Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00750/2013

THE IMMIGRATION ACTS

Heard at Birmingham Magistrates Court On 16th April 2014 (and Sheldon Court on 24th January 2014 in the absence of Mr Madar)	**Determination Promulgated On 3rd June 2014**

Before

UPPER TRIBUNAL JUDGE COKER
UPPER TRIBUNAL JUDGE DAWSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

AWALE MADAR

Respondent

Representation:

For the Appellant: Mr D Mills Senior Home Office Presenting Officer
For the Respondent: Mr C Lane, counsel, instructed by JR Jones solicitors (Ms Chaggar at the hearing on 24th January 2014)

DETERMINATION AND REASONS

1. In a decision promulgated following a hearing on 24th January 2014 we found that the First-tier Tribunal judge had erred in law in allowing an appeal against deportation on the following basis:

    1. The appellant (hereafter the SSHD) appeals a decision of the First-tier Tribunal which allowed an appeal by the respondent (hereafter the claimant) against a decision 18th February 2013 by the SSHD to deport the claimant.

2. Permission to appeal had been granted on the basis that it was arguable that a panel of the First-tier Tribunal (Judge Pooler sitting with Dr J O de Barros, a non-legal member of the Tribunal) who, by a determination promulgated on 16th October 2013, allowed his appeal on the grounds that although there remained a risk of re-offending, the degree of integration in the UK, the lack of any links with the Netherlands and the greater prospects of rehabilitation in the UK led to the conclusion that the decision did not comply with the principle of proportionality as required by regulation 21(5) Immigration (European Economic Are) Regulations 2006 as amended.

3. The claimant, a citizen of the Netherlands date of birth 7th June 1993 had a number of convictions:
   i. On 24th September 2009, 30th October 2009 and 13th November 2009 he was convicted of three separate offences of theft and on each occasion a referral order was made or extended;
   ii. On 27th April 2010 was fined for a public order offence (disorderly behaviour or threatening or abusive or insulting words). The referral order made on 24th September 2009 was revoked and an attendance centre order was made;
   iii. On 28th October 2010, 31st January 2011 and 4th June he was convicted of three separate offences of possession of cannabis and fined;
   iv. On 31st March 2011 he was convicted of theft and received a youth rehabilitation order with a six month supervision requirement;
   v. On 10th May he was fined for resisting or obstructing a constable
   vi. Three offences were committed whilst on bail (two possession of cannabis and one failing to surrender);
   vii. On 17th August 2012 he was convicted following a plea of guilty to an offence of robbery for which he received a sentence of two years detention in a young offender institution, one offence of handling stolen property for which he received a sentence of six month's detention concurrent and a further offence of robbery for which he received a sentence of eighteen months detention consecutive.

4. The First-tier Tribunal panel found that the claimant had not acquired a right of permanent residence in accordance with the Regulations and reached its decision on the appeal on the basis that the claimant's appeal was to be considered on the basis that he had the lowest level of protection afforded to an EEA National. They found, inter alia, that the claimant "poses a significant risk of future offending" [38], that he "acquired, over time, offences of increasing seriousness" [42], "no relatives remaining in the Netherlands" [44(b)], that it cannot be said that he is "well advanced in rehabilitation" [44(d)], that the "prospects of rehabilitation are far greater in the UK than in the Netherlands" [44(d)].

5. Reference was made in submissions before us to the requirements of genuine integration, or substantial degrees of integration and the relevance of being well advanced in rehabilitation (Essa [2013] UKUT 00316 (IAC) paragraphs 26, 30 and 34; see also Tsakouridis [2013] EUECJ C – 145/09; Onuekwere [2013] EUECJ Case C – 378/12

including the advocate general's opinion; MG [2013] EUECJ Case C – 400/12). It was submitted that the First-tier Tribunal panel had failed to weigh in its consideration the escalating criminality, the issue of integration, the lack of rehabilitation and that there was no evidence upon which to conclude that rehabilitation would not be available in the Netherlands to the same extent or with the same effect as in the UK. In response Ms Chaggar submitted that the decision, when read as a whole clearly looked at the particular circumstances of the claimant and reached an overall assessment of the proportionality of the decision.

6. We announced at the hearing that we were satisfied that the panel had materially erred in law for the reasons which we now give.

7. On a reading of the determination as a whole we are unable to accept that the panel had weighed in the balance the countervailing factors in the claimant's appeal; although noted by the panel these did not appear to have been taken account of in the overall assessment of the proportionality of the decision. There is a want of reasoning on this key aspect. We note that no evidence as to the rehabilitation process in the Netherlands was before the panel such as to enable a finding to be made that the claimant would not be able to avail himself of such processes. We conclude that the panel has failed to factor into its decision all of the relevant issues and failed to give adequate reasons for the decision reached, such failure amounting to an error of law such that the decision be set aside to be remade.

8. The decision of the First-tier Tribunal panel is set aside to be remade.

2. We made the following directions:

1) the findings of fact in the First-tier Tribunal panel determination in [38, 39, 40, 42] stand together with the finding that the claimant has resided in the UK since September 2000; that he has no remaining family in the Netherlands; he was not (in October 2013) well advanced in rehabilitation;
2) The claimant have leave to file and serve an up to date OASys report;
3) The SSHD to file and serve an up to date PNC
4) The claimant have leave to file an updated witness statement and witness statements from members of his family as he wishes to call, regarding the time spent in Somalia;
5) Both parties to file and serve skeleton arguments 10 days before the resumed hearing, such skeletons to consider in particular the issues of integration, rehabilitation and residence;
6) Oral evidence to be called from the claimant and his father; no interpreter required.

Hearing on 16th April 2014

3. The findings preserved from the First-tier Tribunal were as follows:

i. the appellant poses a significant risk of future offending;
ii. the risk is likely to reduce if the appellant makes constructive use of his spare time, associated with law abiding peers and

used his time constructively via unpaid work and structured interventions. This would be by attendance on the Thinking Skills programme, addressing how his behaviour affects others and better self management. He would benefit from engagement in education and training programmes;

iii. the appellant has completed courses related to basic literacy; numeracy; alcohol awareness and constructions skills;
iv. his offending history shows he has acquired convictions over time of increasing seriousness ;
v. there are no adjudications against him in prison since April 2013;
vi. As of October 2013 he had not "learned his lesson"; he has not accepted full responsibility for his actions;
vii. He has not attended formal courses addressing offending behaviour or thinking;
viii. The personal conduct of the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
ix. He has been in the UK since 2000 and was a child on entry; he attended primary and secondary school in the UK;
x. He has no remaining family in the Netherlands
xi. He does not have a permanent right of residence nor the additional protection acquired by 10 years residence; his deportation is to be considered against the lowest level of protection afforded by the EEA Regulations.

4. The claimant filed witness statements from himself and his father and we heard oral evidence in relation to the time the claimant spent in Somaliland for about 9 months in 2011 namely: his family had sent him there in order to visit relatives and to encourage rehabilitation. He had disliked it there intensely: the food, the social, community and living arrangements. Whilst there he had worked for an uncle in a shop and had returned to the UK against the wishes of his UK family. Mr Madar also confirmed completion of his Thinking Skills course and produced the records and certificates of his various completed courses. There was no cross examination of either witness, and no challenge to this evidence.

5. The SSHD filed an email from the claimant's offender manager which stated

> "…Mr Madar is still assessed as posing a medium risk of reoffending and a high risk of harm. This assessment relates to the fact that he committed 2 robberies in one evening and shortly after committed a robbery in an Internet Café. The Robbery in the Internet Café was witnessed by the victims children who were aged 3 and 4 years at the time. They were so traumatised by what they witnessed wet themselves when they witness the robbery. The victim gave chase and in order to get his phone back and tripped and broke his arm as a result.
>
> ….The victims children now aged 5 and 6 years continue to have nightmares about the offence. Their father has also begun to suffer from anxiety attacks and has been unable to work since. Another victim requested conditions that Mr Madar be given an exclusion zone not to enter the Edgebaston Area of Birmingham as he feared being recognised and fear of repercussions.
>
> On a positive side not (sic) I can confirm that I visited Mr Madar's family at their home address. Present were his mother, father and older sister, his younger

> brother was away at university. They presented an extremely supportive family have pledged to work with the Probation Service and any other organisation to facilitate the rehabilitation of their son in the UK.
>
> I can also confirm that Mr Madar has made positive steps to address his offending whilst in prison. He is a more sombre young man than the one I wrote the report on 18 months ago. He has successfully completed the Thinking Skills Programme whilst in custody and I have noticed a change in his attitude over the past six months. He has also expressed his willingness to cooperate with his licence and the conditions imposed. There is no doubt in my mind that his resolve to change his lifestyle will be severely tested/challenged on release.

6. The updated PNC filed by the SSHD confirmed the claimant had 7 convictions for theft and kindred offences, 1 public disorder offence, 3 offences relating to police/courts/prisons and 3 drug offences.

7. A summary of information on probation in the Netherlands filed by the SSHD states that the Probation Service

> "….. can only perform probation activities as commissioned by the judicial authorities: the Public Prosecutor Service, the judiciary and the prison system. That means that there is no 'voluntary contact' with detainees.
> Ex-detainees are not supervised by the Probation Service, unless this is within the framework of the Penitentiary Programme (in that case, detention is still continuing) or for the conditional release if special conditions have been imposed: the Probation Service then supervises and helps to achieve compliance with those conditions.

8. There was no evidence produced to us how those deported to the Netherlands entered any supervision or rehabilitation programme in the Netherlands.

9. We received skeleton arguments and heard oral submissions from both representatives. It was accepted by both parties that the claimant's deportation was justified save for the question of proportionality

10. The position of the SSHD is (in essence) that rehabilitation is only of relevance where an individual can be said to be "genuinely integrated" in the host Member State, relying upon Tsakouridis and Essa and that there is "no basis to conclude that prospects of rehabilitation should be treated as relevant factor in a case where a permanent right of residence has not been established." As a secondary position the SSHD submits that if relevant, rehabilitation should be afforded little weight in the proportionality balancing exercise. Essa refers obliquely to this in terms of rehabilitation in the individual's state of origin with which s/he has not lost links leading to the potential for an application to revoke a deportation order. It was not accepted that there would be any adverse effects on the claimant's prospects of rehabilitation by his removal to the Netherlands and relied upon the documents submitted outlining the availability of probation services in the Netherlands. Furthermore the SSHD submitted that it had not been shown that his prospects of rehabilitation, even if found to be relevant in law, would be significantly diminished in his home country and thus this was of no relevance in the proportionality balance.

11. The claimant's submission, in essence, was that the claimant's social and cultural integration is specifically required to be considered and that the greater the degree of integration, the greater the degree of protection from expulsion. To submit, as the SSHD does, that the commission of crime indicates either that there was no integration in society or that such integration as there was, was expunged by the commission of offences would mean that regulation 21(6) has little meaning; integration is a question of fact to be considered in the circumstances of any given case. The claimant also submits that rehabilitation is a factor and should be considered not only from the perspective of the individual but also the wider perspective of the EU as a whole.

Legislative framework

12. Article 21 Treaty on the Functioning of the European Union ("TFEU") states that

> "1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

13. Article 20 of the TFEU states

> "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. "

14. Article 27 of Directive 2004/38/EC is as follows

> 1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
> 2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned….

15. Article 28 0f Directive 2004/38/EC is as follows

> 1. before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

16. The Directive was implemented through the Immigration (European Economic Area) Regulations 2006 and, where relevant to this appeal, are as follows:

"Regulation 19(3) (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"

Regulation 21
(1) In this regulation a 'relevant decision' means an EEA decision taken on 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 on 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.
…"

Discussion

17. In Tsakouridis, the ECJ makes reference to the balance to be struck

" [50] …. between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned….by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity, and if appropriate the risk of reoffending….on the one hand, and, on the other hand, the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which, as the Advocate General observes in point 95 of his Opinion, is not only in his interest but also that of the European Union in general.

[51] The sentence passed must be taken into account as one element in that complex of factors. A sentence of five years' imprisonment cannot lead to an expulsion decision, as provided for in national law, without the factors described in the preceding paragraph being taken into account, which is for the national court to verify.
…..

> [53] To assess whether the interference contemplated is proportionate to the legitimate aim pursued, in this case the protection of public security, account must be taken in particular of the nature and seriousness of the offence committed, the duration of residence of the person concerned in the host Member State, the period which has passed since the offence was committed and the conduct of the person concerned during that period, and the solidity of the social, cultural and family ties with the host Member State. In the case of a Union citizen who has lawfully spent most or even all of his childhood and youth in the host Member State, very good reasons would have to be put forward to justify the expulsion measure (see to that effect, in particular, (Maslov v Austria §§71 to 75."

18. P.I. Case C-348/09, again a case involving imperative grounds of public security and thus the highest level of protection from expulsion, refers to the preambles to the Directive, in particular preambles 23 and 24 and the reference to "genuine integration". The question referred to the Court was whether the term "imperative grounds of public security" covered only threats posed to the internal and external security of the State in terms of the continued existence of the State. In [34] the court states

> "…. Before taking an expulsion decision on the grounds of public policy or public security, the host Member State must take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into that State and the extent of his/her links with the country of origin."

19. In M.G. Case C-400/12 there is again reference to preambles 23 and 24. The UK in that case had taken the view that enhanced protection against expulsion is dependent upon the integration of the Union citizen into the host state and that such integration cannot take place while that citizen is in prison. The court also determined issues as to the calculation of the 10 year period referred to in Article 28(3) (a) of the Directive and as regards the assessment of serious grounds of public policy or public security, such issues not being relevant to the determination of the present appeal. In [23] the court holds

> "… it should first be noted that the Court has found that, while recitals 23 and 24 in the preamble to Directive 2004/38 certainly refer to special protection for persons who are genuinely integrated into the host Member State, especially if they were born there and have spent all their life there, the fact remains that, in view of the wording of Article 28 (3) of that directive, the decisive criterion is whether the Union citizen lived in that Member State for the 10 years preceding the expulsion decision…
> [35] As for the question of the extent to which the non-continuous nature of the period of residence during the 10 years preceding the decision to expel the person concerned prevents him form enjoying enhanced protection, an overall assessment must be made of that person's situation on each occasion at the precise time when the question of expulsion arises (see to that effect Tsakouridis, paragraph 32).
> [36] In that regard, given that in principle, periods of imprisonment interrupt the continuity of the period of residence for the purposes of Article 28(3)(a) of Directive 2004/38, such periods may – together with the other factors going to make up the entirety of relevant considerations in each individual case – be taken into account by the national authorities responsible for applying Article 28(3) of that directive as part of the overall assessment required for determining whether

> the integrating links previously forged with the host Member State have been broken, and thus for determining whether the enhanced protection provided for in that provision will be granted (see, to that effect, Tsakourides, paragraph 34).
> ….
> [38]…….the fact that that person resided in the host Member State for the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken. "

22. In Onuekwere Case C-378/12, the Court considered the issue of the exclusion of periods of imprisonment in calculating the duration of residence to assess Mr Onuekwere's right to permanent residence as a family member of an EU national. Referring to integration the court says

> [25] …. Integration, which is a precondition of the acquisition of the right of permanent residence laid down in Article 16(1) of Directive 2004/38 is based not only on territorial and temporal factors but also on qualitative elements, relating to the level of integration in the host Member State (see Case C-325/09 Dias [2011] ECR I-6387, paragraph 64), to such an extent that the undermining of the link of integration between the person concerned and the host Member State justifies the loss of the right of permanent residence even outside the circumstances mentioned in Article 16(4)…..
> [26] The imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host member State in its criminal law, with the result that the taking into consideration of periods of imprisonment for the purposes of the acquisition by family members of a Union citizen, who are not nationals of a Member State of the right of permanent residence for the purposes of Article 16(4)….would clearly be contrary to the aim pursued by that directive in establishing that right of residence.

23. Advocate General Bot in his opinion in Onuekwere states

> [49] …the integration which lies behind the acquisition of the right of permanent residence laid down in Article 1691) of Directive 2004/38 is based not only on territorial and time factors but also on qualitative elements, relating to the level of integration in the host Member State.
> [50] Periods of residence in prison of course make clear that the person concerned is integrated to only a limited extent. That is even more true where, as in the case in the main proceedings, that person is a multiple recidivist. Criminal conduct in my opinion clearly shows that the person concerned has no desire to integrate into the society of the host Member State.
> ….
> [54] It is clear that every sentence must, in accordance with the fundamental principles of the law on sanctions, comprise a rehabilitative element to be achieved by appropriate means of implementation. Nevertheless if a sentence is imposed, it is precisely because societal values as expressed in the criminal law have been disregarded by the offender. And while rehabilitation must take its proper place, that is precisely because either there was no integration in society, thus explaining the commission of the offence, or because such integration was expunged by commission of the offence.
> [55] besides rehabilitation, the sentence also serves the essential purpose of retribution, which aims to make the offender pay for his crime and is proportionate to the gravity of the offence, expressed here by the penalty of

> imprisonment. These functions cannot operate to negate each other. The rehabilitative function cannot result in a situation where a period spent atoning for the crime committed confers on a convicted person a right the acquisition of which requires recognition and acceptance of social values which he specifically disregarded by committing his criminal act.

24. Advocate General Bot's opinion expresses his view on integration and criminal acts in the course of proceedings to determine the acquisition of residence for the purposes of determining the level of protection acquired. This is reflected in the Court judgments in Onuekwere, MG and PI. None of these cases was considering the issue of 'integration' as a consideration to be taken into account before taking a relevant decision. Length of residence and social and cultural integration are matters that are clearly stipulated as requiring consideration. Assessment of whether a person has residence in excess of 10 years, permanent residence or not requires consideration of the length of residence as defined in and in accordance with the calculations referred to in MG, PI and Onuekwere. Thereafter the level of protection is determined in accordance with regulation 21; the weight to be placed on the considerations and principles set out in regulation 21(5) and (6) is a matter to be assessed in the context of the level of protection acquired by the person the subject of the expulsion order.

25. Essa [2013] UKUT 00316 (IAC), which predated MG and Onuekwere, considers the level of protection afforded to Mr Essa in his circumstances and acknowledges that in the light of the anticipated reporting of MG and Onuekwere, the guidance given may need to be revised. In [20] the Upper Tribunal comment (in considering the level of protection to be afforded to Mr Essa) that they could

> "find no indication in the evidence that he has ceased to be integrated in the United Kingdom".

Under the sub-heading "the duty to facilitate rehabilitation" the Upper Tribunal observes that in Tsakouridis the term "genuinely integrated" was used to describe

> "those for whom the prospects of rehabilitation were a relevant issue in the assessment of the balance"

and went on to hold [26] that the ECJ's

> "…reference to genuine integration must be directed at qualified persons and their family members who have resided in the host state as such for five years or more. People who have just arrived in the host state, have not yet become qualified persons, or have not been a qualified person for five years, can always be removed for non-exercise of free movement rights irrespective of public good grounds to curtail free movement rights. If their presence during this time makes them a present threat to public policy it would be inconsistent with the purposes of the Directive to weigh in the balance against deportation their future prospects of rehabilitation.
> [27] if they achieve rehabilitation on their return to their state of origin with whom they have not yet lost links then they can always go on to apply to revoke the deportation order against them that would otherwise prevent them exercising free movement rights in the host state in the future."

They go on to say [29] that they

> "…do not need to explore the difficult questions that may arise at the periphery of the decided case.
> [30] The problem area concerns those EEA nationals and their family members who have been resident in the host state for five years or more but who have not been engaging in activity that makes them a qualified person for a continuous period during that period. They may have resided in the host state for many years beyond the minimum five years and achieved a substantial degree of integration there and loss of contact with their state of origin. We will reserve the question of whether the prospects of rehabilitation can be a factor in these cases for future consideration."

26. Questions of integration have been addressed in the cases referred to above with regard to the level of protection acquired rather than rather than as part of the consideration to be undertaken prior to the taking of a relevant decision. The Court in Onuekwere does not adopt the statement of Advocate General Bot that integration is expunged on commission of criminal offences. [26] of Onuekwere refers to the imposition of a prison sentence as showing non compliance with societal values but that is not the same as expunging integration. In any event Advocate General Bot refers to periods of imprisonment and 'integration to a limited extent'.

27. Regulation 21(6) has a clear requirement for an assessment of integration, such assessment not merely being for the purpose of determining the level of protection to be afforded. It may of course be that the extent and nature of criminality has a significant bearing on the outcome of such an assessment, but that is very different to determining that criminality expunges integration. Were that the case we are satisfied that the Regulations would not have specifically referred to the requirement to assess integration as a specific element to be undertaken when deciding whether to take a relevant decision ie to deport an individual.

28. Turning to rehabilitation, Advocate General Bot in his opinion in Onuekwere refers to the rehabilitative element of sentencing but states that this cannot result in a situation where atonement for a crime confers rights "the acquisition of which requires recognition and acceptance of social values which he specifically disregarded by committing his criminal act", although this is not adopted in terms by the Court.

29. Essa reiterates that

> [32] …a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending. In such a case if there is acceptable evidence of rehabilitation, the prospects of future rehabilitation do not enter the balance save possibly as future protective factors to ensure that rehabilitation remains durable.
> [33] It is only where rehabilitation is incomplete or uncertain that future prospects may play a role in the overall assessment….It is in the interests of the citizen, the host state and the Union itself for an offender to cease to offend….

> [34] If the very factors that contribute to his integration that assist in rehabilitation of such offenders (family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like) will assist in the completion of a process of rehabilitation, then that can be a substantial factor in the balance. If the claimant cannot constitute a present threat when rehabilitated, and is well advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation.
> [35] At the other end of the scale, if there are no reasonable prospects for rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, we cannot see how the prospects of rehabilitation could constitute a significant factor in the balance…."

30. Advocate General Bot does not support the proposition that rehabilitation is irrelevant, rather that it is a factor which will to a greater or lesser degree impact on the decision made. Essa clearly considers that rehabilitation is to be considered as a factor and the weight to be placed upon it being fact specific. The relevance of rehabilitation will be part of an assessment of factors overall including the nature of the criminal offence and sentence. This includes consideration of the impact on the Union as a whole.

31. The Regulations do not exclude the concept of integration when considering expulsion measures against those who have the lowest level of protection. The issue remains a matter to be considered albeit the weight to be placed upon the various elements in regulation 21(6) will vary depending upon the level of protection acquired prior to a decision to expel being taken.

32. In summary therefore, we extract the following principles:

    a) Regulation 21(6) requires an assessment of the level and extent of an individual's integration into the host Member State which of necessity requires consideration of the offending behaviour irrespective of the level of protection being afforded.
    b) An assessment of rehabilitation is a relevant factor in the proportionality balance as to whether deportation is justified (Essa 3, 4 and 5 confirmed).

33. The parties are agreed that the issue before us is the proportionality of the decision. The claimant has been lawfully in the UK since the age of five and has, since the age of 16 been involved in criminality of increasing seriousness; it is accepted that he remains a present threat. The matters relevant to proportionality include those set out in paragraphs 3 to 7 above. Although the First-tier Tribunal found that the claimant had not accepted full responsibility for his actions and had not attended formal courses addressing offending behaviour, this has now altered to a certain extent as set out in the letter from his offender manager (set out at paragraph 5 above). That letter reiterates the extent of the effect on the victim and his children and expresses the view that the claimant's resolve to change his lifestyle will be severely tested/challenged upon release.

34. The claimant is now almost 21 years old. His criminality became increasingly serious, culminating in August 2012 in his detention following convictions for the first time for a nasty robbery. Previous attempts to deal with his criminality by way

of referral orders, attendance centre orders, youth rehabilitation orders, supervision and fines were patently unsuccessful. His family attempted to deal with his aberrant behaviour in 2011 prior to the robbery, by sending him to family in Somaliland, a country with which he was unfamiliar and for which he had developed no affection or ties. Although he has not acquired higher level protection rights, it was accepted by the respondent that the claimant was and has been lawfully in the UK since the age of five.

35. Although his increasing criminality and in particular the offences of robbery committed after extended efforts by the youth justice system to enable him to address and cease offending behaviour are serious indicators of the level of integration in UK society, we have taken into account the fact that he has spent virtually the whole of his life here in the UK other than some 11 months in Somaliland and the first five years of his life. Those five years would not have impacted significantly upon his awareness of the country in which he was then residing given the dependence upon close family at that age and the lack of awareness of outside factors (see for example Azimi-Moayed and others [2013] UKUT 197 (IAC). We are satisfied that prior to age 16 the claimant's centre of home, social, educational and cultural life was centred in and an integral part of his life in the UK. The escalating criminality since then is a strong indication of a rejection of the social and cultural mores of this society but it cannot, given the length of time he has been in the UK prior to this completely eradicate his links and ties to the UK and his integration. We are however satisfied that the criminality does reduce the weight to be given to his lengthy residence and level of integration.

36. In so far as rehabilitation is concerned it does appear that the offender manager has reached conclusions that he has now made positive steps to address his offending, that he has a highly supportive family and he has evinced an overall willingness to cooperate with his licence and conditions imposed She does however state that his resolve will be severely tested and this is a factor which has weighed heavily with us in determining the proportionality of exclusion.

37. We do accept the submission that the claimant is unlikely to be able to access rehabilitation facilities in the Netherlands. The documentary evidence placed before us does not show a means of accessing such processes; the claimant has no remaining family in the Netherlands; he has in reality no links or ties with the Netherlands having lived there only as a very young child with his family and he does not speak Dutch.

38. Although previous rehabilitative attempts have failed, as evidenced by his continued and increasingly serious criminality, we have taken account of the offender manager's statement that he "is a more sombre young man than the one" she wrote a report on 18 months earlier. The issue of rehabilitation is an issue not merely for the claimant but also for the Union as a whole. The concept of rehabilitation carries with it the question "rehabilitating to what" and in this particular claimant's case that must mean rehabilitation to live a non criminal life in the UK, the country of his home, where all his family are, where all the important and critical ties in his life are, despite being a citizen of the Netherlands.

39. Taking all of these factors together and placing considerable and strong weight on the claimant's increasing criminality and that he remains as a person who is assessed as posing a medium risk of reoffending and a high risk of harm, we conclude that on balance his exclusion would be disproportionate.

40. We therefore dismiss the SSHD's appeal.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision

We re-make the decision in the appeal by dismissing the Secretary of State's appeal thus Mr Madar's appeal against the decision to expel him is allowed.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. No application to make such an order was made to us and we see no reason to make such an order.

Date 2nd June 2014

Judge of the Upper Tribunal Coker