



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: DA/00606/2019

**THE IMMIGRATION ACTS**

**Heard at Birmingham CJC  
On 10 March 2022**

**Decision & Reasons Promulgated  
On 16 March 2022**

**Before**

**UPPER TRIBUNAL JUDGE HANSON  
DEPUTY UPPER TRIBUNAL JUDGE PROFESSOR JUSS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MIRCEA-IULIAN SILES  
(Anonymity direction not made)**

Respondent

**Representation:**

For the Appellant: Mr Williams, a Senior Home Office Presenting Officer  
For the Respondent: No appearance.

**ERROR OF LAW FINDING AND REASONS**

**Background**

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Hawden-Beal ('the Judge') who in a determination promulgated on the 24 February 2020 allowed Mr Siles appeal under the Immigration (EEA) Regulations 2016 against the order for his deportation from the United Kingdom.

2. Mr Siles is a citizen of Romania born on 16 April 1995 who claims to have entered the United Kingdom in 2016.
3. Neither Mr Siles nor any representative attend the hearing. Mr Williams confirmed the address to which the notice of hearing had been sent was the one held by the Home Office. We are satisfied there has been valid service of the notice of hearing which clearly specifies the date, time, and venue.
4. A number of enquiries were made by the tribunal clerk to ascertain if Mr Siles had checked in, who also telephoned the numbers held for Mr Siles and left messages, but he had not.
5. In the absence of any explanation for the failure to attend and lack of application to adjourn, we are satisfied it is in the interests of justice to proceed to hear the application in Mr Siles absence.
6. By a decision dated 2 December 2019 a deportation order was made pursuant to regulations 23(6)(b) and (27) of the 2016 Regulations.
7. The Judge sets out her findings from [28] of the decision under challenge noting Mr Siles offending history and the view of the Secretary of State that repeated convictions, including one 17 months after an earlier conviction for a similar driving offence, demonstrated a lack of regard for the law, lack of remorse, antisocial attitude towards the community, and demonstrated that Mr Siles could not successfully address the issues which prompted him to offend.
8. The Judge notes there was no evidence of offending between 2016 and 2018 but that thereafter Mr Siles *“fell spectacularly from grace”*.
9. The Judge finds at [34] that Mr Siles has become a persistent offender who had not engaged with the community penalties as shown by his repeated breaches of court orders.
10. At [35 - 36] Judge writes as follows:
  35. 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 and I cannot 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 and I note that it was not until I ask the question about courses in prison, did that appellant say that he had attended 4-5 times but did not complete the course because he was released just before is (sic) last attendance was due. He said that he did not think it necessary to mention it in his witness statement but he has experienced representatives, who, once the refusal letter had been read, would have seen immediately that the lack of evidence of rehabilitation courses was one of the reasons why the respondent thought that he had no regard for the law, would reoffend and thus be a risk to the public.
  36. The burden is upon the respondent and I am not satisfied that she has shown, on the balance of probabilities, that there is conduct other than his previous convictions which justifies the decision to deport him.
11. The Judge went on to consider regulation 27(6) before addressing the question of rehabilitation. The Judge notes Mr Siles has cooperated

with his Probation Officer [40] but that there was no specific evidence before the Judge to say exactly what Mr Siles is doing with probation to address his offending behaviour and that Mr Siles own evidence was that probation had not sent him on any course to address his alcohol intake. The Judge speculates that this may be because they accepted his claim not to be drinking anymore [41].

12. The Judge in that same paragraph makes reference to her own experiences working in the criminal justice system but it is not made out that the assertions based on such experience were raised before the Tribunal to enable the Home Office Presenting Officer to comment on the same. They do not seem to be issues that were canvassed at any other stage in the proceedings.
13. At [43] the Judge notes *“Given that the appellant’s rehabilitation is in its infancy, and as per the respondent’s own guidance, it cannot be determinative of whether the appellant will reoffend and thus following ESSA and DUMLIAUSKA the appellant therefore cannot represent a present threat by reason of the propensity to reoffend or an unacceptably high risk of reoffending and so, if he does not represent a present threat to public policy by virtue of the risk of his reoffending, then his deportation cannot be justified”*.
14. The Judge therefore concludes that in the circumstances there is no conduct other than his previous convictions to justify the decision to deport him from the United Kingdom and that the decision was therefore not justified or in accordance with the 2016 Regulations [44].
15. The Secretary of State sought permission to appeal asserting that the Judge’s finding that the fact Mr Siles rehabilitation is in its infancy and that this was somehow material to risk of reoffending is not properly explained in the decision. It is asserted that past conduct was a key assessment which carries weight as to future risks and given that Mr Siles had only been out of prison for a matter of months without reoffending the Judge does not explain how or why such time would yield a durable change sufficient to reduce the risk of offending on the facts.
16. Permission was granted by Upper Tribunal Judge Martin, sitting as a judge of the First-tier Tribunal, on the basis it is said to be arguable that the Judge erred in failing to follow case law in relation to the prospect of rehabilitation and more particularly, in relation to persistent offending as justification for deportation, and that the Judge has arguably inadequately assessed whether the appellant represents an ongoing threat to society.
17. In response to directions provided by the Upper Tribunal, the Secretary of State has provided written submissions dated 10 June 2020 with nothing being filed on behalf of Mr Siles that we have seen. Further directions were made for a face-to-face hearing to consider whether the Judge has made an error of law material to the decision to allow the appeal, which comes before us today.

## **Error of law**

- 18.** The Secretary of States submissions of 10 June 2020 assert the Judge's conclusion that Mr Siles did not represent a present threat by reason of a propensity to reoffend at [43] is "wholly unlawful" for the following reasons:
- a) The Judge, by law, was required to assess the threat posed by Mr Siles at the date of the hearing (see Reg. 27(5)(c) and Schedule 1 para .3) - the Judge, in effect, refuses to do so on the basis of the SSHD's guidance;
  - b) The guidance simply says that early rehabilitation attempts are not *determinative* of the question of rehabilitation - at no point does the guidance say that the Judge should ignore the legal requirement to make a final finding (and nor could it do that as guidance) nor does it say that early attempts at rehabilitation equate to the SSHD failing to show the relevant level of threat at the date of consideration;
  - c) The effect of the guidance is simply to instruct makers in the Home Office that early attempts at rehabilitation do not automatically mean that the person is rehabilitated, thereby, potentially, negating the threat;
  - d) The finding at [41] also appears to be at odds with [35] in which the FtT apparently rejects the credibility of Mr Siles evidence as to why he did not complete the course, in respect of behaviour, in prison.
- 19.** The assertion the Judge wholly misconstrued that part of the guidance is made out before us as is the apparent contradiction between [41] and [35] which establishes the legal error in [43].
- 20.** There is merit, having read the decision carefully, that the Judge's finding at [36] is not at all clear. A reading of the documents clearly shows the Secretary of State's case as to why Mr Siles conduct was at the heart of his convictions, including persistent offending, and general disregard for the law and public safety, matters which appear to have been accepted by the Judge in the determination. The Judge erred, however, in stating that the Secretary of State was required to provide more than this i.e. to provide additional evidence over and above the convictions and the related circumstances appertaining to them.
- 21.** It is accepted that even if a person has offended in the past if there is no evidence that they are likely to reoffend then their appeal must succeed under the Regulations. The difficulty with this decision is the Judge's conclusion that the appeal should be allowed on the basis stated is infected by lack of clarity, adequate reasons, and misdirection in law in the requirement for the Secretary of State to provide more. We cannot find that there is no realistic prospect of reoffending that may be enough to save the decision on the basis of materiality.
- 22.** If it was found there was such a risk the issue of proportionality then arises which includes issues such as the question of rehabilitation. For the reasons stated in the grounds seeking permission to appeal and the further submissions of 10 June 2020 we cannot find that the Judge's findings in this regard can stand or that they lawfully establish that notwithstanding the Secretary of State proving Mr Siles is likely to

reoffend in the future it is not proportionate for him to be removed from the United Kingdom.

- 23.** We find the errors identified go to the heart of this determination such that no findings can stand. The decision is fatally flawed. We therefore set the decision aside with no preserved findings. Having considered the Presidential Guidance in the light of the extent of the factual findings that will be required to be made we find it appropriate in all circumstances for the appeal to be remitted to the First-tier Tribunal in Birmingham to be heard afresh by a judge other than Judge Hawden-Beal.

**Decision**

- 24. The Judge materially erred in law. We set the decision aside. This appeal shall be remitted to the First-tier Tribunal sitting at Birmingham to be heard afresh by a judge other than Judge Hawden-Beal.**

Anonymity.

- 25.** The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Upper Tribunal Judge Hanson

Dated 11 March 2022