into the United Kingdom and the extent of links with the person's country of origin. It also provides that an expulsion decision may not be taken against a person with a right of permanent residence except on serious grounds of public policy or public security.

9. Schedule 1 to the EEA Regulations 2016 makes further provision in relation to considerations of public policy, public security and the fundamental interests of society although, as Ms Patyna noted before us, the provisions of that schedule are to be interpreted and applied conformably with the Directive.

10. The appeals are brought pursuant to Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended and Regulation 36 of the EEA Regulations and Regulation 6 of the Immigration (Citizen's Rights Appeal) (EU Exit) Regulations 2020, on the grounds that the Appellant's removal from the United Kingdom would breach his human rights, the EEA Regulations and the EU Withdrawal Agreement. It is necessary for the tribunal to decide the appeals on the balance of probabilities. The burden of proof is upon the Appellant. Section 117A-D of Nationality and Asylum Act 2002 applies to the Article 8 ECHR issues.

The preserved findings and the issues for decision

11. The following findings from the determination of the First-tier Tribunal were expressly preserved:

(a) The Appellant is a person to whom the protection of EU law, as set out in the UK-EU Withdrawal Agreement, applies; and

(b) The Appellant had acquired the right to reside in the United Kingdom permanently prior to the term of imprisonment which gave rise to the deportation order.

12. The other findings of the First-tier Tribunal were set aside.

13. The issues to be determined at the rehearing were agreed to be as follows:

(a) Does the Appellant represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society?

(b) If yes, is the Appellant's deportation justified by public policy and public security?

(c) If yes, is the Appellant's deportation proportionate in EU law terms?

(d) Alternatively, is the Appellant's deportation proportionate under Article 8 ECHR?

The hearing and the evidence

14. The Appellant applied to admit further evidence at the start of the hearing, in the form of additional witness statements in order to bring matters up to date. The application was not opposed by the Respondent and was granted.

15. The Appellant gave evidence in English in accordance with his witness statements dated 15 November 2022 and 28 November 2023. In summary the Appellant said that he came to the United Kingdom when he was 18 to work. His mother arrived a few months later. He had a succession of unskilled occupations. He was out of contact with his mother between 2006 and 2009 as he lost her telephone number. She managed to locate him through a newspaper advertisement. They were in regular telephone contact. She had visited him only once while he was in prison as she lived far away and worked long hours. He considered that they were close.

16. His crimes had come from keeping bad company. A girlfriend had introduced him to heroin and he became an addict. He started selling drugs but probably consumed more than he sold. He made no money from it. Prison had helped him with courses and he regretted his past behaviour. He had upset his mother. He did not want to be deported, which would be hard on her. He wanted to make a fresh start.

17. Since his release from prison the Appellant had been living in accommodation provided by the Home Office, and reporting weekly. He had relapsed into drug taking once or twice. He informed his probation officer and was given support. His situation was difficult as he didn't want to socialise with people and have to explain that he was not allowed to work and had no money. He felt depressed, unmotivated and alone. This had made him drink but he had stopped. He saw his mother weekly and spoke to her daily.

18. The Appellant was cross examined at some length. The following points emerged. He thought he had relapsed into heroin use three times after he was released from prison. His probation officer had helped him with CGL (Change Grow Live) whose sessions he had attended. He was depressed and had no money, just £45 per week form the Home Office. He was not taking methadone. His mother helped motivate him and he did not want to hurt her. It was possible to find drugs, easily, anywhere, including Lithuania. He had not been able to live with his mother as she had a room in a shared house and could afford more space.

19. The Appellant said he no longer saw Lithuania as his country. He knew he would survive there if he were deported but he worried that he would be unable to visit his mother for 10 years. He knew his actions were his own fault. He had expected that he would be deported. He had no family left in Lithuania.

20. In re-examination the Appellant said that he tried to see his mother when he was reporting to the Home Office as he was given a travelcard and so could afford the journey.

21. Ms Lolita Vaiciukeviciute gave evidence in Lithuanian through the tribunal's interpreter. She confirmed as true and adopted as her evidence in chief her witness statements dated 15 November 2022 and 22 November 2023. There Ms Vaiciukeviciute said she had settled status in the United Kingdom and worked as a cleaner. She had come to the United Kingdom in search of a better life.

Her evidence paralleled that of the Appellant. She was the only person the Appellant was in contact with and they had a close relationship. The Appellant had never been back to Lithuania and it would be hard for him. Mrs Vaiciukeviciute said she earned little and could not help the Appellant financially. She could not go back to Lithuania. She believed that the Appellant had changed for the better.

22. Mrs Vaiciukeviciute was cross examined at some length. The following points emerged. She lived in shared rented accommodation. Her husband was deceased. She had some friends in Lithuania. She had been to Lithuania in 2014 and again in 2016/17. Her son had to control himself. She could only support him as much as she was able. She did not know that he had been back on drugs until he told her. She could speak to him if he were in Lithuania if he wanted it. She could not afford to help him much from her earnings if he went to Lithuania.

Submissions

23. Ms Cunha for the Respondent relied on the reasons for refusal letters, deportation decision and review. The public interest in the prevention of crime outweighed the private interest. The Appellant's previous convictions were an indication of the risk he still posed, as were his relapses into drug taking. Deportation was a proportionate response. Regulation 27 applied. There would be advantages for the Appellant in having a new beginning in Lithuania where he would be removed from past bad influences. The Appellant's mother had been unable to control him. The Appellant's private life was minimal. There was no family life of any significance. There were no very significant obstacles to the Appellant's reintegration into Lithuania. He was not integrated into the United Kingdom. There were no exceptional, compelling or compassionate circumstances. The appeal should be dismissed.

24. Ms Patnya for the Appellant relied on her skeleton argument. There was no real dispute of fact. The Appellant's previous offending had been minor. It was accepted that the Appellant had achieved permanent residence. The central issue was whether the Appellant posed a genuine, present and sufficiently serious threat to one of the fundamental interests of society. It was accepted that drugs offences were against a fundamental interest of society. The Appellant had tried to assist the tribunal and had been frank about his addiction. He had sought help to prevent

further harm. There had been no new evidence from the Respondent.

25. The Appellant had now spent a year in the community and he had the motivation of his mother to avoid re-offending. That was relevant to proportionality, as was the length of time the Appellant had spent in the United Kingdom, effectively his entire adult life. He had worked and he spoke English well. He was able to work and wanted to work. His progress towards rehabilitation should be permitted to continue. The appeals should be allowed.

Discussion and findings

26. This is a sad case. The only witness beside the Appellant was his mother. There was no evidence from any person claiming to be a friend of the Appellant. The Appellant's employment history is a chequered one, a variety of largely short-lived posts in unskilled sectors. The Appellant has a good command of spoken English and he has acquired permanent residence in the United Kingdom under the Directive, but there was little else to show that he is integrated to any significant degree, despite the fact that he has been in the United Kingdom for some 18 years. He said himself that he has little social contact. The tribunal so finds.

27. The Appellant and his mother are currently in regular contact but their past relationship has been marked by at least two long gaps. The Appellant's mother works long hours and has little leisure time. There was no evidence of any special bond or unusual emotional connection between mother and son. The Appellant's mother made no claim that she was able to influence or control him. The Appellant has lived as an independent adult since the age of 18, which is of course usual or normal. The tribunal so finds.

28. The Appellant has only been released from prison relatively recently. He has not been charged with any offences since then. No evidence was adduced from the probation service concerning any assessment of the risk the Appellant currently poses. There was an OASys assessment completed on 27 April 2020, shortly after his conviction, which stated he was not found "to be at risk of serious harm". There is also an email from an officer of the Probation Service to the Appellant's solicitors, dated 8 July 2022. The terms of that email show that the applicant remained in immigration detention on the date that it was written. The officer

stated that the Appellant had at that time been assessed as posing "the following risk of serious harm:

- Children – medium
- Public – medium
- Known Adult – low
- Staff – low."

29. The officer's email continued, stating that the Appellant's licence was to run from 21 September 2021 to 22 March 2023 and was subject to various conditions. The additional conditions were that the Appellant was required to address his behavioural problems associated with anger, violence, alcohol and drugs. He was also to submit to drug testing for specified drugs and was not to take any action that could hamper or frustrate the drug testing process.

30. Those assessments, however, were prepared before the Appellant lapsed into drug taking after his release on licence. He told us that he notified his Probation Officer when he relapsed by taking heroin shortly after his release. He told us that she referred him to Change, Grow, Live ("CGL") so that they could assist him in staying clean. He said that his Probation Officer had decided not to test him for drugs because he had told her about his relapse. He suggested that he had attended regular sessions at CGL where he received acupuncture and undertook activities including art. We have no documentary evidence of any of this.

31. There is nothing to confirm that the Appellant relapsed only once before his licence came to an end. There is nothing from his Probation Officer to confirm that she was informed or that she decided not to test him as a result of that information. There is nothing from CGL to show that he has attended regularly in order to address his addictions. Most importantly of all, there is nothing from the Probation Service to suggest what risk the Appellant might pose now, having relapsed and breached the terms of his licence shortly after release. Evidence of this nature is regularly adduced in appeals of this nature. The Appellant is expertly represented, and has been throughout. Although the burden is obviously on the Secretary of State to demonstrate that the Appellant represents a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom, the reality of the Appellant's situation is that there were indications of a medium risk of serious harm when he was abstinent but there is nothing which post-dates his relapses.

32. The Appellant's expressions of regret and remorse are easily made and unfortunately carry little weight in the context of addictions which are as longstanding and unremitting as his. The fact that the Appellant had already had previous convictions for a series of relatively minor offences which had led to short prison terms and was formally warned that further offending would lead to deportation had no deterrent effect. He has purchased and taken heroin whilst on licence and whilst there is a threat of deportation against him. Such persistent conduct indicates that any desire the Appellant might have to integrate into the United Kingdom and to respect the law has for many years been overborne by his addiction.

33. As already noted, the Appellant admitted that he had relapsed into drug taking since his release from prison. He was uncertain how frequently. He stated at the outset of his evidence that it had been three times but he stated subsequently that it had been twice. The possession of class A controlled substances is obviously a criminal offence, as the Appellant must know. In our view those lapses are a clear indication that he continues to pose a genuine, present and sufficiently serious risk to the public to justify his deportation. His history is one of lengthy addiction with little otherwise to occupy his time. Neither the threat of being recalled to prison nor the threat of deportation was sufficient to prevent the Appellant relapsing and taking heroin. The reality is that we cannot know how many times he did so, or when he last did so.

34. In all the circumstances, we find that there is a genuine, present and sufficiently serious risk of the Appellant relapsing into active heroin addiction and being compelled to finance that addiction by selling Class A drugs as he has historically. In reaching that finding, we wish to make clear that we are not critical of the Appellant. This is a sad case, as we began our analysis by observing. The Appellant fell in love with a woman who was herself using heroin and he decided to take it in order to fit in with her. His life has spiralled out of control since then and even a period of custody has not enabled him finally to escape his addiction.

35. It was rightly accepted on the Appellant's behalf that involvement in Class A drugs is against a fundamental interest of society. The enormous harm and social damage they cause is well known, and was spelled out in the sentencing remarks:

> "The coastal communities of East Kent are particularly blighted by the impact of hard drugs which are often made available to end users by what has become known as the county lines…. Anyone who chooses to involve themselves in selling class A drugs commits a serious offence, because they have such a clear capacity to cause significant harm… It is clear that you were undertaking what you were doing for an element of profit, and must have had some understanding of the scale of the operation you are part of."

36. Therefore, having taken careful account of all that was said by Ms Patyna orally, and at [46]-[52] of her skeleton argument, we find that the respondent has discharged the burden upon her of demonstrating to the civil standard that the applicant represents a genuine, present and sufficiently serious threat to the fundamental interests of society. We resolve the first issue against the Appellant accordingly.

37. We also find that there are *serious* grounds of public policy or public security which justify the Appellant's expulsion. Because the Secretary of State seeks to restrict a fundamental freedom in EU law, it is for him to justify such a restriction and to show that serious grounds of public policy or public security exist. In analysing that question, we have focused on the Appellant's propensity to re-offend, rather than on issues of deterrence or public revulsion. As is clear from SSHD v Straszewski [2015] EWCA Civ 1245; [2016] 1 WLR 1173 (as mentioned in the Upper Tribunal's first decision in this case), such considerations have no part to play in the assessment required by the Directive. Instead, we find that there is a serious and imminent risk of the Appellant relapsing and becoming concerned once again in the sale of Class A drugs. We do not accept for the reasons that we have already set out that the Appellant's efforts to rehabilitate himself or the motivating influence of his mother bear the weight suggested by Ms Patyna in this connection. His relapses post-releases and the absence of any other evidence about his rehabilitative work are considerably more informative. We therefore resolve the second issue against the Appellant.

38. In considering the issue of proportionality, we have been greatly assisted by the submissions made by Ms Patyna, particularly those which appear in her skeleton argument from [55] onwards. We recall that an expulsion measure 'must be both appropriate and necessary for the attainment of the public policy objective sought – the containment of the threat – and also must not impose an

excessive burden on the individual': B v SSHD [2000] EWCA Civ 158; [2000] 2 CMLR 1086. We make it clear at the outset that the first limb of that test is manifestly satisfied. The genuine, present and sufficiently serous risk which the Appellant continues to pose is of relapsing into full-time heroin addiction and of funding it by selling drugs of Class A. His expulsion is appropriate and necessary to achieve that objective. The real question is whether it imposes an excessive burden upon him.

39. The Appellant is 36 years old. He arrived in the United Kingdom at the age of eighteen. We have little information about his current state of health, although we are aware that he has long-standing addition issues and (as we were told at the hearing) has recently had more than a dozen teeth extracted. We accept that his only family contact is with his mother, who he sees as frequently as funding will permit. His economic situation is parlous; he is dependent on state funds and has not been permitted to work, although he said he wishes to do so. Although the Appellant has permanent residence, his degree of integration to the United Kingdom is evidently rather less than suggested by Ms Patyna. He speaks good English and took some courses in prison but his work history has been patchy and his lifestyle has been a troubled one since he fell into addiction.

40. Although the Appellant has never been back to Lithuania, and is not in contact with any relatives there, we find that he would be able to re-integrate without undue difficulty. He was educated there and speaks the language. There is no reason why he would not be able to find employment from which to provide for himself adequately. No evidence to the contrary was produced to us, and the Appellant accepted during his evidence that he would survive there. It is likely that his mother has some contacts of probable use to him. His mother has visited Lithuania twice since coming to the United Kingdom, and would be able to visit him if she wished. The tribunal so finds.

41. Ms Patyna asked us to attach significance to the effect deportation would have on the Appellant's ongoing rehabilitation. At [59] of her skeleton argument, she helpfully cited MC (Portugal) [2015] UKUT 520 (IAC) in that connection. We have taken account of the principles in that decision in reaching the conclusions which follow. We find that there is little evidence before us of the Appellant's ongoing efforts to rehabilitate himself in the United Kingdom. He said that he is going to CGL but there is no evidence of that. He has taken drugs since his release from prison and his lifestyle is becoming increasingly insular. As will be apparent from the

conclusions we have previously reached, we sadly have no faith in the Appellant's ability to rehabilitate himself in the United Kingdom, even with the support which is available to him here, including his mother.

42. Against that, there was no evidence to suggest that the Appellant would be unable to rehabilitate himself in Lithuania and to access support groups if he wishes. As the Upper Tribunal stated in MC (Portugal), it is not to be assumed that the prospects of rehabilitation will be materially different in another member state. He will have the opportunity to make the fresh start he had declared he wants. No doubt drugs are sold on the streets in Lithuania as elsewhere, but the Appellant is likely to be less familiar with any supply systems which operate there, which may afford some measure of protection against the threat of relapse. Having considered all relevant matters in regulation 27(5)(a), together with the authorities to which we were directed, he tribunal therefore finds that the Appellant's exclusion is a proportionate course under EU Law We resolve the third issue adversely to the Appellant.

43. The tribunal further finds that the proportionality balance under Article 8 ECHR falls with the public interest, rather than the Appellant's private interest. We do not accept Ms Patyna's submission that the Appellant meets the private life exception to deportation in s117C of the Nationality, Immigration and Asylum Act 2002. Whilst he might have spent more than half of his life lawfully in the United Kingdom, he is not socially and culturally integrated to the United Kingdom and there would not be very significant obstacles to his reintegration to Lithuania for the reasons we have already set out.

44. Nor are there very compelling circumstances over and above the statutory exceptions which outweigh the public interest in the Appellant's deportation. The Appellant is a medium offender and there is a cogent public interest in his deportation. That public interest is borne out of considerations of deterrence and, in this case, the prevention of future offending. Although the Appellant has been in the United Kingdom for many years, his level of integration is comparatively low and it is proportionate in our judgment to interfere with his private life by deporting him.

DECISION

The appeals are DISMISSED

Signed R J Manuell **Dated** December 2023
Deputy Upper Tribunal Judge Manuell

TO THE RESPONDENT:
FEE AWARD

No fee awards can be made

Signed R J Manuell **Dated** December 2023
Deputy Upper Tribunal Judge Manuell

ANNEX – 'ERROR OF LAW' DECISION OF 17 AUGUST 2023

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000226

First-tier Tribunal Nos:
EA/06012/2022 &
HU/00927/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

……………………………….

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS
Between

KESTUTIS LEVICKAS
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Michael Spencer, instructed by Wilson Solicitors LLP
For the Respondent: Tony Melvin, Senior Presenting Officer

Heard at Field House on 8 August 2023

DECISION AND REASONS

1. The appellant is a Lithuanian national who was born on 30 March 1987. He appeals, with the permission of Upper Tribunal Judge Perkins, against the decision of First-tier Tribunal Judge Hughes ("the judge"). By his decision of 5 December 2022, the judge dismissed the appellant's

appeal against the respondent's decision to deport him from the United Kingdom following his conviction for supplying drugs of Class A.

Background

2. The appellant entered the United Kingdom with his mother in 2005. They have lived in this country since then. His mother subsequently acquired settled status. The appellant committed a number of offences from 2005 onwards. The index offence was by far the most serious of these offences, however, and the appellant was sentenced by HHJ James, sitting in the Crown Court at Canterbury, to a term of three years' imprisonment. The conviction followed his plea of guilty to two charges of conspiring to supply heroin and crack cocaine as part of a 'county lines' operation in East Kent.

3. The respondent's decision-making process in this matter was rather convoluted. On 12 May 2020, she notified the appellant that she was considering his deportation under the Immigration (EEA) Regulations 2016. The appellant made representations against that course. Separately, on 29 September 2021, he made an application for leave to remain under the EU Settlement Scheme. The application for leave to remain was refused on 6 April 2022. On 14 April 2022, the respondent notified the appellant that she did not consider him to be a person to whom the saved provisions of the EEA Regulations applied. She therefore considered his representations as a human rights claim, which she refused.

The Appeal to the First-tier Tribunal

4. The appellant appealed against both of those decisions to the First-tier Tribunal. The appeal against the refusal under the Settlement Scheme was under reference EA/06012/2022. The appeal against the refusal of the human rights claim was under reference HU/00927/2022. The appeals were linked and heard together by the judge.

5. Before the FtT, the appellant was represented by Mr Spencer of counsel, as he was before us. The respondent was represented by a Presenting Officer (not Mr Melvin). The judge heard oral evidence from the appellant and his mother and submissions from the advocates before reserving his decision.

6. The judge's reserved decision is carefully structured. He set out the relevant background and the legal framework which applied to both appeals at [1]-[12] and [13]-[24]. At [25]-[28], the judge explained why the 2016 Regulations would apply to the appellant if he could establish that he had acquired the right to reside permanently in the United Kingdom before IP Completion Day (31 December 2020). At [29]-[33], the judge recorded the Presenting Officer's acceptance that the appellant's employment records, which had been adduced by the respondent in compliance with an 'Amos direction' (Amos v SSHD [2011]

EWCA Civ 552; [2011] 3 CMLR 20 refers), demonstrated that he had exercised Treaty Rights continuously for five years prior to imprisonment. It was accordingly accepted on all sides that the appellant enjoyed the right to reside permanently in the United Kingdom at IP Completion Day and, therefore, that the respondent was required to establish that the appellant's deportation was justified on serious grounds of public policy.

7. At [34]-[45], the judge set out his reasons for concluding that the respondent had established serious grounds of public policy justifying the appellant's deportation. At [46]-[52], the judge made general observations about proportionality. At [53]-[55], he concluded that the appellant's deportation was proportionate under the EEA Regulations. At [56]-[63], he concluded that the appellant's deportation was proportionate in Article 8 ECHR terms, having taken account of the considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002. So it was that he dismissed the appellant's appeals.

<u>The Appeal to the Upper Tribunal</u>

8. There are said to be three grounds of appeal although the first ground contains two entirely separate points. We therefore summarise the grounds of appeal as follows:
   (i) The judge erred in stating at [37] that there was 'no evidence' from the probation service about the risk presented by the appellant;

   (ii) The judge improperly found a contradiction in the evidence given by the appellant's mother as regards the point at which the appellant's addiction ended;

   (iii) The judge misdirected himself in law in finding that 'deterrence' and 'maintaining public confidence' were relevant to proportionality under the EEA Regulations; and

   (iv) The judge misdirected himself in law in failing to weigh the appellant's right to reside permanently in the United Kingdom against the serious grounds in favour of the appellant's deportation.

9. Permission was refused at first instance but granted by Judge Perkins, who considered the grounds to be 'plainly arguable'.

10. The respondent did not file a formal response to the notice of appeal under rule 24 but Mr Melvin filed a skeleton argument in which it was submitted that the decision of the FtT should be upheld. We heard submissions from Mr Spencer and Mr Melvin. We do not propose to rehearse those submissions. Instead, we will consider what was said in our resolution of the issues raised by the grounds of appeal.

<u>Discussion</u>

11. We consider the judge to have misdirected himself in law in his consideration of the appellant's deportation under the EEA Regulations. He was directed by Mr Spencer's skeleton argument to the decision of the Court of Appeal in SSHD v Straszewski [2015] EWCA Civ 1245; [2016] 2 CMLR 3. He did not cite that authority in his decision. He was obviously not required to do so; what mattered was that he showed by his reasoning that he adopted the approach required by the decision of the Court of Appeal. Unfortunately, the judge showed by his reasoning that his approach was at odds with that required by SSHD v Straszewski in two fundamental respects.

12. The first error is to be found in [51] of the judge's decision, which is in the following terms:

> On the other side of the proportionality scales the most significant factor is undoubtably the serious offences that the appellant has committed, including most significantly the offence for which he received a sentence of three years imprisonment. As was most recently identified in Zulfiqar v Secretary of State for the Home Department [2022] EWCA Civ 492, case law has identified three reasons why deportation of foreign nationals who commit such serious offences is in the public interest (i) the risk of re-offending; (ii) the need to deter foreign nationals from committing serious crimes and (iii) maintaining public confidence in the system (see [38]-[44] of Underhill LJ's judgment). These are all factors which must be given considerable weight in any assessment of proportionality.

13. This paragraph appears as part of judge's general observations on proportionality and it is clear from the structure of his decision that he considered everything said within this section to be relevant to the assessment of proportionality under the EEA Regulations and the ECHR. That the judge considered these observations to be relevant to both assessments is also clear from his reference to 'any assessment of proportionality' in the closing words of the paragraph.

14. Whilst there can be no doubt that the considerations identified in Zulfiqar v SSHD are relevant to the assessment of ECHR proportionality, it was made clear in SSHD v Straszewski that deterrence and maintaining public confidence in the system play no role in the assessment of proportionality under the EEA Regulations. At [44] of his skeleton argument before the FtT, Mr Spencer made the submission that neither 'the need to deter other potential wrongdoers or to reflect public revulsion at the offence' were relevant to the EEA assessment. A similar submission was made at [61] of the skeleton argument. Mr Spencer cited [14] and [20] of Moore-Bick LJ's judgment in SSHD v Straszewski in support of those submissions. We need not set out what was said by Moore-Bick LJ in that paragraph. It suffices to observe that it squarely

supported Mr Spencer's submission. It is part of the ratio of that decision that 'wider factors', such as the public interest in deterrence and the need to demonstrate public revulsion at an offender's conduct, play no part in such an assessment.

15. As we understood Mr Melvin's submission on this point, it was that there was nothing in the subsequent sections of the judge's decision to suggest that he had actually held considerations of deterrence and public confidence against the appellant in his assessment of proportionality under the EEA Regulations. We accept that there is nothing within [53]-[55] of the judge's decision to show that he returned to those points in his consideration of proportionality under the EEA Regulations but that is nothing to the point. It is quite clear from the judge's decision that he considered deterrence and public confidence to be as relevant to EEA proportionality as to ECHR proportionality and it must be assumed, therefore, that the scales of each assessment were weighted accordingly in the mind of the judge. In preparing the scales of proportionality under the EEA Regulations in that way, the judge erred in law.

16. The judge's second error concerns the observations he made about the appellant's level of integration, at [50]. He remarked in that paragraph that the appellant had 'demonstrated an element of integration into the United Kingdom', and he went on to weigh that and other such matters against the risk he found the appellant to present to the fundamental interests of the United Kingdom. In this respect, he also overlooked further dicta from SSHD v Straszewski, in which Moore Bick LJ emphasised at [20], [25] and [31] that it was necessary in any such case to consider whether the threat posed by a potential deportee was sufficient to "justify overriding the right of free movement on which the permanent right of residence rests." In treating the appellant as a person with merely 'an element of integration' into the United Kingdom, the judge marginalised the importance of the fact that the appellant had acquired a right to reside permanently in the United Kingdom. In any lawful assessment of proportionality, that was a matter which was deserving of significant weight, yet it is not a matter to which the judge referred in either his general proportionality assessment or that which related specifically to the EEA Regulations.

17. For these reasons, we conclude that the third and fourth grounds of appeal, as summarised above, are both made out.

18. The fundamental errors in the judge's assessment of proportionality might not ultimately have made a material difference to the outcome of the appeal if it could be shown that the judge had been entitled on the evidence to conclude that the appellant continued to represent a threat to the fundamental interests of the United Kingdom and that the respondent had established serious grounds of public policy to justify his expulsion. As Mr Spencer contended in his first ground of appeal, however, the judge's assessment of the risk posed by the appellant also

discloses a clear error. As Mr Melvin accepted, the judge was in error when he said at [37] that the last evidence from the Probation Service was an OASys report dated 27 April 2020. That was simply wrong. The seventh item (of seven) in the appellant's short bundle was described as

> Email from probation officer, Rihanna Bowley re risk assessment of Appellant, 8.7.22

19. It seems that the judge simply overlooked this email. It was relevant in two ways. Firstly, it contained the Probation Officer's assessment of the risk of serious harm posed by the appellant to children, the public, known adults and staff. The assessment was that he presented a medium risk to children and the public and a low risk to known adults and staff. Secondly, it showed that the appellant was on licence until March 2023 and that he was subject to additional licence requirements which included drug testing. We note that the appellant had been released on licence by the time the appeal was heard by the judge: [11] of his decision refers.

20. Mr Melvin submitted that it would have made no difference to the judge's decision if he had considered this document. We do not accept that submission. In order to accept it, we would need to be satisfied that the judge would inevitably have reached the same decision if he had considered the email: Detamu v SSHD [2006] EWCA Civ 604, at [14]. We cannot be sure of that.

21. The judge might have concluded that there was no assessment of the risk of reoffending in the email and that the OASys report continued to be the best evidence in that respect. He might have concluded that he had no up-to-date information about the appellant's compliance with drug testing since his release on licence. He might have felt that the medium risk of serious harm to children and the public pointed in favour of the Secretary of State's case and was of greater importance than the low risk to known adults and staff. But none of these were conclusions which the judge would inevitably have reached; they are merely lawful conclusions which he might have reached. We cannot say with any certainty, in other words, what conclusion the judge would have reached if he had turned his mind to the final page of the appellant's bundle.

22. We were less impressed with the second point made in ground one. The target of this ground of appeal was the judge's finding that the appellant's mother had contradicted her son's evidence when she said that he was a different man from the one who had been taking drugs 'ten years ago'. The judge held that this contradicted the appellant's acceptance that he had been dependent upon heroin until 2020. That finding was properly open to the judge, but it was possibly not well expressed. What the judge probably meant, in our view, was that the appellant's mother had attempted to paint a better picture in her evidence by stating that the appellant had been a drug user ten years, rather than two years, before the hearing. Either way, we doubt that

any such contradiction was really material to the ultimate question of whether the appellant had reformed. The best evidence in that respect was probably the letter from the Probation Service, taken together with the fact that the appellant remained on licence, which the judge overlooked.

23. It follows that the decision of the FtT was vitiated by legal error and must be set aside in part. There was no attempt on the part of the respondent to challenge two important conclusions reached by the judge. The first was his conclusion that the EEA Regulations applied. The second was his conclusion that the appellant had acquired a right to reside permanently in the United Kingdom before his imprisonment. We preserve both of those conclusions, but we set aside the remainder of the decision.

24. The decision on the appeal will be remade in the Upper Tribunal following a further hearing. We were helpfully informed by Mr Spencer at the conclusion of the hearing that the appellant's solicitors have made a Subject Access Request for the appellant's Probation Service records. He expected that disclosure to be made within a month of the hearing. We will therefore direct that the further hearing is not to take place before 15 September. It will be listed for half a day. There will be a Lithuanian interpreter for the appellant's mother. In the event that any further time or directions are required, there is liberty to apply for the same.

Notice of Decision

The FtT erred materially in law and its decision is set aside to the extent recorded above. The decision on the appeal will be remade in the Upper Tribunal on a date to be notified.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 August 2023