Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: DA/00199/2018**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On 21st August 2018	**On 1st October 2018**

Before

Upper Tribunal Judge Gill

Between

The Secretary of State for the Home Department

Appellant

and

Dawid Grebowiec
(Anonymity Order Not Made]

Respondent

Anonymity

The anonymity direction made by the First-tier Tribunal is rescinded or revoked.

Representation:

For the appellant: Ms K Pal, Senior Presenting Officer.
For the respondent: No representation.

Decision and Directions

1. The Secretary of State has been granted permission to appeal the decision of Judge of the First-tier Tribunal S Lal (hereafter the "judge") who, in a decision promulgated on 5 June 2018 following a hearing on 30 May 2018, allowed the appeal of Mr Dawid Grebowiec (hereafter the "claimant"), a national of Poland born on 29 June 1997, against a deportation order made on 25 September 2017. The Secretary of State's

reasons for making the deportation order are set out in a letter dated 22 September 2017 (hereafter the "decision letter"). There is also a supplementary letter dated 14 October 2017 (hereafter the "supplementary decision letter") which considered representations that the Secretary of State received from the claimant late, after the expiry of the time limit of 10 days that he was given when served with a notice dated 31 August 2017 to submit any reasons why he should not be deported.

2. The claimant attended the hearing before me. He was not represented. He was content to proceed with the hearing. I explained to him that I could not hear fresh evidence and that I was limited to considering whether the judge had materially erred in law. I explained to him what this meant in simple terms. He had three companions. During the course of the hearing, one companion tried to interrupt him or prompt him. When I asked her not to do so, she obeyed my instruction, for which I am grateful. I did have some difficulty with the other two companions who made noises of exasperation and, on one occasion, so loudly that I found it difficult to concentrate. I then told them to stop making noises or I would have to ask all three to leave. Fortunately, there were no further difficulties.

Anonymity Order

3. The judge made an anonymity order, stating, at para 20 that: "*there are sensitive issues relating to the appellant*". The judge gave no explanation.

4. Following the hearing before me on 21 August 2018, I considered the documents on file and could not understand why the judge had made the anonymity order or what sensitive issues applied. I therefore issued Directions on 22 August 2018 which said as follows:

> "2. There is a strong public interest in open justice. It is not enough for the judge simply to say that "*there are sensitive issues relating to the appellant".* I have considered the documents on file. I cannot see why the judge made the anonymity order or what sensitive issues may apply in this case to justify an anonymity order.
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> 3. I am therefore minded to lift the anonymity order when issuing my decision as to whether the judge made materially erred in law.
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> 4. If Mr DG objects to my discharging the anonymity order, he must notify the Upper Tribunal in writing no later than 4 pm on Wednesday 5 September 2018, with full reasons for his objection."

5. As at 24 September 2018, the claimant had not made any representations or notified the Upper Tribunal in writing that he objected to the anonymity order being discharged.

6. I considered the material before me. I could not see any reason why the judge said that there are sensitive issues relating to the claimant. I could not see any. There is a strong public interest in open justice. In all of the circumstances, I decided to rescind or revoke the anonymity order.

The Secretary of State's decision

7. The deportation order was made under regulations 23(6)(b) and 27 of the Immigration (European Economic Area) Regulations 2016 (hereafter the

"Regulations"). The Secretary of State also certified the claimant's case under regulation 33 (paras 10-29).

8. The supplementary decision letter is a very detailed decision. It is more detailed than the decision letter because it responded to the claimant's representations which were made late and which were therefore not before the Secretary of State as at the date of the decision letter. I shall therefore refer to a greater extent to the supplementary decision letter.

9. The claimant's criminal convictions are set out at para 11 of the supplementary decision letter. Between 13 November 2015 and 22 August 2017, the claimant had been convicted of 22 offences on 7 occasions. There were 4 offences against the person (battery x 1 and common assault x 3), 3 offences against property (destroying or damaging property x 3), 4 offences of theft and kindred offences (theft by shoplifting x 2, theft from a dwelling x 1 and burglary and theft from a non-dwelling x 1) and 10 offences relating to police, courts and prisons (assault of a constable x 3, breach of a conditional discharge x 1, failing to comply with a community order x 3 and failing to surrender to custody x 3). He received sentences of imprisonment as follows:

   (i) On 24 November 2016, sentences of 6 weeks', 10 weeks' and 20 weeks' imprisonment were imposed upon variation, due to breach of / non-compliance with, sentences imposed for several offences (battery, assault on a constable, common assault, destroying or damaging property and theft by shoplifting).

   (ii) In addition, on 24 November 2016, he received concurrent sentences, upon conviction, of 6 weeks for theft from a dwelling and 3 weeks for failing to surrender to custody and breach of a community order.

   His longest sentence was therefore for 20 weeks.

   The claimant had also received three cautions in total. In 2014, for common assault and in 2015 for possession of a Class B drug and for theft by shoplifting.

10. The Secretary of State did not accept that the claimant had acquired a permanent right of residence (para 18 of the supplementary decision letter). He found that the claimant's conviction history indicated an established pattern of repeated offending (para 30), that there was a significant risk of re-offending (para 34) and that he represented a genuine, present and sufficiently serious threat to justify his deportation on grounds of public policy (para 35). The Secretary of State's reasons are set out in detail. The Secretary of State considered the issue of proportionality (paras 36-47) and concluded that the decision was proportionate. The prospect of rehabilitation was considered at paras 49-53. The human rights claim was then considered in considerable detail, at paras 55-125.

<u>The judge's decision</u>

11. The appeal before the judge was the substantive appeal against the deportation order under the Regulations.

12. In addition, as para 49 of the decision letter stated that the claimant had been served with a notice under s.120 of the Nationality, Immigration and Asylum Act 2002, the

judge had to decide any human rights issues raised in the appeal. The claimant's human rights claim was based on his relationship with Ms K H and her minor son, M.

13. At para 3 of his decision, the judge said that it was not disputed that the claimant had not acquired a permanent right of residence.

14. The judge summarised the oral evidence before him at paras 6-10. These read:

> "6. The appellant stated that he came to the UK when he was 16 to join his mother in the UK. He obtained a NI number and worked part time at the Premier Inn in Gatwick as well as studying at college.
>
> 7. He described the circumstances of his first offence which was in November 2015 and he stated that he was street homeless and he got into a fight. The August 2016 *[sic]* were of a similar nature and concerned an attempt to evict him from a property. The November 2016 conviction was in respect of theft when he was street homeless. He did not dispute the convictions as set out.
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> 8. He met his partner about a one and half years ago and they have been living together for about a year. He was like a stepfather to her 5 year sold *[sic]* son. He accepted that his previous convictions had been caused by being with the wrong company and access to alcohol but he was now out of the previous area and he was dry. He had done substance misuse courses as evidenced in his letters of support. He had not drunk in over a year and half and that *[sic]* he hoped to get paid work in the hospitality sector.
>
> 9. He had not contacted HMRC. He accepted that he he *[sic]* been homeless in the past because he had cased *[sic]* trouble for his mother but now the relationship with her was supportive.
>
> 10. The second witness to give evidence was Ms K H and she adopted her written letter in support. She described how she met the Appellant and that he was her partner for about a year and step father to her 5-year-old son. She accepted that he had been in with the wrong crowd but since he moved in with her he had had no further problems. She referred to her own problems with domestic violence in the past and the role that [the claimant] played in life. The Tribunal made a full note of the evidence, which appears in the Record of Proceedings. The Tribunal has taken into account all of this evidence and the other evidence, to which the Tribunal was referred, as well as the submissions of both parties."

15. The judge's assessment of the issues before him is set out at paras 14-19. Para 20 concerns the anonymity order. I shall quote the whole of paras 14-20. They read:

> "14. The Tribunal considered all the evidence before it. The Tribunal has at all times applied the civil standard of proof.
>
> 15. Having considered the evidence with care, the Tribunal is satisfied that [the claimant] did produce credible evidence of insight into his crimes and into his reformation. He candidly accepted in oral evidence that he had been pulled in the wrong direction by others especially when it came to alcohol. The Tribunal was provided with evidence as to how he would deal with such a situation in the future namely that he has moved away from the previous home area to be with his girlfriend in a different area.
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> 16. The Tribunal has been provided with evidence in the form of the letter from Forward dated 2 February 2018 in which they notice completion of relevant alcohol work and recognition of past mistakes. The Tribunal is satisfied that the evidence shows that [the claimant] has reasonably addressed the issue of alcohol consumption, the impact of his actions on victims and how he would deal with those self same friends and associates who he accepts were the cause of his previous problems, The Tribunal assessed his overall insight as good.
>
> 17. For the reasons given, the presence of insight, plus practical and pragmatic evidence as to how he would actually deal with his friends and associates the Tribunal is satisfied that deportation on grounds of public policy/ public security are *[sic?]* made out. There is no

evidence to suggest that [the claimant] poses such a risk and following Aranz, the Tribunal notes that the burden is on [the Secretary of State] to justify deportation. She has failed to do so other than noting the effect of the offences committed in general terms only on UK society.

18. Moreover, in respect of family life and proportionality, the Tribunal has been provided with credible evidence that [the claimant] has family life in the UK with Ms K H and her son and it would be disproportionate to expect [the claimant] to leave the UK at the present time. The Tribunal accepted her evidence as to the depth of this relationship as well as durability of the same. The Tribunal was satisfied that it would be in the best interests of her son to continue to have [the claimant] in his family life as he is at present.

19. In the light of its findings above the Tribunal did not go on to consider Article 8 separately.

20. The Tribunal has considered whether to make an anonymity direction in this case, because there are sensitive issues relating to [the claimant]. The Tribunal considers it right that until further order [the claimant] and other parties to this matter should have their details protected for that reason the Tribunal makes an anonymity order."

The grounds

16. With regard to the judge's finding that the claimant did not pose a current risk to public policy or security, the grounds contend, in summary, as follows:

(i) In stating that the claimant had produced credible evidence of insight into his crimes and into his reformation, the judge was relying on little more than the claimant's attempt in oral evidence to lay blame on others leading him astray (paras 12 and 15 of the judge's decision).

(ii) The judge failed to take into account the fact that the claimant was a persistent, prolific and violent offender and that he had failed to comply with the conditions of his sentences.

(iii) There was little evidence before the judge of the claimant's rehabilitation or steps taken by him to address his offending.

(iv) The claimant's breaches of community orders and failures to surrender to custody could not be explained away on the basis that he was homeless. The claimant had demonstrated a disregard for the law by disobeying community orders failing to surrender to custody.

(v) There was no evidence of what the claimant was doing in the United Kingdom and, accordingly, a failure to secure employment would increase the risk of re-offending.

(vi) The judge had failed to have regard to Schedule 1 of the Regulations which states, inter alia, that protecting the public and combating the effects of persistent offending are considered to be in the fundamental interests of society in the United Kingdom.

17. In relation to proportionality under the Regulations, there were no age or health reasons preventing the claimant's deportation to Poland nor any reason why he would not be able to find employment or accommodation there on his return.

18. In relation to the Article 8 claim, there was no evidence, beyond the partner's self-serving evidence, that the claimant was in a relationship with the partner or that it

would be in the best interests of her son for the claimant to remain in the United Kingdom. There was a dearth of evidence and of reasoning in the judge's decision.

The hearing on 21 August 2018

19. I heard submissions from Ms Pal. She drew my attention to fact that the judge had not made any mention at all of the fact that the claimant was a persistent offender.

20. Ms Pal submitted that the judge had failed to take into account that the claimant had failed to comply with the terms of his sentences. The letter from the Forward Substance Misuse Team (hereafter "FSMT") dated 2 February 2018 shows that the claimant had engaged with a substance misuse team. However, Ms Pal submitted that, given the claimant's persistent offending, the letter did not go anywhere near to suggesting that the claimant would not behave in a similar way again.

21. Ms Pal submitted that the judge had failed to take into account the public interest.

22. In relation to Article 8, Ms Pal submitted that the claimant's relationship with his partner commenced 6 months before the deportation order, i.e. after the claimant had been served with a "*Liability to removal*" document on 30 January 2017. At that time, he did not mention that he was in any relationship. The family life of the partner's child is with his mother. There was no evidence beyond the partner's evidence for any finding that the claimant enjoys family life with the partner's son. Even if there was such family life, the relationship had only been of short duration.

23. Before hearing from the claimant, I summarised for his benefit the Secretary of State's case and then gave him an opportunity to comment.

24. In the course of his comments, the claimant mentioned the letter from FSMT. In the course of doing so, I located a small bundle of documents that had been submitted by the claimant to the judge and which had been placed on the correspondence section of the file (hereafter the "claimant's bundle"), which is the reason why I had not seen it before the hearing. I am grateful to the claimant for alerting me to the existence of this bundle of documents.

25. In terms of submissions, the claimant said that he was found not guilty of the offence of 21 August 2017. This evidence was not before the judge. He was bailed to his partner's address. He submitted that this shows that he is in a relationship with her. They are living together. He submitted that, if he is deported, it cannot be said that his partner's child will not be affected.

26. Initially, the claimant said that he had not been served with any immigration papers before he met his partner but, on further discussion, he accepted that he was served immigration papers whilst in prison and that he met his partner after he left prison. He said that when he was in the day centre, both his partner and her son visited him. The son did not want to leave him and was crying.

27. I reserved my decision.

Assessment

28. It can be seen from paras 19-26 above that, despite my informing the claimant that I could not hear fresh evidence, he did in fact give fresh evidence. I have to disregard the fresh evidence because my duty is to decide whether the judge made a material

error of law on the evidence that was before him. It is not open to me to consider fresh evidence in order to support his findings. It is not open to me to make my own findings based on the fresh evidence unless the decision is first set aside on the ground that the judge had material error of law.

29. In view of the fact that the claimant's bundle was placed on the correspondence section of the file, I examined the file very carefully to ensure that no documents are omitted from my consideration of the issues in this appeal. I shall deal with the claimant's bundle at the appropriate points.

30. The judge said, at para 3, that it was not in dispute that the claimant had not acquired a permanent right of residence. This seems rather odd because para 8 of the supplementary decision letter states that the claimant had stated in his representations of 31 August 2017 that he has lived in the United Kingdom for most of his life, that he last arrived in the United Kingdom in 2013 and had been exercising Treaty rights in the United Kingdom.

31. However, assuming that the judge was correct, that there was no dispute that the claimant had not acquired a permanent right of residence (if, for example, this as accepted by the claimant at the hearing), this would mean that the claimant had the lowest level of protection under the Regulations. This would therefore mean that the judge had to consider two questions under the Regulations, as follows:

    (i) whether the claimant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society; and

    (ii) if so, whether the decision was proportionate.

32. I have set out the entirety of the judge's reasoning at my para 15 above. I am driven to say that it is seriously wanting. There is no mention in the judge's reasoning, or anywhere else in his decision, that he considered question (i) or even that he was aware of the test to be applied in relation to the lowest level of protection.

33. Not only is it the case that there is no mention in the judge's decision that the applicant was regarded by the Secretary of State as a persistent offender, there is no mention in his reasoning or anywhere else in the decision of the claimant's criminal convictions. There is nothing to indicate that he considered whether the claimant was a persistent offender and, if so, that he had taken into account para 7(h) of Schedule 1 of the Regulations, which provides that, for the purposes of the Regulations, the fundamental interests of society in the United Kingdom includes 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. Indeed, there is nothing to indicate that he was even aware of the existence of para 7(h).

34. At para 17 of his decision, the judge said: "*There is no evidence that the claimant poses such a risk*". It is impossible to see how this sentence can be correct when the evidence before the judge was in the form of the claimant's criminal convictions. What the judge had to do was to consider that offending history, the claimant's oral evidence and the letter from FSMT and then, having assessed the evidence before him, reach a reasoned finding as to the threat that the claimant poses. What we see in the judge's reasoning is reference *only* to the claimant's oral evidence and the letter from FSMT and no mention at all of the criminal history.

35. What is clear from the judge's reasoning is that he simply accepted the claimant's oral evidence by which he gave explanations for his offending behaviour and the letter from FSMT. It is instructive to consider the contents of this letter. It reads:

> "I am writing this letter to inform you that Dawid Grebowiec is currently engaging with the Substance Misuse Team within Brook House Immigration Centre. Dawid Grebowiec has been engaging since January 2018, and has been punctual with his appointment times.
>
> Dawid Grebowiec is completing a non-structured course which is designed to offer 1:1 session's *[sic]* and cell packs to meet his individual's needs.
>
> This is to help Dawid Grebowiec gain knowledge, understanding and to recognise negative choices he may have previously made regarding substance misuse. Dawid Grebowiec has completed *[sic]* session on Cannabis and NPS and will continue to work with myself and complete sessions on Low Mood/Depression, Sleep problems.
>
> Dawid Grebowiec is very positive when talking about his future and how he recognises the mistakes he had made in the past. Dawid Grebowiec speaks openly and honestly about his past and recognises his negative impact within the justice system."

36. The letter from FSMT does not say anything about the risk that the claimant poses of re-offending. If the judge considered that the claimant's engagement with the FSMT for a period of one month (from January 2018 to February 2018) was sufficient to reduce his risk of re-offending so that he did not present a genuine, present and sufficiently serious threat, it would have been necessary for him to have explained why engagement with the FSMT for a period of one month was sufficient, having regard to the claimant's history of persistently failing to comply with court orders including orders that imposed rehabilitation activity requirements.

37. The claimant's criminal history, including his convictions for breaches of community orders and breaches of his bail conditions, was relevant to any assessment of the threat he poses along with his oral evidence and the letter from FSMT. It is impossible to see how the judge could have decided the risk the claimant posed without taking into account the criminal history.

38. There is nothing to indicate that the judge took into account or was even aware of para 3 of Schedule 1 of the Regulations which states:

> **"**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."

39. In all of the circumstances, I am driven to the conclusion that the judge did not in fact take into account the claimant's criminal convictions.

40. Indeed, having regard to the remainder of my reasons below, I can and do say that I have no confidence at all that the judge was even aware of the contents of the decision letter and/or the supplementary decision letter.

41. Para 18 of the judge's decision mentions proportionality but it is clear that this was in connection with the Article 8 claim. The assessment of proportionality under the Regulations entails wider considerations and is a separate issue. In case it is said that, as the judge found that the decision was disproportionate for the purposes of Article 8, any error in this respect is immaterial, I have concluded that the judge also

materially erred in law in reaching his finding that the decision was disproportionate in relation to the claimant's Article 8 claim, for the following reasons:

(i) As in the case of the judge's decision in relation to the deportation case under the regulations, there was in fact no balancing exercise in the judge's reasoning. It is impossible to see any weighing of the factors for and against the claimant. All one sees is a wholesale acceptance, without any assessment whatsoever, of the evidence given by the claimant and his partner.

(ii) There is nothing to indicate that the judge considered para 4 of Schedule 1 of the Regulations which was relevant to any balancing exercise and which states:

> "Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around he same time as-
>
> (a) the commission of a criminal offence;
> (b) …;
> (c) …"

(iii) There is nothing to indicate that the judge took into account the fact that the claimant's relationship with Ms K H and her son was of short duration and established after the claimant had already been served with immigration papers.

(iv) Instead of a balancing exercise, one sees what is clearly an assumption that the mere existence of a genuine relationship between the claimant and Ms K H was sufficient to trump the state's interests in immigration control, an assumption that M's best interests require the applicant to be in the United Kingdom and an assumption that the best interests of a child trump the state's interests. The first and the third assumptions are plainly incorrect.

42. This decision falls far short of the standard that can reasonably be expected. It is rare that it is necessary for the Upper Tribunal to say so. Regrettably, this is one of those rare occasions.

43. For all of the above reasons, I set aside the decision of Judge Lal in its entirety. None of his findings shall stand. His summary of the evidence he heard, at paras 6-10 of his decision, may be relied upon by ether party.

44. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the “Practice Statements”) recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

> “(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”

45. In my judgment this case falls within para 7.2 (b). In addition, given that the claimant won his appeal before the First-tier Tribunal and having regard to the Court of

Appeal's judgment in JD (Congo) & Others [2012] EWCA Civ 327, I am of the view that a remittal to the First-tier Tribunal is the right course of action.

Notice of Decision

The decision of Judge of the First-tier Tribunal S Lal involved the making of errors on points of law such that the decision on the claimant's appeal is set aside in its entirety.

This case is remitted to the First-tier Tribunal for a re-hearing of all issues in this appeal by a judge other than Judge of the First-tier Tribunal Lal.

Signed
Upper Tribunal Judge Gill

Date: 24 September 2018