Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00517/2018**

THE IMMIGRATION ACTS

Heard remotely at Field House On 14 April 2021 *via Skype for Business*	**Decision & Reasons Promulgated On 29 April 2021**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROBERT NISTOR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T. Lindsay, Senior Home Office Presenting Officer
For the Respondent: The respondent did not appear and was not represented

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to were the Secretary of State's grounds of appeal, the decision of the First-tier Tribunal, and Tribunal's own file, the contents of which I have recorded.
The order made is described at the end of these reasons.

The parties said this about the process: the Secretary of State, as the only party in attendance, raised no concerns about the fairness of the hearing

1. This is an appeal of the Secretary of State against a decision of First-tier Tribunal Judge Hawden-Beal promulgated on 30 January 2019. The judge allowed an appeal brought by Robert Nistor, a citizen of Poland born on 30 September 1979, against a decision of the Secretary of State dated 1 August 2018, supplemented by a further decision dated 4 December 2018, to deport him from the United Kingdom pursuant to the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

2. For convenience, in this decision I will use the term 'appellant' to refer to Mr Nistor.

3. I note that the decision of the First-tier Tribunal was promulgated over two years ago. Permission to appeal was granted by First-tier Tribunal Judge Scott Baker on 1 December 2020. It appears that the Secretary of State's application for permission to appeal was made in time, on 5 February 2019. The reasons for the delay on the part of the First-tier Tribunal are not clear.

Absence of the appellant

4. The appellant was removed from the United Kingdom to Poland by the Secretary of State on 2 September 2018. This was ahead of his appeal, pursuant to regulation 33 of the 2016 Regulations. He did not attend the hearing before the First-tier Tribunal, nor participate in those proceedings in any way. The same was true of the proceedings in this tribunal.

5. The notice of hearing was sent to the appellant's last known address in this country. Neither the tribunal, nor the Secretary of State, of whom enquiries were made, has an email address for the appellant, or contact details for him in Poland.

6. Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that the Upper Tribunal may proceed with a hearing if a party fails to attend a hearing if (a) it is satisfied that the party has been notified of the hearing, or that reasonable steps have been taken to notify the party of the hearing; and (b) considers that it is in the interests of justice to proceed.

7. In relation to (a), I was satisfied that reasonable steps had been taken to notify the appellant of the hearing. There was little more that the tribunal could do than send a notice of the hearing to the appellant's last known address. The appellant brought these proceedings, and even though he has been removed to Poland, the responsibility rests upon him to notify the tribunal with his updated contact details. He has not.

8. As to whether it was in the interests of justice to proceed in the appellant's absence, I explained to Mr Lindsay that I had some concerns that the appellant had been removed by the Secretary of State in circumstances in which she may be unlikely to do so again. I explained

that pursuant to the Secretary of State's concession in R (oao Mendes) v Secretary of State for the Home Department [2020] EWCA Civ 924, so-called interim removals appear not to be pursued by the Secretary of State in the absence of a full EU law proportionality exercise, which does not appear to have taken place in this case. See [18] of the Court of Appeal's judgment. That was a factor going to the fairness of proceeding the appellant's absence, as an operative factor in the appellant not being present in the UK to attend his appeal hearing in person was the Secretary of State's action in removing him from the UK, without, it seems, having conducted the EU law proportionality assessment which she now accepts she must conduct before carrying out such interim removals.

9. Notwithstanding the above concerns, I decided that it was in the interests of justice to proceed. The appellant has not remained in contact with the tribunal, something which would be very easy to do from Poland (for example, by email), meaning that responsibility for the tribunal's inability to contact him rests with him. Remaining in touch with the tribunal is entirely within his gift. The appellant enjoys the ability to be readmitted in order to present his case in person, a step he appears not to have taken.

10. I decided that, in the event I were to dismiss the Secretary of State's appeal, the appellant would suffer no prejudice. The Secretary of State's grounds of appeal were such that, if I allowed the appeal, a complete rehearing with full findings of fact would be necessary, and the matter could be remitted to the First-tier Tribunal to be heard afresh by a different judge. I decided it was fair to proceed with this hearing in his absence. Indefinitely adjourning the proceedings would have been inconsistent with the overriding objective which is to deal with cases fairly and justly, avoiding delay, so far as is compatible with the proper consideration of the issues.

Factual background

11. The appellant claims to have entered the UK thirteen years before his appeal hearing in the First-tier Tribunal, although the Secretary of State disputes the length and quality of his residence for the purposes of the 2016 Regulations. What is clear, however, is that the appellant amassed 22 convictions between 2009 and 2018 for offences of theft, possession of drugs and bladed articles, and breaches of court orders. Most offences took place from 2016 to 2018. During his offending history, the appellant was made subject to various non-custodial disposals, such as community orders with drug rehabilitation requirements, some of which he breached, leading to their revocation, and the substitution of custodial sentences. The penalties culminated in a sentence of 20 weeks' imprisonment for two charges of theft (shoplifting) and a single charge of failing to surrender to custody, imposed by the West Yorkshire Magistrates' Court on 15 May 2018.

12. According to the Secretary of State's supplementary decision letter dated 4 December 2018, the appellant's offending between February 2018 and May 2018 involved repeated thefts, including some thefts from the same

retail outlets. The appellant failed to surrender to bail, and committed his most recent offences while subject to a community order. Failing to surrender to custody at the appointed time demonstrated that he had not taken responsibility for his actions, and that he had little regard for the orders imposed upon him by the courts and the police. The pattern of offending demonstrated a propensity to reoffend, and the frequent attempts by the courts to require the appellant to engage with the underlying causes of his behaviour had been in vain. There is no evidence the appellant had sought to improve his behaviour, or learn from his past mistakes. The nature and seriousness of the offences for which the appellant had been convicted increased in time, demonstrating an escalation in the seriousness of his offending. The appellant demonstrated no remorse and showed no understanding of the impact of his actions on his victims. Shoplifting was not a victimless crime. For those reasons, he continued to pose a current threat, considered the Secretary of State. The Secretary of State decided to deport the appellant, on the grounds of public security, maintaining that the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

The decision of the First-tier Tribunal

13. Having set out the procedural and factual background, and the relevant legal framework, the judge reached her operative findings at [21]:

> "Regulation 27 (5) makes it clear that an individual's previous convictions do not, in themselves, justify the decision. I have looked at the evidence presented by the respondent see what conduct other than the appellant's previous convictions justify this decision. There is no evidence from the appellant to show that he has completed any rehabilitation courses whilst in prison to address the reasons for his offending behaviour. But equally there is no evidence before me to say that such courses were available to him, were offered and were refused by him, given the relatively short periods of time during which he was incarcerated. The burden is upon the [Secretary of State] and I am not satisfied that she has shown, on the balance of probabilities, that there is conduct other than [the appellant's]."

The judge allowed the appeal.

Ground of appeal.

14. The Secretary of State's single ground of appeal is that the judge erred in concluding that the Secretary of State had erroneously solely relied on the appellant's previous convictions. In the supplementary decision letter, the Secretary of State set out a series of reasons based on the appellant's underlying conduct which led to the conclusion that he represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Moreover, the judge failed to have regard to the considerations in Schedule 1 to the 2016 Regulations, concerning the "fundamental interests of society." There is no evidence before the tribunal, contend the grounds of appeal, that the appellant's deportation would in any way be disproportionate.

Legal framework

15. Regulation 27 of the 2016 Regulations governs decisions to remove a person on grounds of public policy, public security, or public health. Central to this appeal is regulation 27(5), which lists a range of proportionality considerations. Sub-paragraph (e) provides:

> "a person's previous criminal convictions do not in themselves justify the decision."

16. Regulation 27(8) provides that a court or tribunal considering whether the requirements of the regulation are met must "(in particular) have regard to the considerations contained in Schedule 1". Schedule 1 provides, where relevant:

> "Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society."

Discussion

17. In developing the grounds of appeal, Mr Lindsay drew attention to what he submitted was the detailed analysis contained in the 4 December 2018 supplementary decision letter, contending that it featured detailed consideration of the appellant's underlying conduct, and did not simply seek to rely on the mere fact of his convictions, without more. The judge plainly had seen the letter, for she summarised its contents at [2] to [8]. The judge had misapplied regulation 27(5)(e), conflating the mere existence of previous convictions with the concerns arising from the underlying conduct which led to the convictions.

18. I accept the Secretary of State's submissions. The prohibition against relying on previous convictions contained in regulation 27(5)(e) targets decisions which rely on the mere fact of previous convictions, rather than the threats posed by the underlying conduct which led to the convictions. So much is clear from the sub-paragraph's use of the qualifying term "*in themselves*". It represents a crucial distinction. In and of themselves, previous convictions reveal little about the underlying conduct of an offender, and cannot form the sole basis for a decision under regulation 27. By contrast, the details of the facts of the offences, the offender's circumstances, and any wider pattern of offending allow a qualitative assessment to be conducted of the risk a person poses to the host Member State. As Mr Lindsay submitted, the logical conclusion of the judge's analysis would be that any offending, no matter how heinous, would have to be accompanied by some additional reprehensible non-conviction conduct in order to meet the threshold for deportation under the 2016 Regulations. That cannot be right, and nor is it consistent with the plain wording of regulation 27(5)(e) and its emphasis, consistent with Article 27(2) of Directive 2004/38/EC, that "a person's previous criminal

convictions **shall not *in themselves*** constitute grounds for taking such measures…"

19. The Secretary of State's supplementary decision letter set out at length a range of concerns arising from the underlying conduct of the appellant which led to his convictions. Those concerns related to the persistence of the offending, the appellant's resistance to the rehabilitative qualities of community orders and other non-custodial disposals, the nature of the underlying offences, and a range of other matters. There was plainly material before the tribunal that went beyond the mere fact of the appellant's previous convictions, which the judge did not assess. Nor did the judge consider any of the factors in Schedule 1. This is not, of course, to say that the appellant's conduct *does* meet the regulation 27 threshold for deportation. Rather it is the case that the judge's analysis that he didn't was flawed, for the reasons set out above.

20. The decision of the First-tier Tribunal involved the making of an error of law and is set aside with no findings preserved. Given the extent of the factual findings that will be required upon the decision being remade, it is appropriate that the matter be remitted to the First-tier Tribunal, to be heard by a different judge.

Notice of Decision

The decision of Judge Hawden-Beal involved the making of an error of law and is set aside with no findings of fact preserved.

The matter is remitted to the First-tier Tribunal to be reheard by a different judge.

No anonymity direction is made.

Signed *Stephen H Smith* Date 21 April 2021

Upper Tribunal Judge Stephen Smith