Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01470/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Determination Promulgated**
On 27th April 2015	**On 22nd May 2015**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

KINGSLEY CHUKWUDINMA NWANEKWU
(ANONYMITY DIRECTION NOT REQUESTED OR MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Thomas, Counsel instructed by Freemans Solicitors
For the Respondent: Mr S Walker, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Germany, born on 28th May 1964, who claims to have arrived in the United Kingdom in March 2003. He was issued with an EEA

registration certificate on 17th September 2005, such certificate being valid until 17th September 2010.

2. On 5th July 2011 the Appellant was convicted at Canterbury Crown Court of "being knowingly concerned in fraudulent evasion of prohibition or restriction on importation of Class A controlled drugs" and was sentenced to a period of imprisonment of eight and a half years.

3. On 16th July 2014 the Secretary of State made a decision that the Appellant should be deported pursuant to the Immigration (European Economic Area) Regulations 2006 on the grounds of public policy. In doing so the Secretary of State stated as follows:-

> "She [the Secretary of State] is satisfied that you would pose a genuine, present and sufficiently serious threat to the interests of public policy if you were to be allowed to remain in the United Kingdom and that your deportation is justified under Regulation 21. She has therefore decided under Regulation 19(3)(b) that you should be removed and an order made in accordance with Regulation 24(3), requiring you to leave the United Kingdom and prohibiting you from re-entering while the order is in force. For the purpose of the order Section 3(5)(a) of the Immigration Act 1971 will apply."

The Appellant appealed that decision to the First-tier Tribunal which was heard by the First-tier Tribunal (Judge Moore) on 9th December 2014 and dismissed on all grounds in a determination promulgated on 18th December 2014.

4. He sought permission to appeal that decision and permission was granted by the First-tier Tribunal (Judge Shimmin) in a decision of 12th January 2015.

5. On 2nd March 2015 the Appellant's appeal against the decision of the First-tier Tribunal came before Upper Tribunal Judge O'Connor who in a determination promulgated on 6th March 2015 found an error of law in the decision of the First-tier Tribunal in assessing whether the Appellant represented a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" under Regulation 21(5)(c) of the 2006 EEA Regulations. At [16] of Upper Tribunal Judge O'Connor's decision, he reached the conclusion that it was unclear from the determination of the First-tier Tribunal what conclusion the First-tier reached as to the risk of the Appellant reoffending upon his release from prison. The error of law found by Upper Tribunal Judge O'Connor was set out in the determination as follows:-

> "14. At the hearing before the Upper Tribunal Mr Melvin accepted that the First-tier Tribunal had failed to make a 'definitive finding' as to the risk of the appellant reoffending upon his release from prison. It was asserted, nevertheless, that the First-tier Tribunal had been entitled to find that the appellant represented a genuine, present and sufficiently serious threat to the public.
>
> 15. In her reply Ms Thomas changed tack, adopting Mr Melvin's position that the First-tier Tribunal had failed to 'definitively' rule on the risk of the appellant committing further offences upon his release. It was said that this failure of itself

was demonstrative of the determination containing an error on a point of law requiring it to be set aside.

16. I agree with the parties that it is unclear from the determination what conclusion the FTT reached as to the risk of the appellant reoffending upon his release from prison. The words that I have emboldened in paragraph 11 above support the conclusion that there is a lack of clarity in the First-tier Tribunal's determination – the FTT appearing to initially proceed on the basis of there being a low risk of the appellant reoffending, but then concluding – on the wrong standard of proof – that the appellant's finances on release may well be limited, a feature which it treats as enhancing such risk.

17. If the First-tier Tribunal found the OASys Report not to be correct in its conclusion, and approached the issue of reoffending on the basis of there being a higher risk of the appellant reoffending than that identified in the OASys Report, it was required to provide cogent reasons for doing so. There are no such reasons to be found in the determination. If, on the other hand, the First-tier Tribunal determined the appeal on the basis of the conclusion set out in the OASys Report, it is difficult to understand the root of its finding that the Appellant represents a genuine, present and sufficiently serious threat to the fundamental interests of society; given that the OASys Report concludes that there is a 1% chance of the appellant reoffending in the first twelve months after his release and a 3% chance of him offending thereafter.

18. Consideration of the risk of the appellant reoffending upon his release is, in the light of the terms of the OASys Report and Regulation 21(5)(c) of the 2006 EEA Regulations, the key issue in this appeal and, absent the FTT making a clear and reasoned finding on such an issue I find its determination to be fundamentally flawed by legal error.

19. For this reason I set aside the determination of the First-tier Tribunal.

20. I was unable to proceed immediately to determine the appeal on 2 March because the appellant indicated an intention to call additional witnesses, there being an inability to call such witnesses before the First-tier Tribunal because of the short notice given to the appellant of the change of the hearing date (which had originally formed part of the submissions in relation to ground 1 of the appeal to the Upper Tribunal). Those witnesses were not in attendance before me on 2 March and neither were they required to be, given the terms of paragraph 3 of the directions that were sent out with the grant of permission. In such circumstances I adjourned the hearing of the appeal.

21. The remaking of the decision will be on the basis that the appellant has not attained a right of permanent residence in the United Kingdom, a matter accepted by Ms Thomas during the course of the hearing. Ms Thomas also accepted that the appellant could not succeed on Article 8 grounds, absent success on the 2006 EEA Regulations ground. In such circumstances it was sensibly accepted that there was no utility in the Upper Tribunal determining the Article 8 ground upon its remaking of the decision."

6. Consequently, Upper Tribunal Judge O'Connor set aside the decision of the First-tier Tribunal. This is a resumed hearing of an appeal by the Appellant, a citizen of Germany, born on 28th May 1964. The appeal was adjourned for a resumed hearing in order for the Upper Tribunal to remake the decision under the 2006 EEA Regulations and to hear the oral evidence (see paragraph 20 in UT decision on error of law). The only witness to give oral evidence was to be the Appellant as his family members had not attended. Ms Thomas confirmed in her skeleton argument and in her oral submissions the basis upon which the remaking of the decision would be considered by the Upper Tribunal as set out in [21] of the decision of Upper Tribunal Judge O'Connor, namely that it was accepted that the Appellant had not attained a permanent right of residence in the United Kingdom and also it was accepted that he could not succeed on Article 8 grounds, absent success on the 2006 EEA Regulations ground and thus the Upper Tribunal would proceed to consider the appeal under the 2006 EEA Regulations.

7. At the hearing, the Appellant gave oral evidence. In addition, Ms Thomas on behalf of the Appellant placed reliance on the original documents that had been placed before the First-tier Tribunal that were contained under cover of a letter dated 2nd December 2014. There were no further documents provided on the Appellant's behalf. Ms Thomas had also produced a skeleton argument as directed by the Upper Tribunal.

8. In his oral evidence the Appellant adopted his witness statement found at pages 5-9 of the bundle. He was asked in examination-in-chief when he had become a German national and how he had acquired it. He stated that he acquired German nationality through marriage in 2001. He stated in his evidence that he had entered the UK in March 2003 from Germany and had come to the United Kingdom because he found it difficult to study in the German language. He was asked about paragraph 7 of his witness statement and what he understood to be the negative impact of his criminality and what he meant by it. He stated that before the offences he did not fully understand the full impact of the offence until he came to the United Kingdom. He saw drug users and that was how he found out the impact was "not so good". When asked what he learned about the impact he stated, "I saw some people, junkies and drug users, I saw them in prison and I saw that they were given treatment in prison". When asked how did he feel when he saw that, he stated, "I didn't feel good". When asked, "Why not" he stated, "I didn't know that my actions would put them in this situation".

9. He was directed to the certificate in the bundle of the course entitled "Learning to be financially capable". He was asked what he had taken on the course and he stated that he had previously studied accounting and finance (BA degree) but this course related to budgeting and that it would help him with his problems on release. He was asked what kind of techniques he would use and he said, "I will spend what I have". He was asked about his proposals for full-time employment upon release and the Appellant said that he had spoken to the Probation Service and discussed going back to work with the National Rail Network as they work with ex-offenders. He said he would have to take a health and safety course when he had been released

before he could undertake any such employment. He said that the employment was nothing to do with accountancy.

10. In answer to questions by Mr Walker, he confirmed the date that he first went to Germany was in 1990 as he was working there. He confirmed that he had come to the UK to study in 2003 and the course was accounting and finance. He said that he had worked in Germany for the German Postal Service. When asked about his work and studies between 2003 and 2010, he stated in his evidence that he had arrived in the UK in September 2003 and studied until June 2004. He stopped and was working in January 2004 full-time until July/September 2006 and then went back to finish his studies until 2010. Between the years 2004 and 2006 he stated that he had worked for the NCP Car Park. He confirmed that his family joined him in 2005. He was asked why his family and wife had not attended court. He could give no reason other to say that they were supposed to be at court and made reference to having been diagnosed as diabetic. He claimed that the last time he spoke to his family was two days ago but he did not have much credit on his phone. He was asked about the end of his studies in 2013 and what qualification he had obtained. He stated that he had obtained a BA in Accounting and Finance. As to his current plans, he confirmed that he had not undertaken the course which was in health and safety which would be required if he were to take up any employment with the National Rail Network. He thought that it would be inspecting work, for example being a health officer.

11. In re-examination he was asked about his degree in accounting and finance and the difference from the course that he had undertaken in prison. He stated the course in prison helped him to understand budgeting more clearly and that the degree was theoretical.

12. In answer to further questions, he was asked about his criminal offending and why it was necessary to take part in the crime, bearing in mind he had been in employment and studying. He stated that it was due to "financial pressure". When asked to explain what pressures he was under he stated that he had to repay his tuition fees of over £20,000. He confirmed that there was still over £20,000 to be paid which is why he had to go and get a job. When asked if there were other financial pressures, he stated it was just to pay that outstanding sum off. When asked about his trips to the continent in bringing gemstones to the UK, when asked why it was necessary to undertake that work when his wife was working, he stated that he was getting commission for bringing in the gems. When asked about his claim in the OASys Report about taking the 101 pellets and that he did not know that they were drugs, he confirmed that he did not know that they were drugs in the pellets when he took them. However, when he was told that that was what they were he then accepted it. When asked about his budgeting and why it was necessary to go on such a course, he stated that he had considered it in a "broader way" and how to handle his finances.

13. As to his employment in Germany, he confirmed that he had worked with the Post Office between 1998 to 2001 which meant that he was sorting letters in the Postal Service. He said that he understood German (as the letters would be written in German) and he knew where they had to go. He confirmed that after this he worked

in a warehouse delivering phones to companies and putting them on the shelves in the warehouse. He also drove a forklift truck and confirmed that he had had training in Germany. As to hobbies and interests, he stated that he had played football between 1990 to 2003 and also tried to read. He stated that he had learnt German but he found it difficult to speak. In answer to a question by Ms Thomas as to how well he could speak German he stated that he could speak about "50%". In answer to questions by Mr Walker he confirmed that he would understand the German supervisors who spoke to him in German and that he could reply to them in the German language. He also stated that he obtained training to use the forklift truck that were written instructions and he could follow them. They were not difficult to understand.

The Submissions

14. Mr Walker on behalf of the Secretary of State relied upon the refusal letter dated 16th July 2014. As to his level of integration and rights of residence, whilst he claimed to have arrived in March 2003, he was issued with an EEA registration certificate in September 2005 that was valid for five years. He had not provided any evidence to that he had been exercising treaty rights in the United Kingdom. He submitted that in the light of the matters set out in the refusal letter and the fact that he had provided no evidence of his employment prior to his arrest for drugs offences, the Secretary of State did not accept that he had acquired a right of permanent residence. There was nothing to show any permanent employment in terms of integration within the United Kingdom. He further submitted prior to moving to the United Kingdom most of his adult life he had lived in Germany and that his evidence was not credible as to what he claimed concerning his ability to speak German, bearing in mind the length of residence from 1990-2003, the fact that he had worked in the Post Office and at Motorola and had been driving a forklift truck. In those circumstances it was likely that he had a high level of proficiency and that in light of any return to Germany there would be no barrier to him in understanding or speaking the language.

15. He directed the Tribunal to the refusal letter and the assessment of threat at paragraphs 15 to 28 including the circumstances of the offence at [16] and the NOMS1 assessment at [19]. He submitted that the Secretary of State submitted that this was a very serious offence, importing large amounts of Class A drugs as a courier and as demonstrated by the sentence of eight and a half years' imprisonment.

16. Mr Walker relied upon the refusal letter and further submitted that because of his past situation, having never been in proper employment when in the United Kingdom other than working by way of importing gemstones, his employment had not been significant thus that led to a risk of reoffending as if he could not manage his finances as in the past it would lead to the Appellant being a risk to society and consequent risk of harm to the public. Thus he submitted he had a propensity to reoffend and would represent a genuine and present threat to the public and thus his deportation was justified on the grounds of public policy.

17. He submitted that the Secretary of State had considered the rehabilitation of the Appellant but as he did not show significant integration in the UK and a lack of evidence of regular employment, the fact that his wife and two adult stepdaughters were unable to prevent the Appellant committing such a serious offence and had no influence upon him, those factors taken together would not prejudice any prospects of rehabilitation in the future in Germany. Thus he submitted that his deportation was proportionate.

18. I asked Mr Walker for his submissions concerning the OASys report and what evidence he relied upon to support any view that the report could be departed from. He submitted that the report should be taken into account but that as the Appellant had a serious conviction for drugs this would lead to a propensity to offend.

19. Ms Thomas on behalf of the Appellant relied upon her skeleton argument which set out the appropriate legal framework that should be applied. She began her submissions by stating that there was no question that the offence of which the Appellant was convicted was a serious one as reflected in the sentence imposed and that if this had not been an EEA case he would be struggling to make a case against deportation. However, the EEA Regulations make it clear that a previous offence cannot by itself justify deportation which is why Regulation 19 must be read in conjunction with Regulation 21. She further submitted that whilst it was a serious offence it was a single offence and did not establish a propensity.

20. In considering Regulation 21(5)(c) she submitted that it was not met because he no longer posed a present threat to one of the fundamental interests of society. She placed reliance upon the OASys Report and that the Probation Service's assessment was that he presented a low risk of reoffending (1% in the first year following release and 3% in the first two years following release). She recognised that the Tribunal was not bound to follow the conclusions of the OASys Report but to depart from it there should be cogent evidence pointing to a higher risk profile. In this case she submitted, there was no such evidence.

21. She relied upon the other evidence set out in her skeleton argument at paragraph 7 which she stated supported her principal submission that he no longer posed a genuine or present threat. She submitted that financial management had been the focus of offending but that he had achieved his sentence plan objective of improving his financial skills (see OASys Report page 48). In addition the assessment was that he was "very motivated" to address his offending. The Appellant had been trusted in both open conditions and on ROTL without incident (page 21 of the OASys Report) and there were no discipline issues or adjudications in the course of his sentence and he had attained enhanced status (page 46 of the OASys Report). He was also awarded a trusted position within the prison estate.

22. She further submitted that the fact that he had completed the course was significant as it pointed to a lower risk of reoffending.

23. She further submitted that even if the Tribunal shared the probation officer's scepticism as to the purpose of the previous trips undertaken by the Appellant, they predate the Appellant's imprisonment which has clearly served not only to punish but to rehabilitate but importantly the fact that the Appellant had undertaken such previous trips was already known to the author of the OASys Report and had therefore been weighed in the assessment of risk. For those reasons, she submitted that the Secretary of State could not justify deportation by reference to the serious harm that would be caused if he were to involve himself in the importation of drugs at paragraph 25 of the refusal letter. This was because there was a low risk of reoffending and therefore could not satisfy Regulation 21(5)(c). That Regulation is concerned with a genuine threat and cannot be satisfied by reference to the gravity of any potential threat.

24. As to proportionality, she submitted that he had been resident in the UK for over twelve years and that he has no social and family network in Germany nor does he speak the language well. She submitted that he had been frank in his replies concerning his language and his employment in Germany. She submitted that employment prospects go to the Appellant's financial stability which was an important factor in ensuring his continued rehabilitation and therefore a material consideration within the proportionality exercise (see **SSHD v Dumliauskas and Others [2015] EWCA Civ 145**). Thus she submitted that he could develop social ties but the question of whether it was proportionate is a comparative exercise weighing those factors against the low risk of reoffending. Therefore in those circumstances she invited the Tribunal to find that the Appellant no longer represented a genuine, present and sufficiently serious threat to the fundamental interests of society and that his deportation to Germany was disproportionate.

25. I reserved my determination.

The Legislative Framework

26. There is no dispute as to the legislative framework that I should apply in this appeal. The Appellant is an EU citizen and therefore his deportation is governed by the provisions of the Immigration (European Economic Area) Regulations 2006 (as amended) which give effect to Directive 2004/38/EC.

27. The basis of the Appellant's deportation is found in Regulation 19(3)(b) of the 2006 EEA Regulations which provides as follows:

> "An EEA national who has entered the United Kingdom ... may be removed if—
>
> ...
>
> (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with Regulation 21; ..."

28. Where a decision is taken to remove an individual under Regulation 19(3)(b), Regulation 24(3) states that:

> "The person is to be treated as if he were a person to whom Section 3(5)(a) of the 1971 Act (liability to deportation) applied, and Section 5 of that Act (procedure for deportation) and Schedule 3 to that Act (supplementary provision as to deportation) are to apply accordingly."

29. Therefore once a lawful decision under the Regulations is taken to remove such an individual, the power to deport found in the 1971 Act can be applied as it was in the case of this Appellant.

30. As both parties have stated, Regulation 21 is central to this appeal and, so far as relevant, provides as follows:

> "21 (1) In this Regulation a 'relevant decision' means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.
>
> ...
>
> (5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this Regulation, be taken in accordance with the following principles—
>
> (a) the decision must comply with the principle of proportionality;
>
> (b) the decision must be based exclusively on the personal conduct of the person concerned;
>
> (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
>
> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
>
> (e) a person's previous criminal convictions do not in themselves justify the decision.
>
> (6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the

> person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."

31. The Appellant is an EEA national and consequently his deportation must comply with the requirements of the 2006 Regulations and in particular, Regulation 21. It was conceded before Upper Tribunal Judge O'Connor that the Appellant could not establish a right of permanent residence in the United Kingdom and therefore the heightened level of protection in Regulation 21(3) requiring proof of "serious grounds of public policy" did not apply. Thus the decision must be taken on "*the grounds of public policy, public security or public health*", Regulation 21(1). For the purposes of this appeal, the Regulation set out at 21(5) and (6) are relevant and are set out in the preceding paragraphs.

32. Regulation 21(5)(c) requires the personal conduct of the prospective deportee to represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society." A "threat affecting one of the fundamental interests of society" means a threat to do something prohibited by law (see **GW (Netherlands) [2009] UKAIT 00050**). In order to represent a "genuine, present and sufficiently serious threat" it is necessary to establish a future risk of reoffending and this assessment is required as to how likely it is an offender will reoffend and the nature and seriousness of such offences. Thus it is only then an individual would present a "present" threat.

33. I remind myself that past offending may be relevant in assessing future risk but the seriousness of the past conviction and indeed the fact he has a past conviction cannot in itself justify the deportation of an EU national, unlike the provisions that deal with non-EEA foreign criminals.

34. In the decision of Upper Tribunal Judge O'Connor, he identified the issue in this case that had given rise to the error of law that findings relevant to this issue had not been made by the First-tier Tribunal in respect of the evidence and in particular the OASys Report and the information contained within it which stated that the risk of reoffending was 1%.

35. I therefore begin with the relevant personal conduct of the appellant. This refers to the Appellant's criminal offending and the conviction for knowingly being concerned with the fraudulent evasion of prohibition or restriction on importation of class A drugs for which he received a sentence of eight and a half years' imprisonment.

36. The sentencing remarks of the judge who imposed the sentence are brief. The judge stated as follows:-

> "This is a very serious offence. Class A drugs do immense damage to the user and have grave consequences to the community at large, increased crime, hardship to family of the user and also violence. There have to be deterrent sentences for those who traffic in drugs. I take into account in your case that you are put as a courier and no more than that, you are not an organiser in any way and I shall sentence you on that

> basis. I take into account your good character; your age and all that has been said about you by your Counsel. I also take into account your plea of guilty, albeit at the stage of the commencement of the trial and therefore it will be limited credit only that you will receive, but nevertheless you will receive some credit in relation to that late plea. There has to be a sentence of imprisonment in this case, as it is conceded by your Counsel, and it has to be a lengthy sentence of imprisonment. Taking into account all that I have heard about you and read about you, the shortest sentence which, in my judgment, matches the seriousness of this offence, and taking into account all the mitigation that has been put before me, is one of eight and a half years' imprisonment. …"

37. The circumstances of the offence are not set out in the sentencing remarks of the judge but are summarised in the decision letter of the Secretary of State at paragraphs 16-18. The circumstances of the offence was that on 26th November 2010 he attempted to pass through Dover Eastern Dock having disembarked a Eurolines Coach from Antwerp and was intercepted by Customs Officers. He had been travelling on a German ID card. When questioned, he stated that the reason for his trip to Belgium was that he had received a phone call from a family member in Nigeria asking him to look at the prices of semi-precious stones and making jewellery. He had in his possession a list which purported to be a price list for various stones. He stated that he did not have any accommodation for the trip and following a strip search and scan it was found that he had in his body 101 wrapped pellets of cocaine.

38. During his interview, he explained that he had met an old friend from Nigeria in Germany where he used to reside who now lived in Antwerp and owned a jewellery shop. He said that when he was a student at Greenwich University he made extra money where he would courier jewels to and from Antwerp for his friend. He had made commission from this. He stated that his friend in Antwerp had ended up getting into debt and lost his shop in a fire so his friend needed to get some money. The Appellant was taken by his friend and two other men to a house and threatened at gunpoint to take a package to London. He had been informed that his mother had been taken hostage to ensure that he would complete the delivery and it was stated she had been held for two months. He also stated that he was promised £3,000 for making this trip but he never received any payment. He was forced to swallow 101 packages which he believed to be precious stones. Whilst it had been noted that he had made 80 near identical trips prior to the incident and they were for bringing precious stones into England, he believed this to be a legal business and had carried the stones in his pocket.

39. There is no doubt that the Appellant's offence is a serious one as demonstrated by the details and circumstances of the offence and ultimately by the length of sentence imposed. As required by the EU Regulations, the Tribunal must make an assessment of whether the Appellant represents a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". The sentencing judge made no reference to any future risk of reoffending. Miss Thomas has confirmed that there was no pre-sentence report available to the judge when sentencing the Appellant and the basis of the mitigation is not set out in the sentencing judge's remarks.

40. There are however two OASys Reports that have been provided. The first OASys Report is at D1 onwards in the Respondent's bundle dated 20th January 2014. At Section 3 of the form, the level of risk of serious harm is indicated to be "low", having taken into account the risk factors relevant to the Appellant, namely, his association with pro-criminal peers, vulnerability to those involved in legal drugs and deficit thinking skills. This is an offence that was carried out for financial gain. As to those potentially at risk it was noted that there was no direct victim identified but victims of the illicit drug industry are the users whose health, relationship, livelihood and liberty are often adversely affected and the general public who are the victim of acquisitive crime. It also refers to the Appellant being a risk to himself having ingested the drugs in order to carry them. The offence summary is set out section 4 as set out earlier. As to issues of accommodation, it made reference to his previous residence, living with his family at the family home with his wife and two stepdaughters. The plan was to resume this family life there and it is recorded that he had a successful ROTL to that address. His education, training and employment is dealt with at D3 referring to his qualifications (multiple GCSEs and accounting qualifications). He had a degree in accounting and finance and at the time of arrest was studying for a Sage 50 in accounting. His further plans were set out to embark upon employment in the railways upon release.

41. The work undertaken in prison was summarised, namely he had completed an OCR level in IT user skills (April 2011), OCR level 2 ITQ in IT skills (September 2011) and also obtained an OCR level 3 ITQ award. He had completed a financial course in education OCR level 1, learning to be "financially capable" (confirmed by the Education Department). He had no issues as a drug user or with alcohol that could be linked to his offending behaviour. As to lifestyle and associates, it refers to the jewellery runs made in the past. There was no evidence that this was illegal but it was considered to be linked to his behaviour. The circumstances of the offence swallowing packages showed also a degree of risk taken to himself.

42. The summary of the OASys Report was that he was assessed at a low risk of reoffending based on the Offender Group Reconviction Scale (OGRS) which showed the risk of reconviction as 1% within twelve months and 3% within 24 months and the low risk of serious harm to others, albeit putting himself at risk by ingesting packages.

43. Thus the 1% risk of reoffending took into account the circumstances of the offence, his previous association with the peers he had been involved with, the financial motivation for the index offence, his compliance with the educational courses relevant to the risks relating to financial management and his family links and his educational and employment (it was recognised that he was unemployed at the time of the offences).

44. The most recent update of the OASys Report is dated 14th October 2014. At page 2 it notes the offender has not been identified as a prolific or other priority offender and the purpose of his sentence as recorded is "punishment". The box for reform and rehabilitation has not been ticked. The sources of information for the report refer to

the previous OASys Reports (which includes information provided by the Appellant) and also the prison records. An analysis of the offence was set out at page 7 which repeated that of the earlier OASys Report. It was noted at page 8 that the main motivation of the index offence was financial gain and gave the circumstances of where the appellant stated he had been threatened or coerced to carry out the offence. As to his attitude towards the offence, the report noted that he accepted responsibility for the offence and thus acknowledged full responsibility for the offence although it was noted he stated he had been under duress and did not think the packages contained drugs. His account was as before and that he had previously lived in the family home with his wife and two stepdaughters and that he had been back to the house there on successful ROTLs. At page 9, the issue identified which contributed to risk of harm was the emotional state at the time of the offence and the financial motivation. At page 11 it noted that he would be unemployed on release and identified problems with his employment history. Financial management was considered at page 13. It was noted that he had problems with financial matters in the past referring to his student loan of £27,000 and the index offence being for financial gain. It summarised that he had financial issues linked to offending behaviour. The evidence concerning his family relationships was summarised at page 14. It referred to a close relationship with both the family in the UK and that his wife and daughters were embarrassed by him being in prison but they still supported him. He said that he had a home to return to and wished to do so to live with his wife and daughter. He had been married for seven years and that they were still very supportive and referred to the successful ROTL so that they could spend time together.

45. Dealing with lifestyle and associates that was considered as before and the relevant considerations referred to the author's scepticism of his account that he did not know what he was carrying when caught at Dover Docks. As to thinking and behaviour skills, it was reported that he had an ability to recognise problems but had a problem with impulsivity and awareness of consequences. The conditions of moving precious stones was also considered but noting that there was no evidence before the Probation Services that it was illegal activity but thought it could offence of possible pro-criminal attitude. The Appellant stated that he was remorseful for his past actions (page 27) and stated that he had wasted years of his life in prison and for his sake and that of his family he would never contemplate offending again.

46. A summary of the OASys Report can be found at page 33. It demonstrates that the identified risks that were taken into account in the assessment of the risk of reoffending and the risk category related to finance, employment, lifestyle and associates, thinking and behaviour and attitude. The risk of reoffending was placed at 1% for the first twelve months and 3% after 24 months. The categorisation was "low".

47. His compliance and behaviour was also summarised at page 35 confirming that there had been no discipline issues, there were no warnings as to any offences, there was no refusal of mandatory drug tests nor had there been any positive results on such tests, there had been successful ROTL, no proven adjudications and that he had an

enhanced level as a prisoner. His motivation was described as "very motivated" and as to the financial risks he was described as having carried out a course of being "financially capable" and that the object of improving these financial skills was "fully achieved".

48. The courts have recognised that an OASys Report is a document compiled by a trained Probation Officer and cannot be lightly dismissed (see **AM v SSHD [2012] EWCA Civ 163** and the decision of the Upper Tribunal in **Secretary of State for the Home Department v Vasconcelos [2013] UKUT 06378**). As Miss Thomas recognised in her submissions, it is open to the Tribunal to depart from the findings of such a report if there is evidence upon which to do so. The decision of **Vasconcelos** (as cited) makes it plain that in assessing whether an EEA national represents a current threat to public policy by the risk of reoffending, the Tribunal should consider the assessment provided but was not bound to it if the overall assessment of the evidence supports a conclusion of a continued risk.

49. I now turn to an assessment of the evidence. The Appellant gave short evidence before the Tribunal and in general terms there were no issues of credibility or inconsistency raised concerning that evidence. Indeed his evidence reflected that already set out in his interviews for the OASys Report and the evidence that was before the First-tier Tribunal.

50. The report outlined as a risk factor financial issues. It sets out and had regard to his previous qualifications in accounting and finance; he was also assessed upon his personal circumstances at the time of being unemployed (but in education) and that he had a debt by way of a student loan of £27,000 and he had successfully completed a course on being financially capable which had been fully complied with. I find that none of that information has been either displaced or changed in the evidence given by the Appellant or put before this Tribunal. Whilst it is right that he had a degree in accountancy and finance and therefore the question as to why it was necessary to undertake a further course arises, I consider that there is a distinction between learning about accounting on a theoretical level and that which was identified from his personal circumstances which was to be able to manage his own personal finances which I find is very different and distinct. In this regard, I accept the evidence that he successfully completed the course of being "financially capable" as it is referred to in the OAsys Report and confirmed by the education providers. The course content appears to cover all the relevant skills in his field. The Appellant's evidence, which was unchallenged, was that part of the course related to budgeting, a matter that he identified as requiring specific assistance with by reference to his past conduct.

51. His evidence made reference to the future plans for employment and that was to undertake a health and safety course to enable him to work in the railway industry as it is said that they work with ex-offenders. This is consistent with the evidence in the OASys Report and there is no reason to believe that such work is either not available for him or that he is unsuitable for this work. It is likely that this has been

discussed during his time in custody as part of the process to support life in the community.

52. The Probation Service did not identify any further work in this area or indeed any other courses that they thought necessary to reduce the risk of reoffending.

53. The OASys Report made reference to his accommodation issues and considered this in the light of what was described as his strong family life with his wife and two daughters. I have considered this and observed that I have not had the advantage of hearing from members of his family in oral evidence although they have provided written statements. The contents of those statements are consistent with and corroborate the Appellant's evidence that his wife and daughters are still supportive of him. I do question why, if that is so, they did not attend court. I recognise that the report makes reference to his wife and daughters and their embarrassment concerning the issue of offending and I would accept that this must have caused them personal distress and could be a contributing factor as to why they did not attend court. Nonetheless in the light of their absence , I attach less weight to those statements although I observe that Mr Walker did not indicate that he would challenge their contents. However there is other evidence that corroborates the continuity of family life. The OASys Report refers to the ROTL periods at home and when this matter was before the First-tier Tribunal there had been six home visits lasting between four to five days and I find that it is not likely that such arrangements for temporary release to that address would have been made if the family members were not supportive of him. Thus, notwithstanding their non-attendance, I am satisfied on the balance of probabilities that there is evidence that they continue to support the Appellant and that his plans for resuming his family life with his wife and daughters remains.

54. The Appellant gave evidence before me of regretting his offence and that before the offence he did not understand the full impact of such offending behaviour and referred to seeing those who took drugs whilst he had been in custody. The evidence is consistent with the evidence as assessed by the Probation Service in which it was stated that he did accept full responsibility for the offence and was described as "highly motivated" to change. I observe that he stated before me that he did not think the packages were drugs when he took them but when he was told what they were, he accepted responsibility for the offence and indeed pleaded guilty to it which was reflected in the discount he was given on his plea. I have to say I share the view set out in the Probation Report that it is highly unlikely that he would not have known that he was swallowing drugs; there is no evidence that the previous trips to the continent involved the swallowing of gems, indeed the evidence was that he carried them in his pocket. However that was a view shared by Probation Officers and factored into the assessment of risk and there cannot be stated to be any additional or new evidence that the Probation Services either overlooked or did not take account of and was therefore properly assessed and quantified in the OASys Report.

55. As to his evidence of regretting the offence it is of course easy to state such a sentiment in the knowledge that there are deportation proceedings pending.

However the OASys Report identifies this Appellant as "highly motivated" to change and on the evidence before the Tribunal based on his conduct in prison, provides support for that view. None of that evidence has been challenged by the Secretary of State. He has successfully completed a number of courses relevant to employability prospects for the future and has had, whilst in custody, a full-time job with the stores which was a trusted and privileged job. He had been granted category B status and transferred to an open prison in November 2013 and was engaged in work in the print shop as well as working as a volunteer worker with a children's hospice and during his time raised finances in order for the hospice to be run. The OASys Report in addition marked any absence of disruptive issues, proven adjudications and his attainment of enhanced status as a prisoner in which he was awarded a trusted position within the prison environment. His behaviour has not been tested in the community because he has remained in custody after the custodial element had expired.

56. During the course of submissions I asked Mr Walker on behalf of the Secretary of State to identify to the Tribunal any facts or evidence relied upon to demonstrate a departure from the assessment of risk in the OASys Report. He submitted that if he could not manage his finances he would be at risk of reoffending and also that he had a propensity to reoffend and further submitted that this was a serious conviction of importation of drugs and thus he would reoffend in a similar situation.

57. I have considered the refusal letter and the points raised therein. It made reference to the OASys Report and the NOMS 1 assessment and acknowledged in a number of paragraphs the assessment was that he had posed a low risk of harm to the public and of reoffending (see paragraphs 19 to 26). A careful examination of those paragraphs demonstrate that they set out the risk factors at paragraph 19 by reference to association with pro-criminal peers, vulnerability to be influenced and deficit thinking skills. All of those factors were taken into account in the assessment of risk by the probation services. The risk to the Appellant at paragraph 20 again was a factor already considered in the report. The paragraphs also make reference to the Appellant's previous conviction and the circumstances of this. This is relevant to the personal conduct of the Appellant but as to evidence relied upon as to demonstrate an enhanced risk of offending the Secretary of State has set out that this is to be referred to as "potential" to reoffend (see paragraph 26) and that the evidence suggested that he had a "propensity" to offend.

58. The decision letter also sets out the harmful effects of drugs offences which have on the community and rightly so acknowledged the harm to the public. It also again referred to the low risk of reoffending.

59. I have carefully considered the Secretary of State's letter, however I do not find that the Respondent has either referred to any evidence or engaged with the test that should be considered, namely, how the assessment made by the Probation Services in the OASys Report, a report that should be given weight, of a 1% risk of reoffending impacts on the legal test set out in Regulation 21(5)(c). At its highest the refusal letter makes reference to the offence itself and the harm that would ensue if

such an offence was committed again but does not properly consider the test as to whether a 1% risk of reoffending and the assessment in the OASys Report represented a "genuine, present and sufficiently serious threat" or committing an offence to justify his removal from the UK.

60. I do not consider that from the circumstances of the offence he committed that he can properly be described as having a "propensity" to commit such crimes. He has not committed any drugs offences before and was a man of good character. Whilst there has been reference made to the large number of trips made to the continent, there was no evidence before the Probation Officers nor before this Tribunal that that conduct was illegal. There remains a question mark concerning those visits but that is far from supporting a propensity to commit drugs offences.

61. Consequently I have reached the conclusion from the assessment of the evidence before me that it has not been established by any other evidence that the assessment of the Probation Service in the form of the OASys Report either miscategorised the risk of reoffending or that they had failed to take into account any relevant matter when reaching that assessment. It has not been demonstrated that the assessment of the Probation Services should be displaced either in the evidence before me or by Miss Walker referring me to evidence in this regard. Not only was the risk categorised as low, it went so far as to place the risk on the scale at 1%. Thus the expert evidence before the Tribunal which is not diminished and is consistent with the evidence before this Tribunal points in the Appellant's favour. I have had regard to the decision of **Essay (Essay: rehabilitation/integration) [2013] UKUT 316** and in particular at paragraphs 32 in which it was stated:-

> "We observe that for any deportation of an EEA national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in the case of criminal convictions short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to reoffend or an unacceptably high risk of offending. In such cases, if there is acceptable evidence of rehabilitation, the prospects of future rehabilitation do not enter this balance, save for possibly a future protective factor to ensure the rehabilitation remains durable."

62. When applied to the circumstances of this case the risk of reoffending is categorised as low and as stated earlier it is placed on the scale at 1% and whilst it is right to observe that by itself could not exclude any risk of reoffending, given the risk placed at 1% it appears to be very low. As set out earlier I do not consider that the Appellant could properly be described as having a "propensity" to commit such offences and it also cannot properly be said, based on the expert evidence before me, that there is an "unacceptably high" risk of the Appellant reoffending such as he would present a "genuine, present and sufficiently serious threat". That is the legal test set out in Regulation 21(5)(c) and it has not been met in this case.

63. It is only if the threat is made out on the evidence that it is necessary to go on to address the ways in which the Secretary of State weighed in the balance the considerations set out Regulations 21(6) concerning whether the removal is proportionate. Even if it was necessary to consider proportionality the following matters appear to me to be relevant. I am satisfied that the Appellant has no social or familial links to Germany. His history and chronology demonstrates that he acquired citizenship on the basis of a previous marriage to a German national. He had lived in the UK since his arrival in 2003 and there is no evidence he had ever returned to Germany during that time, nor has he maintained any social or family links with that country.

64. I would weigh in the balance that he had previously worked in Germany and whilst his language skills are not said to be fluent, the evidence before me is that he can speak and understand 50% of that language. I could not find that he has no prospect of re-establishing his social life but that has to be balanced against his length of residence in the United Kingdom and the family life he has established with his wife and daughters in the United Kingdom in terms of the length of that residence and his integration in the UK. In that regard I take into account that he could not demonstrate a permanent right of residence as he had not produced evidence of exercise of treaty rights during that period of time and whilst that counts against him in terms of integration, there is evidence of him having studied during that period and given the length of time in the UK in the period of over eleven years, that establishes some level of integration in the UK. The Appellant was a man of previous good character who has committed a very serious offence, however the expert evidence demonstrates that there is a very small risk of reoffending and he has a family, all of whom are well-established in the United Kingdom.

65. In terms of proportionality any assessment following the primary finding that Regulation 21(5)(c) is not met must have the consequence of the decision being disproportionate having found that his removal has not been justified by the Respondent.

66. The public policy grounds for removal is an exception to the fundamental principles of the free exercise of EU rights and as such an EU citizen should not be expelled as a deterrent to others without the personal conduct of the person concerned giving rise to consider that he will commit other offences that are against the public policy of the state. Furthermore it is accepted and acknowledged by both advocates that the appellant's deportation could not be justified simply on the basis of his previous criminal conviction, even of such a serious nature as the importation of class A drugs and the imposition of the lengthy sentence he received. This is because the legal regime for deporting EU criminals is different and can properly described as more restrictive than that for foreign national criminals under the UK Borders Act 2007. It must be established that the Appellant represents "a genuine, present or sufficiently serious threat affecting one of the fundamental interests of society". In this context the future risk of reoffending is considered in the light of his conduct and it has not been established on the evidence before the Tribunal that the test is met under Regulation

21(5) (c). Therefore the Appellant's criminal conviction, whilst serious, cannot justify a decision to deport him as an EU national on public policy grounds.

67. It is not necessary to consider Article 8 in the light of the above conclusions.

68. Consequently the appeal is allowed under the EEA Regulations 2006.

Notice of Decision

The appeal is allowed under the EEA Regulations 2006(as amended).

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Reeds