Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00292/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 6 January 2014	**On : 16 January 2014**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN
UPPER TRIBUNAL JUDGE KEBEDE

Between
MOHAMED ELMI
(NO ANONYMITY ORDER)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Radford, instructed by Wilson Solicitors LLP
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Dutch national, born on 1 July 1984 in Somalia. His appeal comes before us following a hearing on 21 October 2013 at which Upper Tribunal Judge McGeachy and I found an error of law in the decision of the First-tier Tribunal.

2. The further background to the appeal is as set out in our error of law decision which is reproduced as follows:

"1. The appellant is a Dutch national, born on 1 July 1984 in Somalia. He has been given permission to appeal against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to deport him pursuant to regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

2. The appellant claims to have arrived in the United Kingdom in July 2003. He first came to the attention of the UKBA on 29 March 2006 following his arrest on two counts of possessing a controlled drug with intent to supply and failing to surrender to custody at the appointed time, for which he was sentenced on 18 April 2007 to 39 months' imprisonment. On 15 May 2007 he was sentenced to three months' imprisonment following his conviction on various counts of failing to surrender to custody and assaulting a constable; on 15 June 2007 he was sentenced to 12 months imprisonment for burglary; and on 29 April 2009 he received a fine on conviction for being drunk and disorderly.

3. The appellant was convicted of the index offence, assault occasioning actual bodily harm, on 25 September 2012 at Harrow Crown Court, and received a sentence of 16 months' imprisonment. He did not appeal against the conviction or sentence. On 29 October 2012 he was notified of his liability to deportation and he responded accordingly, referring to his Dutch nationality and family ties to the United Kingdom. On 11 December 2012 the respondent made a decision to deport him under regulation 21 of the EEA Regulations, on the grounds that he posed a genuinely, present and sufficiently serious threat to the interests of public policy.

4. The appellant appealed against that decision and his appeal was heard before the First-tier Tribunal by a panel consisting of First-tier Tribunal Judge Devittie and Mrs Bray JP. The panel heard from the appellant, his mother and sister. They recorded the evidence that the appellant had fled the civil war in Somalia with his sister and aunt at the age of nine years, in 1991, and had lost contact with his mother. He and his sister and aunt went to the Netherlands, where they remained until they came to the United Kingdom in 2003. His mother travelled to Finland in 1996 and claimed asylum there. She managed to re-establish contact with him and visited them in Holland before leaving Finland in 2008 to join them in the United Kingdom, after obtaining Finnish nationality.

5. Having considered evidence before them from HM Revenue and Customs and other evidence relating to the appellant's employment history, the panel rejected the appellant's claim to be entitled to permanent residence under the EEA Regulations and found that, whilst he had resided in the United Kingdom continuously since 2003, he had not been exercising Treaty Rights for a continuous period of five years so as to entitle him to such residence. Accordingly he was considered to fall within the first level of protection under regulation 21, whereby the decision to deport him could be taken on the grounds of public policy, public security or public health. The panel went on to consider whether the appellant's deportation met the requirements of regulation 21(5) and, in so doing, considered a NOMS (National Offender Management Service) assessment and a psychiatric assessment which had been produced as evidence of the level of risk of re-offending. They concluded from that evidence that the appellant's personal conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and, having assessed the appellant's circumstances and his family ties, found that the deportation decision complied with the principle of proportionality. They accordingly dismissed the appeal under the EEA regulations and also dismissed it on Article 8 grounds.

6. Permission to appeal against that decision was sought on the grounds that the Tribunal had made mistakes of fact in assessing the expert evidence; that the Tribunal had failed to consider the European dimension when conducting the proportionality exercise under regulation 21, in accordance with the principles in Essa, R (On the Application Of) v Upper Tribunal (Immigration & Asylum Chamber) & Anor [2012] EWCA Civ 1718; and that the Tribunal had failed to take the steps commended by the CJEU in Case C-145/09 Land Baden-Wurtemberg v Tsakouridis [2011] CMLR 11 in relation to rehabilitation.

7. Permission was initially refused, but was subsequently granted by the Upper Tribunal on 15 August 2013, primarily on the "European dimension" grounds relating to the judgment in Essa.

8. At the hearing, Ms Radford relied upon all the original grounds of appeal. She submitted that the Tribunal had misrepresented what the psychiatrist had said in her report and had considered, in terms of the appellant's risk of re-offending and rehabilitation, only the negative factor of the lack of employment prospects, rather than giving weight to the positive factors such as family support. Furthermore, having looked at the factors which the psychiatrist said could have reduced the risk of re-offending from medium to low, the Tribunal reached a conclusion that the risk was more than medium and, moreover, conflated the risk of re-offending and the risk of serious violence. There was therefore a misunderstanding of the expert's conclusions and that then formed the basis for the proportionality assessment at paragraph 16. The Tribunal also failed to consider the appellant's progress in the form of certificates completed in prison. Ms Radford submitted further that the Tribunal failed to set the threshold at the correct level and failed to address the grounds relating to the decision in Essa, which had formed part of the skeleton argument before it. The Tribunal failed to consider the appellant's integration in the United Kingdom and the fact that cutting his ties in this country, by removing him to Holland, would jeopardise his rehabilitation.

9. Mr Melvin submitted that the Tribunal had not materially erred in law. It had considered all the factors referred to by the psychiatrist and had made an overall assessment. The Tribunal was entitled to conclude that the appellant posed a medium risk, given his violent behaviour, and was entitled to be sceptical of his last minute attempt at demonstrating an attempt at rehabilitation. With respect to the ground upon which permission had been granted, Mr Melvin submitted that the cases of Essa, VP (Italy) v Secretary of State for the Home Department [2010] EWCA Civ 806 and Tsakouridis all concerned cases where the appellant was entitled to the higher levels of protection against deportation, whereas the appellant in this case was not integrated as he did not have permanent residence. There was little evidence of rehabilitation, which was relevant to the fourth paragraph of the heading in Essa. Although there was some family support, the family had not managed to influence the appellant and there was no evidence to suggest that they would assist in his rehabilitation. The Tribunal had been entitled to conclude as it did.

10. We consider that the ground upon which permission was specifically granted can most likely be adequately addressed by the President's guidance at paragraph 4 of the head-note to Essa, as reflected also in the findings at paragraphs 26 and 35 of that determination. However we have concerns about the conclusions reached by the Tribunal in regard to the risk of re-offending, namely the finding at paragraph 15(v) that "the risk of the appellant re-offending in committing acts of serious violence is, at the very least, more than medium". Although that was not a point specifically raised in the grounds of appeal, Mr Melvin did not seek to have it excluded and we consider in any event that it can be viewed as an

extension of the first ground of appeal relating to the Tribunal's assessment of the expert evidence. We do not view the grant of permission as excluding the other grounds raised. We find merit in Ms Radford's submission in regard to that matter and consider that there is indeed no proper indication in the determination as to how the Tribunal reached the finding that the risk of re-offending was more than medium, given that that was not the conclusion of either the NOMS report or the psychiatric assessment.

11. According to the NOMS report, the appellant posed a medium risk of serious harm to others, but the likelihood of reconviction was considered as being low. That was also the assessment made by the London Probation Trust in 2010, as stated in their letter of 28 February 2013. The psychiatric report started from an assessment of initial risk of general re-offending as medium, but with an indication that that risk would be significantly reduced if various factors were present: if the appellant continued to distance himself from his deviant peer group, abstained from alcohol and drugs, structured his week with meaningful activities such as employment, education or training, had access to a legitimate and dependable income and was able to manage his finances, and if he had the continued support of his family. Thus a finding by the Tribunal that any of those factors was not present could not inevitably, and absent any other particular circumstances, have led to a conclusion that the risk of re-offending was higher than that determined by the assessor. Yet there was nothing in the Tribunal's findings at paragraph 15(v) to suggest that other circumstances existed beyond the appellant's inability to address some or all of those factors. As such the Tribunal plainly failed to provide any, or any adequate, reasons for concluding that the appellant's risk of re-offending was "at the very least more than medium".

12. Plainly, the Tribunal's finding on the risk of re-offending was crucial, not only to its conclusion that the appellant's personal conduct represented a genuine, present and sufficiently serious threat to society, but also insofar as it formed the basis for the proportionality assessment at paragraph 16 of the determination, as is apparent at paragraph 16(i). Accordingly, we can only conclude that the Tribunal's conclusions as to the threat posed by the appellant and its proportionality assessment are fundamentally flawed and cannot stand. We set aside its decision.

13. With regard to the re-making of the decision, we do not consider that remittal would be appropriate, given that the primary findings of fact made by the Tribunal have not been challenged and can be preserved. Whilst we consider that the "EU dimension" point as established in Essa and the other cases we have cited above can largely be answered by reference to paragraph 4 of the head-note to Essa, as we have already stated, we consider it would nevertheless be helpful for clear findings on the matter of rehabilitation to be made and, in that respect, the Tribunal may well be assisted by further evidence and submissions in that regard. Ms Radford indicated that there would be further oral evidence if the decision were to be re-made.

14. Accordingly, we make the following directions for the resumed hearing.

Directions

(a) No later than seven days before the date of the next hearing, any additional documentary evidence relied upon by either party is to be filed with this Tribunal and served on the opposing party.

> (b) A Somali interpreter will be booked for the hearing, but in the event that no interpreter is required the Tribunal must be informed of this no later than seven days before the hearing.
>
> (c) Skeleton arguments from both parties to be served no later than two days before the hearing. "

3. Prior to the hearing an adjournment application was made by the appellant's representatives in order to obtain a supplementary risk assessment from a forensic psychiatrist. That application was refused on the grounds that it had been made at a late stage bearing in mind that the error of law decision had been promulgated in June 2013.

4. Ms Radford renewed the application before us, pointing out that it was the First-tier Tribunal's decision that had been promulgated in June 2013 and that the error of law decision had in fact been made only in October 2013. She advised us that the appellant had been released from custody in October 2013 and it had not been deemed appropriate to commission a report at that stage, given that it was usual practice for a resumed hearing to be listed about three months after an error of law decision whilst the purpose of the report was to present a current risk assessment. However the hearing was in fact listed earlier than anticipated, shortly after the Christmas break. Ms Radford advised us that it was intended that the report would demonstrate the extent to which the appellant had integrated into the community since his release from custody, in terms of employment and otherwise, and the risk he now posed to the public. It came to light, during her submissions on the application, that he had in fact been recalled into custody in June 2013, following his release on bail in April 2013, as a result of a breach of the terms of his licence arising from his having spent two nights away from his home, and was released on bail again on 16 October 2013.

5. Mr Melvin opposed the adjournment request on the grounds that it was for the Tribunal to list the appeal when it was suitable and that there would be little value in a report that simply repeated what the appellant considered to be his current circumstances. What was more relevant were witness statements and evidence of his contribution to the community, but such evidence had not been produced. Mr Melvin submitted that in any event it was the appellant's integration over the ten years of his residence in the United Kingdom that was relevant and not in the recent months when the deportation process would have focussed his mind on staying out of trouble.

6. We pointed out that a further report from the probation services would have been more useful in assessing risk, but Ms Radford advised us that the appellant no longer saw his probation officer now that his licence had expired and that a forensic psychiatrist would be able to provide the same information.

7. We concluded that the interests of justice would not be served by granting the adjournment request. We considered that there had been ample time for the appellant's representatives to obtain a supplementary psychiatric report and that no proper or adequate reason had been given for the delay in commissioning a report. Indeed the initial adjournment request had not been made until 17 December 2013, whilst the notice of

hearing had been issued on 29 November 2013. We noted further that no indication had been given at the error of law hearing, when considering further evidence to be produced at a resumed hearing, of an intention to produce a further psychiatrist report. In fact the grounds of appeal leading to the grant of permission and the skeleton argument produced before us were based upon the previous psychiatric report.

8. We were, furthermore, not persuaded as to the efficacy of a psychiatric report, since it was not the case that the appellant suffered from any mental illness or that his criminality was claimed to have arisen out of a mental disorder. We considered the usefulness of a report prepared on the basis of one interview with the appellant and from information provided by the appellant, would be of little assistance, in particular since the report was not to be prepared by Dr Hundal, the author of the previous report. We considered that the various factors stated in Dr Hundal's report to influence the appellant's integration and risk of re-offending, including accommodation, employment and education, finance, relationships, lifestyle, would be best addressed by evidence from the appellant and his family. Indeed, Dr Hundal stated in her report before the Tribunal that "it is not possible to state definitively whether or not Mr Elmi will offend in the future as he, in common with the rest of the population, has some ability to determine his own future actions." Finally, we considered the view of the Upper Tribunal in Vasconcelos (risk-rehabilitation) [2013] UKUT 00378 in regard to adjournment requests to adduce supplementary material, where it said at paragraph 51: "It is not intended to give the claimant a second opportunity to present his primary case." For all of these reasons we refused to adjourn the proceedings.

9. It was agreed by all parties that the First-tier Tribunal's findings of fact were to be preserved, in particular at paragraphs 13 and 14 of its determination leading to the conclusion that the appellant was not entitled to permanent residence in the United Kingdom. The decision was to be re-made in regard to the risk of re-offending and rehabilitation and proportionality for the purposes of regulation 21(5) of the EEA Regulations.

10. We then heard from the appellant and his mother, both of whom chose to give their evidence through an interpreter in the Somali language. We were advised that the appellant's sister was not able to attend the hearing since she was at work. There was no additional statement from her. We were referred to her statement for the hearing before the First-tier Tribunal.

11. The appellant adopted his statement relied upon before the First-tier Tribunal. He confirmed that he lived with his mother. His sister lived in East London. He had ceased spending time with his old peers and instead had been assisting his family, had registered with a gym and played football. He had also started working on 26 December 2013 and produced a salary slip to that effect. He had not worked prior to then because the conditions of his temporary release prevented that until the restriction was removed on 16 December 2013. It was his attitude about life that had led to him finding employment when he had previously failed to do so, since he had previously made little effort. He no longer allowed himself to be influenced by bad company. He attended the gym and the library and no longer used drugs or alcohol. When asked to explain the circumstances

leading to his being recalled on licence he said that it arose out of the pressure he was under at the time by reason of the restriction on taking employment and his resulting lack of income. His sister had given him her bank card to withdraw some money for her and, whilst she had given him her card on previous occasions, on that occasion he used the money for gambling without her knowledge and lost the money, leading to him being too ashamed to return home and thus breached the condition of his residence. He reported the breach to the probation services and sought advice.

12. When cross-examined by Mr Melvin, the appellant agreed that he had stolen the money from his sister and that that had occurred whilst he was on licence and on bail and subsequent to the appeal before the First-tier Tribunal. He had apologised to his sister and she did not press charges against him. That was not the reason why she was not present at the hearing. She had not prepared a statement for the hearing because she was not asked to do so. When asked about his links to the community in Neasden where he lived, he said that he had previously had links only with the peers whom he had believed to be friends. He now had better relationships with his family, he attended the library and he avoided bad company. His neighbours had noticed the change in him. He agreed that he had spent a considerable amount of time over the past ten years in prison and unemployed. With regard to assisting the community, he had assisted local Somalis in the mosque by collecting money and clothes to send to Somalia. He could not recall when that was, but believed it was in 2012. With regard to his comment to the psychiatrist that he intended to return to Somalia to farm his father's land, he had said that when peace returned to the country he would like to visit his father's children and look at the farm. He then agreed that what the psychiatrist had stated was correct.

13. The appellant said that he had arrived in the United Kingdom at the age of nineteen, having spent ten years in the Netherlands, including seven years attending school there. He had worked for most of the following three years in a restaurant and a hotel. With regard to courses attended in the United Kingdom to address his offending he had undertaken a two week anger management course just before his licence ended last year. He did not need to attend courses about alcohol and drugs awareness as he had given up alcohol in 2011 and given up drugs when he was in prison. He was not drunk when he committed the offence in May 2012 – that was just what the judge believed. His mother had stopped working shortly after arriving in the United Kingdom because of pains in her shoulder. She used to attend English classes. The appellant said that he had no relatives in the Netherlands and had lost contact with the friends he had had there. He had mostly forgotten the language.

14. In response to our further questions, the appellant said that was able to speak Dutch fluently when he left the Netherlands. He had not thought to ask his neighbours to give evidence about his changed attitude. His sister was unable to attend the hearing due to work. The amount of money he had taken from her and gambled was £530. His solicitor had succeeded in having the restriction lifted in regard to employment as it had been an error on the part of the immigration services.

15. We then heard from the appellant's mother, Sarah Sedow, who adopted the statement she had given before the First-tier Tribunal. She provided evidence of the benefit payments she received, which she said was support allowance due to the pain in her shoulder. She was aware of the appellant having used his sister's bank card. Her daughter used to trust him with her card but on that occasion he had misused the money. They had decided to forgive him. The relationship between the appellant and her daughter was very good. He had not given her any other problems.

16. When cross-examined the appellant's mother confirmed that her son had been given the bank card by his sister but had not given her the money he had withdrawn. She confirmed that she had come to the United Kingdom in 2008. She was a Finnish citizen. She had worked in the United Kingdom for five months from March to July 2009 but was unable to work thereafter due to the problem with her shoulder. She attended college in 2010 but was unable to continue her course because of her shoulder. She later put herself on a waiting list for the college. Her daughter was not at the hearing because of work. She had not produced a statement because she was not asked to, but she continued to support and assist the appellant. Her daughter paid for the electricity and council tax and covered various bills and expenses that she and the appellant could not afford to pay. When asked if her son had undertaken any charity or community work, she said that he was not permitted to. She was not aware that he had done any such work. His links to the community consisted of his family and friends. She was not aware of him being a member of any clubs. She was now able to influence him directly as he remained at home most of the time, although he had been living with her previously. She was aware that he had a job but did not know how he had found it or how long it would last.

17. We then heard submissions from both parties.

18. Mr Melvin submitted that the appellant remained at medium risk of re-offending. Since his release from custody he had stolen from his sister. There was no evidence to support his claim to have reported his breach of conditions to the probation service himself. He had shown a disregard for United Kingdom laws. There was little evidence of employment and no evidence to show that he had changed into a respectable member of United Kingdom society. His integration into the community was at a very low level. In any event he was a multiple recidivist. There was no prospect of rehabilitation. There was no evidence of continuing support from his sister. Any family life there might be was restricted to that between himself and his mother, although that did not meet the legal test of family life given the absence of evidence of dependency. The appellant would be able to return to the Netherlands and reintegrate into society there. His removal was just and proportionate.

19. Ms Radford accepted that the appellant was not integrated for the purposes of EU law, but submitted that the issue was that of proportionality. In that regard the relevant consideration was the public interest, not of the United Kingdom, but that of Europe, in line with the principles in Batista v SSHD [2010 EWCA Civ 896 and Case C-145/09 Land Baden-Wurtemberg v Tsakouridis [2011] CMLR 11. This case, she submitted, was unusual in that it concerned the return of an individual to a country of refuge rather than a country

of origin and accordingly the appellant's level of connection to the Netherlands was much lower. He had no cultural and family connections there. His problems began when he left his family and moved away and that was when the bulk of his offending occurred. When he returned to his family his level of offending was not as great. He did not commit any offences when at liberty between 2009 and 2012 and he had not committed any offences when on licence. The incident with his sister's bank card was not theft as he had her permission to use his card, albeit not for gambling. What was relevant was how he had dealt with and approached that incident with the support of his family. He also had employment here now. These were all indications that he had changed his ways and matured and that there was a chance of rehabilitation. However the absence in the Netherlands of any dedicated support such as that from his family meant that there was a chance that he would go off the rails if returned to that country. The circumstances of the family and their separation due to the situation in Somalia were relevant. His mother had spent many years away from him and had finally been reunited with her children. When weighing up all those matters and taking account of the high threshold and the low risk of reconviction he should be allowed to remain in the United Kingdom where he had a chance of staying on the right side of the law and where his mother's right to be with her child would be protected.

Consideration and findings

20. The starting point in this appeal is that it is accepted that the appellant cannot meet the higher levels of protection against expulsion afforded under regulations 21(3) and (4) of the EEA Regulations. Accordingly, his expulsion can be justified only on the general grounds of public policy, public security or public health, following which the relevant test is to be found in regulation 21(5), as follows:

> "21(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."

21. We previously set aside the First-tier Tribunal's decision on the grounds that, in considering whether the appellant represented a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society", the Tribunal concluded that the risk of him re-offending was higher than medium, a conclusion that did not appear to be supported by the expert evidence before it. Accordingly we have, in re-making the decision, re-visited the evidence that was before the Tribunal and considered the further evidence before us in assessing risk.

22. In so doing, we note that the most recent risk assessment from the probation services is contained in the National Offender Management Service (NOMS) report, taken from an OASys report completed on 25 November 2012, two months after the appellant was convicted of, and sentenced for, the index offence. When we enquired of Ms Radford about the absence of a more recent assessment we were simply advised that the appellant no longer saw his probation officer as his licence had since expired. However we note from the letter of 28 February 2013 from London Probation Trust at page 41 of the appellant's main appeal bundle that the appellant's solicitors were provided at that time with details of his current offender manager and from the email correspondence at page 43 of the appeal bundle that they were in contact with his probation officer in May 2013, whilst he was still on licence. We consider it unfortunate that a more recent risk assessment was not acquired at that time and that no request for further details has since been made to the probation services. We therefore have no evidence from an offender manager of the appellant's progress during the period of his imprisonment and no risk assessment from the probation services following his release on licence. As we have stated above we did not consider that a report from a forensic psychiatrist would have provided the same assistance and evidential value as a report from those who had ongoing contact with him.

23. However, returning to the evidence that is available to us, we have taken note of the earliest risk assessment, from London Probation Trust, which pre-dates the index offence, and can be found in their letter of 28 February 2013. That assessment followed the appellant's convictions for offences committed in 2006 and 2007 and his release on licence in November 2008. In 2010 he was assessed by the London Probation Trust as a medium risk of serious harm with a low risk of re-offending. With regard to the assessment following conviction for the index offence, we note from the NOMs report that the likelihood of re-conviction was assessed as low, whilst the risk of serious harm to others was assessed as medium. The particular risk factors identified in that report were anger management and managing finances.

24. Dr Hundal, in her report prepared in May 2013, a month after the appellant's release on immigration bail, reached similar conclusions. With regard to his behaviour, she noted that he minimised his behaviour at the time of the index offence, that he did not show regret for the crime and that he minimised the injuries sustained by the victim. She noted that he had not attended any courses on victim awareness whilst in custody, although he had attended courses to improve his literacy and numeracy. She noted that he was not so forthcoming about his offending history and substance history and that there were considerable discrepancies in his account. Dr Hundal was of the opinion that there were identifiable factors that precipitated the appellant towards engaging in offending behaviour: his association with a deviant peer group with concurrent illicit drug and alcohol misuse, a lack of structured daytime routine, an absence of gainful employment or training and a struggle to manage his finances. She graded his initial risk of re-offending as medium in the next year if he remained in the community, but with the possibility of a significant decrease in that risk if, with the continued support of his family, he continued to distance himself from his deviant peer group, abstained from alcohol and illicit substances, structured his week with meaningful activities, such as paid employment,

education or training, had access to a legitimate and dependable income stream and was able to manage his finances. She noted that, at the time of writing the report, he had not maintained any contact with his previous peer group and maintained that he had not used alcohol and illicit substances.

25. We have considered, from the evidence before us, the appellant's ability to address the factors identified in the NOMs report and by Dr Hundal as contributing to his offending behaviour. It appears to be the case, and we accept, that the appellant has continued to distance himself from his previous peer group. However we note that that was in any event the case prior to the commission of the index offence which occurred after he had moved to live in Neasden with his mother – the NOMs report quotes the OASys as referring to disassociation from his previous peers as of 2010. We also note that the index offence was committed independently and without the influence of peers. With regard to abstinence from alcohol and illicit drugs, we note that Dr Hundal observed that he was not forthcoming about his substance history. We also note that whilst it is the appellant's evidence that he has abstained from alcohol since 2011 (paragraph 41 of his statement of 22 May 2013 and his evidence before us), it was the sentencing judge's view that he had committed the index offence under the influence of alcohol, a view which he rejects. We are therefore somewhat sceptical of his claim to have entirely abstained from alcohol and drugs but are prepared to accept that that is largely the case. We note also that, with regard to addressing his offending behaviour, he has not attended any victim awareness courses and attended a short anger management course only days before his deportation hearing which, as the First-tier Tribunal found, raises doubts as to the genuine nature of his motivation.

26. With regard to education, training and employment, we note that the appellant has historically commenced various courses without seeing them through to completion and has not succeeded in maintaining employment for any significant period of time. At the time of preparation of the NOMs report it was observed that he had lost his motivation to find work and appeared content with receiving state benefits and that he had taken no positive steps to return to college. The issue is also addressed at paragraph 6.2.2 of Dr Hundal's report, where reference is made to courses attended in custody but no engagement in educational programmes since being in the community. The only progress we observe from the more recent evidence before us is the appellant's claim to have commenced employment, selling fruit and vegetables in a market. However the evidence of that employment is limited to one wage slip dated 31 December 2013 which we are informed relates to employment commenced on 26 December 2013, consisting of ten hours, four days a week. There is no supporting evidence from his employer to confirm that such employment is intended as ongoing and permanent. Given the recent nature of the employment, the fact that it commenced only a matter of days prior to his deportation appeal and, on the appellant's own evidence, followed advice from his solicitor to find a job, we are not persuaded that it represents a genuine move on the part of the appellant to establish himself in the work force. It is the appellant's claim that he was unable to find employment previously since the conditions of his temporary admission erroneously prevented him from working until his solicitors intervened to remove the restriction. However we note from the IS96 form of temporary admission that that condition appears

to have been imposed only recently, on 16 October 2013, following his release on bail, and consider from his previous history that that was not a matter particularly influencing his lack of employment.

27. Other than attendance at a gym and his local library, the appellant was unable to provide any evidence of efforts to undertake meaningful activities or engage himself with the community. He referred to a short stint of charitable work for the Somali community through his local mosque, but his mother appeared to be unaware of any such activities.

28. Of particular significance is the appellant's behaviour, since his release from prison. After being granted bail in April 2013 he was recalled on licence in June 2013 and remained in custody until released on bail in October 2013. It is his claim that he breached the terms of his licence by not returning to his home and that that occurred as a result of the shame he felt after using his sister's money for the purposes of gambling. He claims to have reported the breach to the probation services himself and to have sought advice from his probation officer, but we are not persuaded that a failure to spend one night at his home (as was his evidence before us) followed by an immediate and voluntary presentation to the probation services would result in the revocation of his licence. It is of note that there is no supporting statement from his probation officer. With regard to the incident itself, the evidence was unclear as to whether, whilst having previously had his sister's consent to use her bank card to withdraw money, the appellant had her consent on that particular occasion. What is clear is that he did not have consent to use the money for himself, and certainly not to use it for the purposes that he did, namely to gamble. The incident is particularly relevant to the appellant's circumstances, given the financial motivation behind much of his offending including the index offence. His gambling problem was referred to in the NOMs report as a contributory factor in his inability to manage his finances and was also referred to in the psychiatric report from Dr Hundal, at paragraph 6.2.3, where she recorded that he did not admit to having a gambling problem and his claim to not currently be in financial difficulties. It was Ms Radford's submission that the manner in which the appellant dealt with the incident, by discussing the way forward with his family and by presenting himself to the probation services, demonstrated a developing maturity on his part. However we do not agree. We consider there to be no reliable evidence to support the appellant's account of events and we note the absence of any evidence from his sister to confirm her ongoing support following the incident.

29. The continued support from the appellant's family is a factor relied upon in the claim that he no longer poses a risk to the community and forms part of Dr Hundal's assessment. The appellant claims that his sister continues to support him and that her absence from the hearing was due to her work commitments. That was confirmed by his mother. Whilst we acknowledge that she attended previous Tribunal hearings to support him, we do not accept that she would not have been aware of the importance of attending the current proceedings, which were decisive in the matter of his deportation. It is particularly relevant that she did not produce a statement confirming continuing support in the absence of attendance at the hearing, in particular given the recent incident. We are not persuaded to accept the evidence of the appellant or his mother in that regard. We found neither to be reliable witnesses and it was clear to us that Ms Sedow was, perhaps

understandably, keen to adapt her evidence to assist her son's case. We note in particular her claim that the financial support provided by her daughter was for the appellant's benefit and was dependant upon the outcome of the deportation proceedings, a claim we simply do not accept – we have no doubt that the support provided was for her benefit and would continue in the appellant's absence.

30. Whilst we accept that Ms Sedow will continue to support her son in any way she can, and would hope to influence him against further criminal activity, we cannot accept that she would be able to do so, given her inability to do so in the past. She has, through circumstances largely outside her control, been absent for most of his life and was unable to exercise any influence over him since joining him in the United Kingdom. The appellant was living with her at the time he committed the index offence and there is no evidence to suggest a change in circumstance such that she would be able to prevent him from offending again.

31. In all of these circumstances, we conclude that the appellant's personal conduct does meet the high threshold of representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. He has shown a continued disregard for the law in this country, he is a repeat offender and has failed to demonstrate any genuine efforts or motivation to address his offending behaviour. Although there is no evidence of offending for three years from 2009, he returned to crime in 2012 at a time when he was living with the support of his family. For the reasons we have given above we consider that, in terms of the findings at paragraph 5 of the head-note to Essa v Secretary of State for the Home Department (EEA: rehabilitation/integration) Netherlands [2013] UKUT 316, he has made little, if any, progress during the sentence and licence period and there has been no material shift since the OASys assessment. Certainly, there is no evidence from either the prison staff or the probation services to suggest any such progress. Whilst the period of imprisonment involved elements of rehabilitation, it is the case that he made no effort during that time to engage in his offending behaviour by means of victim awareness or other such courses, albeit that he attended a limited number of education courses. We find that he has failed satisfactorily to address any of the risk factors set out in the NOMs report and in Dr Hundal's report and we find no reason to depart from the risk assessments previously made.

32. With regard to integration, Ms Radford accepted that the appellant had not integrated, for the purposes of EU law, and clearly that is the case. He has not acquired permanent residence and has made little effort, in his ten years of residence in the United Kingdom, to integrate into United Kingdom society. Indeed, a substantial period of the time spent in the United Kingdom has been in prison. Although he speaks English, he preferred to use an interpreter for the hearing, despite having been absent from Somalia since the age of nine and having lived in the United Kingdom for ten years. There is no evidence at all of any ties to the community, other than his immediate family and even with regard to his family those ties appear to be limited to his mother and, to some extent, his sister.

33. In view of the absence of integration, and in the light of our findings above, we consider there to be no reasonable prospects of rehabilitation in the future. Even if such prospects existed, they would carry little weight in the proportionality balance and, in that respect, we refer to paragraph 4 of the head-note to Essa:

> "At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, it cannot be seen how the prospects of rehabilitation could constitute a significant factor in the balance. Thus, recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with propensity to commit sexual or violent offences and the like may well fall into this category."

34. Turning, therefore, to proportionality, we accept that the appellant has family ties in the United Kingdom, but note, as stated above, that the only evidence of continued family support emanates from his mother and, previously, his sister. We accept that, following years of separation from his mother, for the most part as a result of circumstances beyond their control, he has formed a close bond with her. We accept that he provides her with a level of comfort and assistance, in terms of housework, massaging her shoulder and taking her to the doctor, but we do not consider that that amounts to dependence for the purposes of any legal test of family life. Indeed, his mother has managed without him for substantial periods of time whilst he was in prison. She is supported by her daughter and receives no financial assistance from the appellant. The appellant has lived in the United Kingdom for ten years, but has spent much of that time in prison (Whilst Mr Melvin submitted that it was more than five years, Ms Radford advised us that it amounted to around three years). As already stated, he has made little or no effort to become integrated into United Kingdom society. He has contributed nothing of significance to the community. Indeed we were struck by the complete dearth of evidence of any ties or support from friends, members of the community or any other parties. Ms Radford relied on the guidance in Maslov v. Austria - 1638/03 [2008] ECHR 546 in terms of proportionality, but we fail to see how the principles in that case apply to the appellant, given the lack of integration and ties and considering that he came to the United Kingdom as an adult and committed his offences as an adult. With regard to the index offence, we note that it was one that involved significant violence and that, according to Dr Hundal the appellant continued to minimise his actions and the victim's injuries and showed no regret for the crime.

35. We have regard to the "European dimension" in this case, in particular given that that was the basis for the original grant of permission to appeal against the decision of the First-tier Tribunal. Ms Radford relied upon the cases of Batista v Secretary of State for the Home Dept [2010] EWCA Civ 896, VP (Italy) v Secretary of State for the Home Department [2010] EWCA Civ 806 and Tsakourides in referring to the question of the shared interest of EEA countries, both in terms of the interests of the European Union itself and in terms of the appellant's own rehabilitation. She submitted that the appellant's removal to the Netherlands would prejudice his rehabilitation, given the lack of family or other support in that country and that it would accordingly not be in the interests of the EU for him to be deported from the United Kingdom to a country where his risk of re-offending, due to an absence of such ties, would increase. However we find the appellant's

circumstances to be completely different to the circumstances arising in those cases, given the nature of his ties to the United Kingdom, his level of integration in this country and the relevant level of protection against expulsion to which he is entitled.

36. We accept, as Ms Radford submitted, that the Netherlands is not the appellant's country of origin, and that his ties to that country are accordingly not as strong as those of an indigenous Dutch national who had come to the United Kingdom at the same age. Nevertheless, it is relevant that he spent ten years in the Netherlands, from the age of nine to nineteen years, his formative years. Although he arrived in that country as a refugee from Somalia, he was educated there and subsequently worked there. He speaks the language fluently – we reject his claim to have forgotten most of the language, given that he accepts he spoke it fluently when he left. Considering the significance of the period of time spent in that country, as a teenager and young adult, we also reject his claim to have lost contact with all the friends he had there. Whilst he claims to have no family remaining in the Netherlands we note that his evidence of subsisting family ties in the United Kingdom is limited to that of his mother and, to an extent, his sister. There was no evidence from any other family members such as the aunt with whom he had lived in the Netherlands. His mother is an EU national and is accordingly free to travel and visit him in the Netherlands, as is his sister. There is nothing in the medical evidence before us to suggest that his mother's health problems should prevent her from so doing. Significantly, the appellant did not engage in criminal activity whilst in the Netherlands, but only commenced his offending in the United Kingdom. Although he claims that that was because he was not living with his family at the time, it is the case that his most recent offending was committed whilst he lived with his mother. We find no reason why he could not return to the Netherlands and re-establish himself there and we reject the submission that removing him to that country would prejudice his rehabilitation or that his chances of successful rehabilitation would be any greater in the United Kingdom than in the Netherlands.

37. For all of these reasons we consider that the appellant's deportation would not be disproportionate and, having taken account of the considerations in regulation 21(6), we conclude that the appellant's expulsion is justified on the grounds of public policy and would not be in breach of the EEA Regulations. In view of our detailed findings on proportionality we find no other considerations arising under Article 8 of the ECHR and conclude that his deportation would not breach his human rights.

DECISION

38. The making of the decision of the First-tier Tribunal involved an error on a point of law and the decision has accordingly been set aside. We re-make the decision by dismissing the appeal on all grounds.

Signed Date
Upper Tribunal Judge Kebede