Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01875/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
on 17th February 2015	**on 18th February 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARCIN KARWOWSKI

Respondent

Representation:
For the Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer
For the Respondent: Mr K McGuire, Advocate, instructed by McGill & Co., 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 Scobbie, promulgated on 19th December 2014, allowing the Appellant's appeal against deportation in terms of the Immigration (European Economic Area) Regulations 2006. The grounds are as follows:

Ground 1: Failing to give adequate reasons for a finding on a material matter.

3. The judge erred in the consideration of present threat for the purposes of Regulation 21(5)(c) …

4. … the judge fails to engage adequately with the appellant's criminal [record] and instead places much emphasis on the fact that the appellant *'has merely been found guilty of cultivating cannabis'*.

5. … the judge minimises the seriousness of the appellant's offence and significance of the criminal sentence … when assessing risk.

6. There was no report from probation assessing the appellant's risk of reoffending. He has a previous record of supplying drugs in Poland.

7. The judge makes no finding whether the appellant has sought to address his offending attitudes or substance misuse. It is clear he has not undertaken rehabilitation courses. The appellant's justification is '*because he took no drugs in prison'* but the judge concludes he cannot determine the veracity of this statement.

8. … The judge has failed to undertake a holistic assessment … when determining whether the appellant is a genuine present and sufficiently serious threat in accordance with the Regulations.

Ground 2: Material misdirection in law.

9. … the judge erred … by considering the issue of rehabilitation … the Upper Tribunal in *Essa* [2013] UKUT 00316 establishes clearly the parameters of the rehabilitation principle [paragraph 30 of *Essa* is quoted] …

10. Since the appellant cannot be said to be integrated in the UK and has not acquired permanent residence … rehabilitation is an irrelevant consideration.

3. In a Rule 24 response the appellant cites authority on the extent of the requirement to give reasons; on disagreements with weight not amounting to error of law; and on the presumption that a specialist Tribunal understands its area of law. On the second ground the response says that given the finding that the appellant's conduct did not represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society, proportionality was not crucial. Further, the judge's approach was consistent with that of the Court of Appeal in *Essa* [2013] Imm AR 644, and the SSHD's decision under appeal also considered the issue of rehabilitation. The judge was correct to find that this counted in favour of the appellant.

4. Mrs O'Brien submitted that the first ground was not simply disagreement, but disclosed irrationality, verging even on perversity, in the

determination. The appellant had followed a clear line of criminal offending not of a varied but all of a drugs-related nature. He offended significantly in Poland and continued such criminality in the UK very soon after arrival. Although the judge set out the correct holistic approach at paragraph 25, at paragraphs 26 to 31 he gave no proper reasons for finding in favour of the appellant despite his criminal history. The statement at paragraph 27 that the appellant had *"merely been found guilty of cultivating cannabis"* minimised his offending in the context of the whole facts. It was irrational at paragraph 28 to formulate an outcome based on *"looking solely at this conviction in itself"*. The comment at paragraph 29 that there was *"little else"* to take into account against the appellant again minimised his criminality. In dealing with rehabilitation at paragraph 33 the judge should have noted that there was nothing to show that the appellant had any wish to change his behaviour. Ground 1 disclosed material error.

5. Mrs O'Brien acknowledged that Ground 2 might be more problematic. The SSHD's decision letter specifically treats the prospects of rehabilitation in the host country as relevant. Although the judge had fallen into error he might have been led to do so by the reference to *Essa* in the decision letter. However, she said that the ground did demonstrate that the judge placed too much reliance on rehabilitation prospects. The appellant has not integrated into UK society, having spent only a relatively short period here before his arrest. The aspect of rehabilitation should have been no more than neutral. The judge went wrong by finding it to favour the appellant.

6. Mr McGuire relied upon the Rule 24 response. He further submitted that the first ground was no more than a classic example of disagreement with findings properly reached. The factual background had been before the judge in the form of a statement from the appellant and statements from three family witnesses who also attended to give oral evidence. The discussion in the determination at paragraphs 26 to 31 and at paragraph 33 showed that the judge kept the convictions in the UK and in Poland clearly in mind throughout. It was accurate to say that these were the only matters counting against the appellant. The respondent had not submitted that there were any other significant factors against him. The judge was not only entitled but bound to note the difference between drugs convictions for possession and for supply. The use of the word "merely" at paragraph 27 had to be read in context. It did not minimise the offending itself but drew the proper distinction. At paragraphs 26 and 27 the judge was simply setting out the correct factual position. The judgment which he reached after hearing the evidence and considering the submissions was properly open to him and reflected no error of law.

7. On Ground 2, Mr McGuire said that the SSHD's decision letter and submissions in the First-tier Tribunal treated the relative prospects of rehabilitation in the UK and in Poland as an issue. It was not an error to adopt a legal approach on which the SSHD relied. Even if some error could be found in paragraph 33, it was immaterial. To find that the appellant

had a better chance of rehabilitation in the UK was simply a factual matter. It was a valid factor in favour of his remaining in the UK. In any event, *Essa* was a problematic authority because the prospects of rehabilitation could not be distinguished from the risk of reoffending and the evaluation of whether an appellant posed a present threat. Even if not in the language of rehabilitation, such an evaluation had in effect to be carried out by the judge.

8. I indicated that the SSHD's appeal would be dismissed.

9. Although the Presenting Officer did her best to put the argument in terms of lack of reasoning and failure to adopt a holistic approach, Ground 1 discloses no more than disagreement. The judge said at paragraph 26 that this was not the easiest of cases, and I think it was a finely balanced one. Another judge might not have given the same answer on whether the appellant poses a present threat, but this judge gives adequate reasons at paragraphs 27 to 33 for coming down on the side which he did.

10. I do not think the argument in Ground 2 is properly open to the SSHD when it follows upon a decision which cites *Essa* and states that the relative prospects of rehabilitation had to be considered in the proportionality exercise. That is sufficient for present purposes, although there may also have been something in Mr McGuire's argument that in any event the relevant considerations had to come into play in the assessment of a present threat.

11. The determination of the First-tier Tribunal shall stand.

12. No anonymity direction has been requested or made.

17 February 2015
Upper Tribunal Judge Macleman