



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00566/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre  
On 24<sup>th</sup> October 2019

Decision & Reasons Promulgated  
On 31 October 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

Mohamed Barkhadle  
(no anonymity direction made)

Respondent

For the Appellant: Mr Bates, Senior Home Office Presenting Officer  
For the Respondent: Mr Brooks, Counsel instructed by JM Wilson Solicitors

DECISION AND REASONS

1. The Respondent is a national of the Netherlands born on the 8<sup>th</sup> January 1993. On the 7<sup>th</sup> February 2018 the First-tier Tribunal (Judge Rowlands) allowed his appeal with reference to Regulation 27 of the Immigration (European Economic Area) Regulations 2016 ('the EEA Regs').
2. The central finding made by Judge Rowlands was that Mr Barkhadle had lived in the United Kingdom since he was 7 years old. The First-tier Tribunal found

that he had therefore accrued ten years' continuous residence in the United Kingdom. This, the Tribunal reasoned, meant that the Secretary of State had to show 'imperative' grounds for his expulsion, which on the facts he could not do. The appeal was accordingly allowed.

3. The Secretary of State appealed, the complaint made that it was not enough for the First-tier Tribunal to simply point to that long residency: in order to attract the highest level of protection Mr Barkhadle had first to establish that he had acquired a permanent right of residence under Articles 16 and 28(2) of the Directive. Reliance was placed on the decision of the CJEU in Franco Vomero C-424/16 to that effect. Since the First-tier Tribunal made no findings on whether such permanent residency was established, it followed that its decision on the proposed deportation is defective.
4. The Secretary of State's appeal came before me on the 17<sup>th</sup> June 2019. At that hearing Mr Brooks, appearing for Mr Barkhadle, accepted that there had been no Vomero finding on permanent residence and that to that extent the decision was flawed for error of law. He submitted however that the error was not such that the decision should be set aside. That is because of this passage at paragraph 27 of the determination:

"I cannot agree that his deportation was properly done on the imperative grounds of public security. This is a more severe test than simply that of public policy or public security. Had I even been considering those I would not have reached the conclusion that his behaviour was such as to be serious enough to justify deportation on that basis ..."

Mr Brooks described this as an 'in the alternative finding' and invited me to dismiss the Secretary of State's appeal.

5. Having heard Mr Brooks' submissions, and those made by Mr Bates on behalf of the Secretary of State, I decided that the decision of the First-tier Tribunal must be set aside. Whilst I accepted that the passage cited by Mr Brooks was an indication by the Tribunal that it would have allowed the appeal even if the Appellant attracted no enhanced protection, it was a conclusion entirely unsupported by reasons. The Tribunal itself had recognised that Mr Barkhadle is a repeat offender, and that he has a poor criminal record. The Secretary of State was therefore entitled to ask for reasoned findings about why the Tribunal considered that he should not be deported.
6. By my written decision of the 18<sup>th</sup> June 2019 I found the Secretary of State's grounds of appeal to be made out and set the decision aside. In doing so I noted that in granting permission First-tier Tribunal (now Upper Tribunal) Judge Blundell commented that in the final analysis the Vomero error might be irrelevant, considering the finding that Mr Barkhadle has lived in the United Kingdom since he was seven years old. If he could show that he had been at school for a continuous five-year period, or otherwise living in the United Kingdom in accordance with the Regulations (for instance as a family member

of an EEA national exercising treaty rights), then the position would revert to that as it was found by the First-tier Tribunal: he would have accrued his 'permanent residence' and therefore his ten year continuous residence, which would give him the highest level of protection against deportation under the EEA Regs. Since the Secretary of State had not challenged the findings on 'imperative' grounds it would follow that Mr Barkhadle would in those circumstances succeed in his appeal. In light of Judge Blundell's remarks I considered it appropriate to give Mr Barkhadle an opportunity to provide evidence that he had at some stage lived in the United Kingdom for a continuous period of five years 'in accordance with the Regulations'. The matter was therefore adjourned with directions.

7. By the time that the appeal came back before me, Mr Barkhadle had produced evidence to demonstrate that he was enrolled in schools in Birmingham, at both primary and secondary level, for the requisite amount of time. What he could not do was demonstrate that during that period he had comprehensive sickness insurance. He could not therefore show that he was a 'student' within the meaning of either the Directive or the Regulations. Nor did it appear that he had ever registered with the Home Office so that the Secretary of State would, according to her own policy, overlook the lack of sickness insurance. See Regulation 4(1)(d)(ii) & (iii):

(d) "student" means a person who –

(i) is enrolled, for the principal purpose of following a course of study (including vocational training), at a public or private establishment which is –

(aa) financed from public funds; or

(bb) otherwise recognised by the Secretary of State as an establishment which has been accredited for the purpose of providing such courses or training within the law or administrative practice of the part of the United Kingdom in which the establishment is located;

**(ii) has comprehensive sickness insurance cover in the United Kingdom; and**

**(iii) has assured the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that the person has sufficient resources not to become a burden on the social assistance system of the United Kingdom during the person's intended period of residence.**

8. Mr Brooks accepted that Mr Barkhadle was further unable to evidence any economic activity on the part of his mother such that he could have accrued a right of residence as a family member. It followed that Mr Barkhadle had not demonstrated that he had acquired a permanent right of residence at any point,

and so could not have the benefit of any *Vomero* period of long residence. He attracts no enhanced protection against expulsion.

9. I am invited to re-make the decision on that basis.

### **Legal Framework**

10. The relevant framework for my decision is Regulation 27 of the 2016 Regs:
- 27.- (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 right of permanent residence under regulation 15 except on serious grounds of public policy and 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 in the best interests of the person concerned, 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) **The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also 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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account 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;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010; or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

**(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).**

11. The relevant part of Schedule 1 is paragraph 7:

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

(b) maintaining public order;

(c) preventing social harm;

- (d) preventing the evasion of taxes and duties;
- (e) protecting public services;
- (f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;
- (g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);
- (h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);
- (i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;
- (j) protecting the public;
- (k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);
- (l) countering terrorism and extremism and protecting shared values.

### **The Secretary of State's Case**

#### 12. Mr Barkhadle has the following convictions:

20 <sup>th</sup> April 2010	Convicted of theft (shoplifting) at Birmingham Youth Court and made subject to a four-month referral order
8 <sup>th</sup> June 2010	Convicted of handling stolen goods
11 <sup>th</sup> February 2011	Convicted of attempted robbery and handling stolen goods and made subject to an 18-month Youth Rehabilitation Order
31 <sup>st</sup> May 2017	Convicted of resisting an officer at Birmingham Magistrates' Court and sentenced to a 12 month Community Order with costs

1<sup>st</sup> November 2017 Convicted at Birmingham Magistrates Court of failing to comply with his Community Order - unpaid work imposed for breach

13. Before me Mr Bates accepted that as poor as this record is, it is unlikely that the Secretary of State would be pursuing deportation action were that the sum total of his case. The centrepiece of the Secretary of State's case was rather a statement made by an officer of the West Midlands Police, to the effect that Mr Barkhadle has been involved in a good deal of serious criminality for which he had not been convicted.
14. DC Rachel Hensley's statement is dated the 1<sup>st</sup> August 2018. At the time that she wrote it she was working within the West Midlands Police Serious and Organised Crime Prevent Team. Although she has never met Mr Barkhadle personally DC Hensley drew on several sources to compile her report: the Police National Computer (PNC), the police database and a 'portal' used by police officers and relevant staff to record their personal accounts of investigations and encounters with individual suspects. She writes that Mr Barkhadle first came to the attention of West Midlands Police in 2007 when a local school reported that a group of Somali males were causing a nuisance and shoplifting in the Rookery Road area of Birmingham. The group, of whom Mr Barkhadle was identified as a 'prominent member', became well known to officers in Birmingham city centre dealing with anti-social behaviour.
15. The databases available to DC Hensley show that between September 2007 and August 2017 Mr Barkhadle has '26 Non Convictions for 43 Offences' recorded. The detail of these investigations is set out. Mr Barkhadle was for instance identified as the perpetrator of an assault and robbery of a woman on a bus who was knocked unconscious by being kicked in the head after she resisted being robbed. Mr Barkhadle was arrested and when questioned stated that he had acted in self-defence. For reasons unexplained that investigation ended with no charge being made. The other investigations recorded concerned criminal damage, multiple offences of burglary, street robbery, possession of a knife and assault. All these investigations ended either in 'no further action' or Mr Barkhadle being found not guilty.
16. DC Hensley also writes:
  - "Barkhadle quickly gained police custody records often relating to Robbery, Violence and Theft offences. Barkhadle went on to serve custodial sentences between February 2010 to November 2010 then for 11 days in June 2011 and again from September 2011 to September 2012"
  - "Barkhadle has been linked to firearms, fraud and drug dealing"
  - "Suggestions of involvement in the importation of illegal drugs were raised following regular recordings of stops since 2011 at various ports ... often described at point of stop as hostile and anti-police"

- “In August 2016 Mohammed Barkhadle was linked to possession of a sawn-off shotgun and ammunition with the suggestion he had swapped these items for a watch with his brother”
- “In June 2017 Mohammad and his brother Zak have been committing robberies against other young criminals. This had led victims to seek revenge leading to a shooting in which Zak has been the intended target however an associate of Mohammad has been victim to being shot”
- “In December 2016 there was a murder outside a shisha lounge whereby a group of Somalians attacked the victim. Barkhadle was interviewed in relation to the murder”

17. Having reviewed all of this information DC Hensley concludes:

“I strongly believe that he is a prominent member of a Somalian group involved in drug dealing and firearm offences posing a significant risk to the communities and opposing gang members with little concern for the general public being exposed to the dangers surrounding his lifestyle and behaviour/ he has been involved and committed crime in company with his younger brother Zakaria Barkhadle failing to prevent and divert him away leading to his deportation earlier in 2018. ... [he] has no respect for authority”.

18. Mr Bates placed reliance on all of this material. He further asked me to note that there was no evidence before me to show that Mr Barkhadle was currently exercising treaty rights. Although he has lived in this country since he was a boy, and has a number of family members here, it was the Secretary of State’s case that his deportation would be wholly proportionate given the evidence of risk to the public. His brother had already been deported to the Netherlands and so he already had at least one relative there.

### **The Case for Mr Barkhadle**

19. Mr Brooks’ primary submission was that the Secretary of State had failed to discharge the burden of proof in respect of the test in Regulation 27(5)(c). none of the convictions had ever attracted a custodial sentence and on their own fell well short of the evidence needed to justify a conclusion that Mr Barkhadle represented a genuine, present and sufficiently serious threat. The last conviction was over two years ago and most of them were committed when Mr Barkhadle was a youth: on the occasion of that last serious one he was only 17. Mr Brooks submitted that I could not safely place reliance on the police evidence. There were numerous deficiencies in DC Hensley’s assessment. She had never met Mr Barkhadle; the entire report was based on hearsay and it contained serious factual errors: contrary to her evidence, Mr Barkhadle had never been given a custodial sentence. DC Hensley had not presented herself for cross examination. Mr Brooks pointed out that the First-tier Tribunal had



not accepted this report as particularly weighty. Insofar as he acknowledged that Mr Barkhadle does appear to be 'known to police' he submitted that for all we know this arises from nothing more than hostility between the police and boys that they perceive as 'Somalian youth' engaging in anti-social behaviour. There was no evidence of current risk, and Mr Barkhadle has expressed his regret for his past convictions.

20. In respect of whether or not it would be proportionate to deport Mr Barkhadle Mr Brooks relied on his close relationships with his mother, four sisters and a little brother. I have before me witness statements from both Mr Barkhadle and his family members attesting to the bonds of love and affection between them. I am told that one of his sisters is a single mother and that he helps her by taking the children to school etc. His mother is in ill health and he takes her to her hospital appointments. As to his ability to work, Mr Barkhadle strongly contests the Secretary of State's submission that he is "failing" to exercise treaty rights. In fact he is currently on conditions that prevent him from working. He states that between 2015 and 2017 he worked for DHL but he was in car accident and was no longer able to keep that job due to injuries sustained.

### Discussion and Findings

21. I am satisfied that Mohammad Barkhadle has lived in this country since he was young boy, that he attended primary and secondary school here, and that he no doubt has many friends in the Birmingham area. He regards the United Kingdom as his home. I further accept that he has a close relationship with his mother and sisters. I make clear however that all of that will be very emphatically outweighed if I accept the evidence of DC Hensley that Mr Barkhadle has been, for some 12 years, a source of serious concern for West Midlands Police, being connected to anti-social behaviour, vicious assaults on members of the public, robberies at knifepoint, drug trafficking and onward distribution, theft, burglary and inter-gang warfare. That litany of criminality is such that if I accept it, the Secretary of State would certainly make out her case. It matters not that Mr Barkhadle has managed to avoid conviction since 2017. The picture that emerges from DC Hensley's report is of a profoundly anti-social and violent criminal, and I do not need a probation service report to tell me that. The evidence of DC Hensley is, on the particular facts of this case, crucial.
22. With that in mind I have had regard to the guidance of the Upper Tribunal in Farquharson (removal – proof of conduct) [2013] UKUT 00146 (IAC). Although concerned with the statutory scheme under the Immigration Acts, not the Regulations, Farquharson was concerned with the approach to be taken to police evidence such as that before me.
23. The facts in Farquharson were that the appellant had been charged with six serious violence offences against women: five counts of rape and one of

domestic violence against a partner. None had ended in conviction. On two occasions the jury failed to reach a verdict; in two others the complainant did not want to give evidence; in two of the rapes the CPS declined to pursue the matter due to concerns about the credibility of the complainant. The evidence before the Tribunal on these matters consisted of the CRIS records, and the interpretation thereof by a DC Mahmood who attended court and was cross examined.

24. The Tribunal directed itself that the standard of proof was the balance of probabilities, and noted that it is for the Secretary of State to substantiate the conduct relied upon. In particular regard was had to the Secretary of State's submission in Bah (liability to deportation) [2012] UKUT 196 (IAC):

“Where any assertion of fact by the Secretary of State material to the assessment of whether deportation is conducive to the public good is in dispute, it must be established by her on the civil standard of the balance of probabilities”.

25. In considering how that burden might be discharged the panel in Farquharson (comprising the then President Mr Justice Blake, Sir Jeffrey James KBE CMG and Upper Tribunal Judge Lane) adopted with approval this guidance in Bah:

“any material relevant to meet that standard may be received by the Tribunal whether it is hearsay or a summary of information held by others, if it is supplied in time and in accordance with case management directions but the weight to be attached to such material will depend on its nature, the circumstances in which it was collected or recorded, the susceptibility of the informant or original informant to error, and the extent to which the appellants are able to comment or rebut it.”

26. Having so directed itself the Upper Tribunal in Farquharson then proceeded to conduct its own detailed analysis of each of the alleged incidents, noting: “if the material renders itself capable of more than one interpretation we should only draw one adverse to the appellants if on the balance of probabilities there is no other reasonable explanation on the material before us”. Applying that principle to the evidence before it the Tribunal concluded that the burden had been discharged in respect of some of the incidents, and not in others. The decision concludes, insofar as is relevant, with the following statements of principle:

“First, the UKBA must consider carefully what allegations of conduct it wishes to rely on in the absence of a conviction or other authoritative finding of fact. In our judgement the agency should not allege conduct that it is not prepared to prove to the appropriate civil standard. The decision in Bah demonstrates that conduct based on intelligence and crime reports can be relied on in immigration appeals provided that there is some degree of transparency about how the material is accumulated and what it consists of. If intelligence is so sensitive that a sufficient gist of it cannot be disclosed, then it should not be raised in the appeal. Mere assertion will not be enough.

Second, where deportation or removal proceedings are based on information derived from police sources, a police witness statement should be made available enclosing the relevant documentary material. That material must fairly reflect the strengths and weaknesses of any assessment and should not be cherry picked to present one side only if there is material that exculpates as well as inculpates. The witness statement should reveal that this exercise has been undertaken to obviate the need for third party disclosure requests under the Upper Tribunal Rules. The judge must ensure that the hearing is fair.

Third, material is likely to be considered the more cogent, the greater the extent to which it is supported by other relevant documents. In the present case we have searched for data relating to the incidents independent of the complainant's narrative. The CRIS extracts might have been supported by witness statements made by forensic medical examiners or eye-witnesses. This will not always be necessary, and the Tribunal is not conducting a re-trial, but it may well prove helpful. We anticipate that the CPS should be able to assist the UKBA and indeed the Tribunal and, where material is sensitive, appropriate directions as to its return and use can be made if requested in advance".

27. I return to the evidence before me.
28. The report by DC Hemsley refers to multiple incidents, and the Secretary of State has not specified which ones in particular she seeks to rely upon. That has not made my task any easier.
29. Some of the matters raised by DC Hensley can be discounted the outset, since they individually fall, clearly and demonstrably, short of meeting the relevant standard. Amongst these are the following matters:
  - i) The allegations of "nuisance" behaviour in the Rookery Rd area in 2007 appear to add nothing to the existing conviction for shoplifting, committed when Mr Barkhadle was still a minor;
  - ii) I can make no findings on the "issues" said to have been caused by Mr Barkhadle and associates around bookmakers and on public transport between 2010 and 2012, since DC Hensley here makes what is accepted to be a significant error of fact in that she details three prison sentences that were never imposed or served;
  - iii) No particulars or evidence are offered in respect of the allegation that Mr Barkhadle is "linked" to firearms, fraud and drug dealing in Birmingham City Centre;
  - iv) The suggestion that he is involved in the importation of illegal drugs appears to be wholly without foundation, consisting of nothing more than the fact that he travelled abroad frequently and didn't like being stopped by the police. I must assume that a car with "hostile to police" occupants, stopped at port, would be subject to a search; absent any positive assertion

that such a search found illegal substances I must assume that nothing was in fact found on any such occasion;

- v) In August 2016 Mr Barkhadle was “linked” to possession of a sawn-off shotgun and ammunition. No particulars or evidence are offered by the Secretary of State, nor any explanation given as to whom might have done the ‘linking’;
  - vi) In June 2017 police investigating the shooting of an associate of Mr Barkhadle came to hear that it was a revenge attack for a series of robberies perpetrated against other young criminals by Mr Barkhadle and his brother. No particulars or evidence are offered by the Secretary of State;
  - vii) In December 2016 the police interviewed Mr Barkhadle “in relation to” a murder outside a shisha bar. That is the extent of the information provided – it does not appear that the investigation went any further than that, and no charges were ever brought. It is not even clear whether he was interviewed as a witness or a suspect;
  - viii) The alleged robbery on the 5<sup>th</sup> May 2008 was not pursued by the CPS who offered no evidence and Birmingham Youth Court dismissed the case. No new evidence has been provided by the Secretary of State in respect of this offence;
  - ix) DC Hensley mentions police interest in Mr Barkhadle in respect of a further 15 robberies (one with a charge of kidnap), all of which end with ‘no further action’, findings of not guilty or the CPS offering no evidence at trial. In none of these does the Secretary of State offer particulars or evidence sufficient to warrant a civil standard finding; ditto the five additional charges of theft, two of burglary, one of threatening behaviour, one of criminal damage and one of assault on a PC.
30. Only two of the matters raised by DC Hensley give any level of significant detail.
31. The first is the assault on the woman on the bus. The victim was travelling on a bus in the company of her brother on the night of the 22<sup>nd</sup> May 2007 when she was approached by a group of men who verbally abused her and her brother and tried to grab the woman’s bag. She pushed them away and tried to get off the bus. As she left the bus she was kicked in the head; once she was on the floor she was kicked again and lost consciousness. When she woke she found that items had been stolen from her bag. Her brother had also been assaulted, sustaining a broken jaw. The report states that the ‘IP’ (this abbreviation is not explained but I read it to be ‘injured party’) “identified Barkhadle from school”. When interviewed Mr Barkhadle admitted that he was there, and that he was involved in the incident, but claimed that he had acted “in self-defence”. Reading those bare facts I am perplexed as to why the police took no further action. There was a positive identification from someone who knew Mr Barkhadle personally, and it is difficult to see how kicking the head of a woman

already on the ground could ever legitimately be described as self-defence. That brings me back to the guidance in Bah and Farquharson. I have to assume that the decision not to pursue that prosecution was taken in full possession of all of the available evidence and having regard to all known facts. There are alternative explanations for the events of that night, namely that of Mr Barkhadle that it was a dispute on a bus between two groups of people known to each other and that he acted in fear for his person. The Secretary of State has provided no additional evidence. There are no witness statements, and it is not even clear who provided the information that DC Hensley was working with. Nor is it clear that it was in fact Mr Barkhadle who is said to have assaulted the woman, rather than one of the other youths on the bus. I am unable to find that the Secretary of State has proven that on a balance of probabilities it was Mr Barkhadle who assaulted and robbed the victims on this occasion.

32. The second incident occurred on the 15<sup>th</sup> November 2008. Acting on a description given by the victim, the vendor of a mobile phone stall in a shopping centre, police apprehended Mr Barkhadle on a bus on suspicion of stealing items from that stall. The stolen phone was found near to where he was sitting on the bus. Although he denied having any property on his person, another phone and a SIM card were found in the waistband of his trousers. On this occasion Mr Barkhadle attempted to frustrate the investigation into him by providing false details in custody; I also note that someone described as his "father" refused to act as an appropriate adult (I was told that his father remains in Somalia). The police decided not to pursue the matter after the stallholder declined to give any further evidence. In this instance I would be prepared to find - just - that the burden is discharged. A description of the offender, plus CCTV footage from the shopping centre, lead police to the top of a bus, where they find Mr Barkhadle along with the stolen phone. He then behaves in a way consonant with DC Hensley's description of him as profoundly anti-social and 'anti-police'.
33. I therefore add the details of the theft on the 15<sup>th</sup> November 2008 to the convictions that I already know about. It is a poor criminal record. From a young age Mr Barkhadle was engaging in theft (at the time of the 2008 offence he was fifteen; at the date of his first conviction in 2010 he was seventeen). The behaviour certainly escalated in 2011 with the attempted robbery, but it is right to note Mr Brooks is correct when he says that the offending since then -an altercation with a police officer in his home, and a failing to comply with conditions - do not in themselves indicate any significant risk to the public. What I am left with is a young man who between 2008 and 2011, whilst still youth, committed offences such as shoplifting, attempted robbery and handling stolen goods. That is not to be condoned in any way, but the offences, and the sentences imposed, fall far short of establishing that he presents a risk to the public today.
34. It follows that the appeal must be allowed. I make no general finding on the quality or reliability of DC Hensley's report. She no doubt prepared her report

in good faith. Unfortunately it did contain significant errors, not least in her assertion that Mr Barkhadle went to prison for a year when in fact he has never served a custodial sentence. That error enabled Mr Brooks, quite properly, to question whether the 'intelligence' reports upon which DC Hensley relied were credible or factually correct. In her review of this case the Secretary of State may wish to reflect on the legal framework that the Tribunal must apply when non-conviction 'bad character' evidence is offered. Had DC Hensley's report been supported by live evidence, or even witness statements or case notes, my decision may well have been other than it is.

### **Decisions**

35. The determination of the First-tier Tribunal is flawed for error of law and it is set aside.
36. I remake the decision in the appeal as follows: "the appeal is allowed under the Immigration (European Economic Area) Regulations 2016".
37. There is no order for anonymity.

Upper Tribunal Judge Bruce  
30<sup>th</sup> October 2019