Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00796/2018

THE IMMIGRATION ACTS

Heard at Birmingham Justice Centre	**Decision & Reasons Promulgated**
On 31st January 2020	**On 14th April 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DAMARS DAMARS PUCINS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Bates, Senior Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Pucins. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Pucins as the appellant, and the Secretary of State as the respondent.

2. The respondent appeals the decision of First-tier Tribunal Judge Hillis promulgated on 9th July 2019 allowing the appellant's appeal under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016") against the respondent's decision to make a deportation order. Permission to appeal was granted by First-tier Tribunal Judge Grant on 5th August 2019.

3. Notice of the hearing of the appeal before me was sent to the parties on 20th November 2019. A copy was sent to the appellant at his home address, and having checked the Tribunal file, I am satisfied that the Notice of Hearing has not been returned to the Tribunal. I am satisfied that the Notice has been sent to the last known address provided by the appellant. The matter was called on for hearing at 12:35pm and there was no appearance by or on behalf of the appellant. No explanation has been provided for the appellant's absence. My clerk telephoned a telephone number held on the Tribunal's records for the appellant, but the phone was switched off and the Tribunal was unable to contact the appellant to consider whether there is an explanation for his absence. Mr Bates informed me that according to records held by the respondent, the appellant has not reported to the respondent since 28th May 2019 and is shortly to be treated as an absconder. In the absence of any explanation for the failure of the appellant to attend the hearing, it is in my judgement in the interests of justice for me to proceed to determine the appeal in the appellant's absence.

Background

4. The appellant is a national of Latvia. He first came to the attention of the authorities in the UK on 7 November 2014, when he was convicted at South Derbyshire Magistrates Court of possession of a Class A drug – heroin. The appellant was served with a notice of liability to administrative removal on 14 February 2016 as an EEA national who was not exercising treaty rights. He was removed from the United Kingdom on 20th May 2016. On 25th January 2017, the appellant sought admission to the UK by deception when he attempted to use a travel document that did not belong to him, to gain entry. He was refused entry. He again came to the attention of the authorities in December 2017, February 2018 and August 2018 when he was convicted of various offences at South Derbyshire Magistrates Court. The appellant's offending history is set out in the respondent's decision and is referred to in the decision of the FtT.

5. The appellant attended the hearing of his appeal before the First-tier Tribunal. The appellant was unrepresented and at paragraph [9], the judge sets out the relevant legal framework. The judge referred to Regulations 23 and 27 of the EEA Regulations 2016 that apply to exclusion and removal decisions taken on the grounds of public policy, public security or public health.

6. Judge Hillis refers to the evidence at paragraphs [10] to [19] of his decision. The judge's findings and conclusions are set out at paragraphs [35] to [48] of the decision. The judge noted, at [36], that on the appellant's own account he has not been living continuously in the United Kingdom for the previous five years, and thus is only entitled to the lowest level of protection from removal under the EEA Regulations 2016.

7. The judge noted the appellant was released from HMP Moorland on licence on 14th December 2018 and the licence expired on 26th April 2019. The post-sentence supervision commenced on 26th April 2019 and expired on 14th December 2019. Therefore, at the date of the hearing before the FtT and decision of Judge Hillis, the appellant was still under the supervision of the Derby Probation Service. The judge noted at [37] that there was no evidence before the Tribunal that the appellant has breached any of the supervision requirements. At paragraph [38], the judge stated:

> "The appellant's record shows that his first offence was committed on 7th November 2014 which involved the possession of a Class A drug, namely heroin for which he was fined and ordered to pay court costs and the victim surcharge. His following offences from 7th September 2015 to 10th October 2018, save for one offence of battery on 10th August 2018, all involved shoplifting to fund his own drug habit. There is no evidence before me that the appellant has committed any offences or been in breach of his licence following his release from prison on 14th December 2018, which at the date of hearing was a period of six months."

8. The Judge found the appellant to be a credible and truthful witness who showed clear remorse for his previous of offending and the judge accepted that he was never involved in the supply of drugs, despite his addiction to Class A heroin. At paragraph [40], the judge stated:

> "Since his release from prison he has been in regular employment and has managed to remain drug-free. He has established a relationship with a lady and her son which, on the face of it, appears to be stable although they are not currently cohabiting. During his last prison sentence he took the opportunity to undertake education courses and become drug-free. In my judgement, the appellant has given every indication that he seeks to lead a lawful life in future and put his

> dependence on unlawful drugs in the past. In my judgement, although he committed many offences of shoplifting to fund his drug habit he was as much a victim of his dependency as he is a criminal and he has put that dependency behind him."

9. At paragraph [42], the judge referred to the conviction for the offence of battery, and the sentence of four weeks imprisonment that the appellant received to run concurrently with the sentences he received for shoplifting on the same occasion. The judge referred to the evidence of the appellant's employment and noted there was an absence of evidence in the form of a report from the probation service or the supervising officer of his licence, to show that the appellant is anything other than at low risk of offending in the future. The judge considered the letters from Prison Officers provided by the appellant in support of his appeal, which had not been challenged by the respondent. At paragraph [43], the judge concluded that the respondent placed too much weight on the appellant's previous convictions, which under Regulation 27(5) do not in themselves justify the decision. The judge accepted the appellant's entire family are now living in the UK in exercise of their treaty rights. At paragraph [47] the judge concluded as follows:

> "In my judgement, on the evidence before me taken as a whole the appellant has shown that he behaved very positively whilst in prison, became a trustee and assisted the officers with interpreting for other Latvian prisoners during discussions with the prison officers. He undertook education courses and regained his physical fitness on the gym course whilst successfully participating in the drug course to become drug-free. He has not reoffended since his release and has not breached any of his licence conditions. He has obtained gainful employment, is living in the same accommodation as his mother and appears to be in a settled relationship with his partner. He has shown all the indications of someone who seeks to rehabilitate himself within society."

10. The judge concluded that taking the evidence as a whole, the decision to remove the appellant from the UK has not been shown by the respondent to be proportionate and justified on the grounds of public interest in public policy. The judge concluded that there was insufficient evidence before him to conclude that the appellant presents a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

The appeal before me

11. The respondent claims First-tier Tribunal Judge Hillis erred in his approach as to whether the personal conduct of the appellant represents a

genuine, present and sufficiently serious threat affecting the fundamental interests of society, taking into account past conduct and the principle that the threat does not need to be imminent. The respondent claims that given the appellant's offending history, although the appellant may have behaved positively whilst in prison and not reoffended since his release, the judge erred in finding that the appellant has rehabilitated himself to the extent that he no longer poses a threat to the fundamental interests of society. The respondent claims that in reaching his decision, the judge only refers to the convictions and failed to have regard to the fact that the appellant sought readmission to the UK using a false passport on 25th January 2017, which was a facet of the personal conduct of the appellant and relevant to the fundamental interests of society. The public policy requirements of the United Kingdom include restricting rights otherwise conferred in order to protect the fundamental interests of society. Schedule 1 of the EEA Regulations 2016 expressly provides that the 'fundamental interests of society' include *inter alia* preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system, and, 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). The respondent claims the judge considered the appellant's prospects of rehabilitation, but there is no evidence that the appellant's prospects of rehabilitation would be less likely in Latvia. The respondent claims the judge erred in his assessment of proportionality by focusing upon the reasons why the appellant does not wish to be removed from the UK without sufficient regard to the public interest in the appellant's deportation.

12. Mr Bates adopts the grounds of appeal, and submits that although the judge refers to factors that weigh in favour of the appellant, the judge failed to have proper regard to the unlawful conduct of the appellant which is relevant to a proper consideration of whether the exclusion of the appellant is justified on the grounds of public policy. Mr Bates submits the fundamental interests of society include the prevention of unlawful immigration and abuse of immigration laws and maintaining the integrity and effectiveness of the immigration control system; Schedule 1, Paragraph 7(a) of the EEA Regulations. It also includes combating the effects of persistent offending particularly in relation to offences which have taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27; Schedule 1, Paragraph 7(h). The

respondent submits that in reaching his decision the judge fails to engage with the matters set out in Schedule 1 identifying the fundamental interests of society. Mr Bates submits the appellant has shown utter disregard for immigration laws and the judge failed to consider the appellant's conduct as a whole, in considering whether the personal conduct of the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Mr Bates submits that when one considers the appellant's offending, the appellant has demonstrated in the past that there can be long periods during which he did not offend and it was irrational for the Judge to conclude the appellant does not pose a risk of reoffending because he had behaved positively whilst prison and has not reoffended since his release. That was a short period during which the appellant has been under the threat of deportation.

13. Mr Bates submits the judge erred in concluding the exclusion of the appellant from the UK is not proportionate and the appellant would not pose a sufficiently serious threat to the fundamental interests of society.

Discussion

14. As the judge noted found at paragraph [36] of his decision, it is uncontroversial that the appellant has not acquired permanent residence and is only entitled to the basic level of protection set out in Regulation 23(5) and Regulation 27(1) of the 2016 Regulations. It is convenient to set out, at the outset, Regulation 27 of the EEA Regulations 2016 insofar as it is relevant:

> 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.
>
> …
>
> 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.

15. It is also convenient to set out Schedule 1 insofar as it is relevant to this appeal.

7. Fundamental interests of society

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;

...

(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);

...

16. As the appellant has not exercised treaty rights for a continuous period of five years, the Regulations give only the lowest level of protection against removal. Nevertheless the appellant cannot be deported unless his personal conduct represents "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. This is set out at Regulation 27(5)(c).

17. Judge Hillis considered the factors set out in Regulation 27(5) of the EEA Regulations at paragraphs [37] to [48] of his decision. The judge found the appellant to be a credible and truthful witness who showed clear remorse for his previous offending and I remind myself that the judge had the advantage of hearing from the appellant who clearly made a favourable impression upon the judge.

18. A finding as to whether the conduct of the appellant represents a genuine, present and sufficiently serious threat is a prerequisite for the adoption of an expulsion measure and it is only upon such a threat being established, that the issue of proportionality arises. Here, the judge concluded at paragraph [48] that there is insufficient evidence before him to conclude that the appellant presents a genuine and sufficiently serious threat affecting one of the fundamental interests of society. In reaching that decision, the judge appears to have taken into account a number of factors. First, the appellant was released on licence on 14th December 2018, and there was no evidence that the appellant breached any of the licence conditions or committed any further offences; *Paragraphs [37], [38] and [47].* Second, the appellant's conduct whilst in prison and the courses that he completed; *Paragraphs [40] and [47].* Third, the evidence that since his release from prison the appellant has been in regular employment and has managed to remain drug-free; *Paragraphs [40], [42] and [47].* Fourth, the appellant has established a relationship with a lady and her son which, on the face of it, appears to be stable, although they are not currently cohabiting; *Paragraphs [40] and [47].*

19. In my judgement, in reaching his decision the judge had regard to a number of factors that weigh in favour of the appellant and the judge was undoubtedly entitled to have those factors in mind. However, this is not a case where there has been a prolonged period of industrious good behaviour showing that the appellant's offending can be considered in isolation when considering the fundamental interests of society. In reaching his findings and the overall conclusion set out at paragraph [47], the judge fails to have any regard whatsoever to the fact that the appellant was administratively removed to Latvia on 20th May 2016, and, on 25th January 2017 sought admission to the UK by deception when he attempted to use a travel document that did not belong to him, to gain entry. Although the judge was concerned with the question of whether the appellant presents a genuine and sufficiently serious threat affecting one of the fundamental interests of society, there is no reference at all by the judge to the 'fundamental interests of society' expressed in Schedule 1 of the 2016 Regulations. The judge concludes at paragraph [48] that there was insufficient evidence before him to conclude the appellant presents a genuine and sufficiently serious threat affecting one of the fundamental interests of society. I cannot be satisfied that the judge would have reached the same conclusion, if the matters set out in Schedule 1 had been taken into account, and the judge had factored in, the appellant's

attempt to gain entry in January 2017 by deception. In my judgement, the decision of the FtT is vitiated by a material error of law and must be set aside.

Remaking the decision

20. I must then decide what to do now. The appellant has not attended the hearing before me and is not represented. However, I have had the advantage of reading the papers. The appellant's stay in the United Kingdom has not been particularly prolonged. As the FtT judge found, it is only long enough to give the basic level of protection to which an EEA national is entitled.

21. The appellant has established a relationship with a lady and her son, which on the face of it, the FtT judge found to be "stable although they are not currently cohabiting". The appellant lives with his mother and the FtT judge found that his entire family are now living in the UK in exercise of the Treaty rights. There does not appear to have been an OASys Report and the FtT judge proceeds upon the premise that there is no evidence to show the appellant is anything other than a low risk of re-offending. That however, is to disregard the fact that the appellant has in the past had periods during which he has not offended, but overall, he is a persistent offender. I find the personal conduct of the appellant, taking into account his convictions and his attempt in January 2017 to enter the UK by deception in breach of immigration laws, to be such that he presents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In reaching that decision I have had regard to the lack of evidence showing the commission of any further offences and the steps taken by the appellant towards rehabilitation and the remorse that he expressed before the FtT. In short I find that this is a case of a man whose criminality and conduct is sufficient to warrant deportation and who has not been able to show that his or his family's circumstances come within the exceptions to exclusion. I find that the decision to the appellant complies with the principle of proportionality and the appellant is not somebody who is entitled under EEA law, with its different regime, to be allowed to remain.

Notice of Decision

22. The Secretary of State's appeal is allowed.

23. I set aside the decision of the First-tier Tribunal and substitute the decision dismissing the appellant's appeal against the Secretary of State's decision to deport him.

Signed Date 27th March 2020

Upper Tribunal Judge Mandalia

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email