Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01748/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 April 2014	**On 3 April 2014**
Decision given orally	

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

NIKOLA OBLAKOVIC

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Grigg, Counsel, Kesar & Co Solicitors
For the Respondent: Miss A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Croatia where he was born on 7 March 1989. He appeals with permission the decision of First-tier Tribunal Judge Parkes and Dr J O

de Barros who, for reasons given in a determination dated 15 January 2014, dismissed the appeal against the decision to make a deportation order dated 20 August 2013 with reference to the Immigration (European Economic Area) Regulations 2006. This decision followed the appellant's conviction on 22 October 2012 at Nottingham Crown Court of conspiracy to handle stolen goods for which the appellant was sentenced to a period of imprisonment of three years and seven months. He has now completed his custodial sentence and has been released on licence

2. The Secretary of State explained in her decision to make a deportation order that she had regard to Regulation 21 of the 2006 Regulations and was satisfied that the appellant would pose a genuine, present and sufficiently serious threat to the interests of public policy if he were allowed to remain in the United Kingdom and consequently considered that deportation was justified. She therefore decided with reference to Regulation 19(iii)(b) that the appellant should be removed and that an order be made requiring him to leave the United Kingdom and prohibiting him from re-entering whilst that order is in force.

3. The appellant appealed that decision on grounds that the decision was unlawful under the Human Rights Act 1998, in breach of the EEA Regulations and that the decision was not otherwise in accordance with the law. In dismissing the appeal the Tribunal concluded at [33] of its determination that:

> "The appellant continues to present a present and serious threat to the fundamental interests of society by his involvement in the commission of large scale criminal activity with international elements and that this is a danger that he continues to present."

4. The determination is challenged on four grounds. In summary these are that the Tribunal erred in directing itself at [11] that it was for the appellant to show on a balance of probabilities that he should not be deported. The second ground is that the Tribunal erred in its assessment under Regulation 21. The third ground is that the Tribunal had erred in failing to consider and make findings on the appellant's engagement with his rehabilitation and the reduction in risk as a result with reference to the Tribunal decision in *Essa* (EEA rehabilitation, integration) [2013] UKUT 00316 (IAC). The fourth ground is that the Tribunal's findings and conclusions under Article 8 were erroneous.

5. On behalf of the Secretary of State, Miss Everett accepts that the Tribunal erred in its direction as to the burden of proof and she further accepts that the materiality of that error is compounded by a failure by the Tribunal to specifically direct itself as to the consequences of the appellant having a permanent right of residence which had been approved in January 2011. This required the Tribunal to consider whether there were serious grounds of public policy or public security and so above the base level protection which an EEA national or family member has under Regulation 21.

6. I am readily persuaded that Miss Everett was correct to make that concession. In [2] of its determination the Tribunal began a series of directions. Para [2] indicates that the Tribunal was aware of the role of Regulations 19 and 21. Rather than specifically directing itself as to the higher level of protection the appellant is entitled to, it observed that with the appellant having been in the United Kingdom for less than ten years, the circumstances did not engage "the Rule relating to imperative grounds of public security". It is not the appellant's case nor would he be able to successfully argue it even if it were, that he has been here for ten years in the light of the impact of his period of imprisonment in 2012.

7. Thereafter the Tribunal directed itself as [3] to [8] with reference to the Immigration Rules, the Refugee Convention, the Qualification Directive and to humanitarian protection. None of these matters were issues that the Tribunal was concerned with. Having regard to the nature of the direction at [2] and these irrelevant directions the question must be asked whether the Tribunal fully understood the task that it was required to undertake.

8. Accordingly, I am satisfied that the misdirection as to the burden of proof was a material misdirection, particularly having regard to the language of the determination and the failure to identify and address the higher level of protection the appellant is entitled to. This deals with grounds 1 and 2. As to ground 3, the Tribunal reached its conclusion regarding the appellant's rehabilitation and concluded at [32]: "We find that his claims to have reformed are not allowable and we do not accept them". If this were a sustainable finding it would mean that rehabilitation had no role in this appeal but since the Tribunal approached its findings through the prism of misdirection as to the burden of proof, I find also that this ground is made out. As to the final ground, Mr Grigg accepts that this is not a material challenge since the rights protected under Regulation 21 are of a higher order than those encompassed by Article 8.

9. For these reasons I set aside the decision of the First-tier Tribunal and preserve none of its findings. Having regard to the nature of the error and the need for detailed findings to be made, the correct course pursuant to s. 12 of the Tribunals, Courts and Enforcement Act 2007 and the Senior President's Practice Statement, is for the matter to be remitted to the First-tier Tribunal for its reconsideration of the issues.

10. Mr Grigg has indicated that the appellant wishes to obtain an updated probation report from his probation officer. It will be for the appellant to persuade the First-tier Tribunal to accept that new evidence and I make no direction in this regard.

11. On this basis the appeal is allowed and the matter is remitted to the First-tier Tribunal for a further decision by a judge or panel other than FtTJ Parkes and Dr J O Debarros.

Signed Date 1 April 2014

Upper Tribunal Judge Dawson