Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01338/2014

THE IMMIGRATION ACTS

Heard at Glasgow **Determination issued**
On 13 January 2015 **On 15 January 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

DAMIAN GORECKI
Respondent

Representation
For the Appellant: Mrs R Pettersen, Senior Home Office Presenting Officer
For the Respondent: Mr S Winter, Advocate, instructed by Bruce Short, Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but are referred to in the rest of this determination as they were in the First-tier Tribunal.

2. The SSHD appeals against a determination by First-tier Tribunal Judge J C Grant-Hutchison dated 9 September 2014, allowing the appellant's appeal against a deportation order made under the Immigration (European

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Economic Area) Regulations 2006. The material parts of the grounds are these:

> … the judge materially misdirected herself … as she has placed great weight on the appellant's future rehabilitation …
>
> The UT in *Essa* [2013] UKUT 00316 and *Vasconcelos* [2013] UKUT 00378 reaffirmed … that rehabilitation … only becomes relevant to … regulation 21(5) when someone has established a right of permanent residence. *Essa* at paragraph 26:
>
> *… the Court's reference to genuine integration must be directed at qualified persons and their family members who have resided in the host state for five years or more. People who have just arrived…, have not yet become qualified persons, or have not been a qualified person for five years, can always be removed for non-exercise of free movement rights irrespective of public good grounds to curtail free movement rights. If their presence during this time makes them a present threat to public policy it would be inconsistent with the purposes of the directive to weigh in the balance against deportation their future prospects of rehabilitation.*
>
> …. Rehabilitation is not a relevant consideration of those EEA nationals who have not acquired permanent residence. The judge clearly considers the issue … in great detail… despite it only being relevant when someone has established permanent residence …
>
> Furthermore… the appellant's crimes and offending behaviour had been escalating, which was accepted by the judge at paragraph 37 … the way in which the appellant ended up serving his sentences is irrelevant. The appellant has a clear propensity to reoffend and there are grounds of public policy for deporting him. The appellant is a genuine, present and sufficiently serious threat.

3. Mrs Pettersen submitted that the judge's consideration of rehabilitation prospects was plainly central to her decision, and on that point she overlooked that the regulations, as made plain by the case law, do not admit that factor into the balancing exercise. The appellant came to the UK in 2009, and had no right to expect any rehabilitation to be carried out here. The error was so material as to require the decision to be set aside. On the evidence which was before the First-tier Tribunal, the decision should be reversed. Further, the appellant is known to be subject to a further sentence of 10 months imprisonment, imposed on 8 January 2015. He has not suggested that any other evidence should be introduced if a fresh decision were to be required.

4. Mr Winter's submitted firstly that the judge had not decided the case on rehabilitation prospects only but on other significant matters which were relevant under regulation 21(5). Any error was immaterial. Secondly, he argued that on the basis of *Tsakouridis* [2011] 2 CMLR 11, from which *Essa* derives, and of a close reading of *Essa*, rehabilitation prospects are relevant even in a case which does not reach the 5 year threshold. He relied particularly on the opinion of the Advocate General at AG50, "Observance of the principle that criminal sanctions must have the function of rehabilitation is indissociable from the concept of human dignity and … belongs to the family of general principles of Union law"; A86, 87 and 95; the Court's general agreement with the AG; and paragraphs 26, 49, 52 and 53. *Essa* at paragraph 26 was somewhat

inconsistent with paragraph 28, which says that the longer the residence the greater the degree of integration and the weightier the prospects of rehabilitation as a factor against removal. It is also inconsistent that at paragraph 30 a problem area is identified of those who have been resident for more than the minimum of five years and are integrated but not qualified persons. The question is reserved whether the prospects of rehabilitation can be a factor in those cases. Mr Winter argued that there should be no restriction on considering rehabilitation as a relevant factor.

5. If there were error, Mr Winter accepted that the Upper Tribunal should go on to substitute a fresh decision. The only further evidence would be a statement by the appellant, prepared by his solicitors. (It is not signed and dated but can be taken into account.) The appellant has a trial pending on 16th January 2015 in Perth Sheriff Court on a charge which he denies. He has another case there with an intermediate diet on 19 February and a trial diet on 10 March 2015. On 7 January 2015 his sentence was made up of 4 months on a charge of assault; 2 months recall on the offensive weapons charge; and 4 months for breach of a community payback order. He has no contact with family in Poland, no home and no prospects. His (Polish) partner would not move with him, and he "would do anything" to remain in Scotland with her and their daughter.

6. Mrs Pettersen submitted in reply that the judge not only went wrong about rehabilitation, she for no good reason discounted the appellant's breach of bail conditions and failed to deal with the obvious point that his offending was escalating. The appellant's circumstances did not approach those where *Essa* left any room for expansion of cases to which rehabilitation prospects were relevant.

7. I reserved my determination.

8. *Tsakouridis* was a case about a 10 year resident. *Essa* found the same principles to apply to a 5 year resident, but not to those falling short of that period. Mr Winter gleaned such pickings as he could from those authorities but they are plainly too lean. If there is any suitable candidate for extending the scope of the established principles, it is not this appellant. The judge erred on the issue, which is mentioned several times and emphasised in the concluding paragraph, so the decision has to be remade.

9. I observed at the hearing that in remaking the decision I should take into account the further conviction but not the two further sets of pending criminal proceedings. With reference to the proceedings pending on 19 February and 10 March 2015 that is not quite right, on closer reading of the appellant's statement. He admits the mistake of becoming annoyed by being "punished twice" and deciding not to "sign on" at a police station, in breach of a sexual offences prevention order. This is therefore another matter which counts against him, although the decision would have been the same without this further adminicle of evidence.

10. The appellant finds it easy to say that he would “do anything” to remain with his partner and child, but in his conduct he does nothing to help himself. At the hearing in the First-tier Tribunal he professed to understand that he had to change or he would not get another chance, but rather than rehabilitating himself he has continued on a downward spiral. Even if relevant, the evidence shows no likelihood of rehabilitation in this country to count in his favour. His tendency is in the wrong direction. The appellant has made no good case against the decision to make a deportation order.

11. The determination of the First-tier Tribunal is **set aside**. The following decision is substituted: The appellant’s appeal, as originally brought to the First-tier Tribunal, is **dismissed**.

12. No anonymity direction has been requested or made.

14th January 2015
Upper Tribunal Judge Macleman