**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00211/2015

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision and Reasons Promulgated** |
|---|---|
| **On 18 January 2016** | **On 15 March 2016** |

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ANGELO DEMYTER**
**aka**
**ANDRZEJ DEMYTER**
**ANGELO ANDZELO DEMYTER**
**ANDREJ DEMYTER**

**[NO ANONYMITY ORDER]**

Respondent

Representation:

For the appellant: Mr Steve Whitwell, a Senior Home Office Presenting Officer
For the respondent: Mr Tony Gaisford of Counsel, instructed by Nandy & Co, solicitors

## DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against her decision to deport him from the United Kingdom pursuant to Regulation 21 of the Immigration (European Economic Area) Regulations 2006 (as amended). The appellant is a citizen of Poland and thus an EEA citizen.

**Background**

2. The claimant is a Polish man of Roma ethnicity. He describes himself as a Polish Gypsy. He was born in Hamburg, Germany, on 6 April 1993 but returned to Poland in 1994 where he was raised by his grandparents. He left Poland again in 1996, travelling with his grandparents and his uncles, but the family returned again to Poland during that year. In 1998, travelling with his grandmother, the claimant came to the United Kingdom. He was a dependant in her asylum claim. The claimant says he fears racial mistreatment in Poland by white supremacists, and that he speaks no Polish at all and has neither family or friends there now. On 29 March 2004, the claimant was granted indefinite leave to remain under the Family ILR exercise.

3. The claimant first came to adverse attention on 20 January 2010, age 16, when he was convicted at Stratford Juvenile Court of burglary and theft. He was given a 3 months' Referral Order. Two months later, he was convicted of possession of a Class A drug (heroin) at Stratford Magistrates' Court and received another 3 months' Referral Order.

4. On 19 August 2010, now age 17, he was convicted at Hammersmith Youth Court of attempted theft from the person, and given a Youth Rehabilitation Order (YRO) until 19 August 2011, together with a drug treatment order and a requirement for drug testing for the next 6 months. The claimant did not manage to comply with his YRO. In October 2010, he was convicted again, an offence of attempted theft from the person, for which he was given another YRO, together with 2 offences of common assault, for which a 3-month curfew was imposed. This time the YRO was to last until 28 October 2011.

5. The claimant did not succeed in staying away from crime, because on 3 February 2011, still age 17, he was convicted again at Stratford Juvenile Court, and again, at Stratford Magistrates' Court on 22 March 2011, this time for burglary and theft, for which he was sentenced to 18 months in a Youth Offenders Institution (YOI) and a non-residential drug and alcohol program. That was his final offence as a minor.

6. The claimant's adult offending began with the index offence for the deportation order, a conviction on 10 September 2013, age 20, for 3 counts of burglary and theft. He was sentenced at the East London Magistrates' Court to 9 months' drug rehabilitation, supervision for 12 months, and 4 months in a YOI (suspended for 2 years), together with 100 hours unpaid work in the community.

7. On 20 May 2015, after giving the claimant an opportunity to make representations, the respondent decided to deport the claimant. The claimant was released from detention from June-mid July 2015, then taken into immigration detention. He was released on bail in December 2015.

8. The claimant claimed asylum: on 23 September 2015, the respondent refused his claim, and at the First-tier Tribunal hearing, the claimant through his representatives indicated that the asylum, humanitarian protection and Article 3 ECHR claim was not pursued.

**First-tier Tribunal decision**

9. The First-tier Tribunal decision proceeded on the basis that the claimant was entitled only to the basic level of protection provided by Regulation 21(1), (2), and (5). He could not demonstrate that 5 years of his time in the United Kingdom had been 'in accordance with the Regulations' because while a minor, he could not show that his grandmother was working or otherwise a qualified person, and he had not been an adult, nor worked legally, for 5 years before the index offence occurred. The claimant speaks English fluently, and also Roma, but not Polish. His connections with Poland were now tenuous.

10. The First-tier Tribunal heard evidence from the claimant, his grandmother, and from his uncle. The Judge considered the OASys report. He noted that the burden of showing that it was unlawful for the respondent to remove the claimant lay on the claimant. He set out the requirements of the Regulations and relevant jurisprudence and considered all of the claimant's circumstances as advanced.

11. The First-tier Tribunal found that the proposed deportation was unlawful under the Regulations and also, if applicable, under Article 8 ECHR. He allowed the appeal.

**Permission to appeal**

12. The respondent challenged the First-tier Tribunal as having conflated Article 8 ECHR with the Regulations, contrary to the guidance given by the Upper Tribunal in *Badewa* (sections 117A-D and EEA Regulations) [2015] UKUT 000329 (IAC). She asserted that rehabilitation should not have been taken into account in assessing whether the claimant still represented a threat and that the support of his family had not prevented him from offending in the past.

13. The claimant was not advanced in his rehabilitation and his removal to Poland would be proportionate.

14. Permission to appeal was granted on that basis, with particular reference to the decision of the Upper Tribunal in *Greenwood (No.2)* (paragraph 398 considered) [2015] UKUT 00629 (IAC).

15. There was no Rule 24 Reply from the claimant or his representatives.

16. That is the basis on which this appeal came before the Upper Tribunal.

**Upper Tribunal hearing**

17. At the hearing, Mr Whitwell for the Secretary of State relied on his skeleton argument. The claimant had been in the United Kingdom since he was 5, and was now 22 years old. For the majority of that time, he was a minor and the respondent did not accept that the claimant had established a permanent right of residence. Poland did not join the European Union until 1 May 2004, when the claimant was 10 years old, so he could not have been living in the United Kingdom 'in accordance with the Regulations' before that.

18. Mr Whitwell in his oral argument maintained that the claimant remained a threat. The OASys report assessed him on 12 February 2014 as presenting a medium risk of reconviction (51%) and a medium risk to the public in the community. The claimant had 16 offences giving rise to 10 convictions. The claimant had stopped using drugs only in April 2014, age 19, after having a drug problem since he was 14 years old. The claimant had not been tested for drug use since March 2014.

19. The claimant had spent only a short time in the community (3 weeks) before being returned to immigration detention and had been bailed in December 2015. The hearing before me was on 18 January 2016 and that was insufficient time to show a change in his habits or in the risk of reconviction or harm in the community.

20. It was right that, as set out in the First-tier Tribunal's decision, the claimant had undertaken various programs in prison and produced certificates in relation to them. The First-tier Tribunal had relied on the claimant's family support, but that had not been sufficient to deter him in the past. The medical evidence was limited, consisting of a letter from University College London Hospitals concerning his undescended testicle on the right side at the age of 3 and a psychiatrist's letter of 15 May 2014, dealing with his detoxification which was said to have been completed on 1 March 2014.

21. The oral evidence before the Upper Tribunal consisted of the claimant's mother, grandmother and uncle, and also reference to a family member who was said to have rehabilitated and moved to Essex, but who was not present.

22. Mr Whitwell asked me to allow the respondent's appeal.

23. For the claimant, Mr Gaisford relied on the OASys report and on the psychiatrist's letter. There had been no subsequent conviction. The First-tier Tribunal had accepted that the claimant was drug free from March 2014. The claimant had been outside prison for 3 weeks but was re-detained in July 2015 on reporting. He had persuaded a judge, without any representation, that he was fit for bail. His record of juvenile offending was linked to his drug use. The First-tier Tribunal had heard evidence from multiple witnesses who spoke of differences in the claimant's behaviour. The claimant had already been contrite at the sentencing hearing and was no longer a genuine, present and sufficiently serious risk to the United Kingdom community.

24. The claimant would rely on *MC* (Essa principles recast) Portugal [2015] UKUT 00520 (IAC) at [3] and [29(j)] and on *Greenwood,* in particular at (v) in the judicial headnote.

25. In relation to the Secretary of State's contention that the First-tier Tribunal had conflated the question of Article 8 with the power to remove under the Regulations, if that was an error of law, it was immaterial. EEA rights are declaratory and the judge had made clear findings on family support, and on the claimant's change in behaviour while in prison. The respondent's decision was based only on the claimant's previous offending and, save for the OASys report, he would have been found to have rehabilitated himself. The offences were mostly committed as a minor and the Tribunal should bear in mind the decision of the European Court of Human Rights in *Maslov v. Austria* - 1638/03 [2008] ECHR 546. He asked me to dismiss the Secretary of State's appeal and uphold the First-tier Tribunal decision.

**Discussion**

26. The claimant has resided in the United Kingdom lawfully since 29 March 2004, but not in accordance with the EEA Regulations: he was granted indefinite leave to remain in the Family ILR Exercise. Poland joined the European Union on 1 May 2004, by which time the claimant was not an EEA migrant but settled in the United Kingdom with indefinite leave to remain. That is relevant to the Article 8 element of his claim, if the EEA Regulations claim fails.

27. The correct approach in cases where there is an EEA Regulations claim and an Article 8 ECHR claim, as here, is set out in the judicial headnote to the Upper Tribunal's decision in *Badewa:*

> *"The correct approach to be applied by tribunal judges in relation to ss.117A-D of the Nationality, Immigration and Asylum 2002 (as amended) in the context of EEA removal decisions is:*
> *(i) first to decide if a person satisfies requirements of the Immigration (European Economic Area) Regulations 2006. In this context ss.117A-D has no application;*
> *(ii) second where a person has raised Article 8 as a ground of appeal, ss.117A-D applies."*

28. I begin, therefore, by considering the EEA Regulations element of the appeal. Towards the end of his submissions, Mr Gaisford conceded that the claimant could not qualify for Regulation 21(3) protection. He was right to do so: on any view, the claimant has not shown that he is entitled to the Regulation 21(3) 'serious grounds' protection. He cannot show that in any 5-year period after 1 May 2004 he resided in the United Kingdom in accordance with the Regulations, either in reliance on his grandmother's exercise of Treaty rights on his behalf after 1 May 2003 and before his majority on 1 April 2011, or by a combination of his grandmother's exercise of Treaty rights during his minority and his own exercise of Treaty rights between 1 April 2011 and his first custodial sentence on 12 April 2012. There was no such evidence before the First-tier Tribunal and nothing before me meets that test. The claimant cannot claim the higher protection under Regulation 21(3) and has only the basic protection afforded by Regulations 21(1) (2), and (5).

29. After the hearing, and without leave or any application under paragraph 15A of the Tribunal Procedure (Upper Tribunal) Rules 2008, the claimant's solicitors submitted two letters purporting to confirm his attendance at Langdon Academy from 1

September 2004 to 24 November 2008, and at Eleanor Smith School from 11 November 2008 to 17 July 2009. Having regard to Regulation 4 of the EEA Regulations, that is not sufficient to make the claimant a 'student' because it is not suggested that at any time he had comprehensive sickness insurance or was able to demonstrate sufficient resources not to become a burden on the United Kingdom's social assistance system. Unless therefore his grandmother was a qualified person during that period, the claimant's attendance at school does not entitle him to the 'serious grounds' level of protection in Regulation 21(3).

30. I move therefore to consider whether the First-tier Tribunal erred in law, having regard to the principles drawn together in the Upper Tribunal's decision in *MC (Essa Recast)*, as follows:

> "*1. Essa rehabilitation principles are specific to decisions taken on public policy, public security and public health grounds under regulation 21 of the 2006 EEA Regulations.*
> *2. It is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (regulation 21(5)(c)) that it becomes relevant to consider whether the decision is proportionate taking into account all the considerations identified in regulation 21(5)-(6).*
> *3. There is no specific reference in the expulsion provisions of either Directive 2004/38/EC or the 2006 EEA Regulations to rehabilitation, but it has been seen by the Court of Justice as an aspect of integration, which is one of the factors referred to in Article 28(1) and regulation 21(6) (Essa (2013) at [23]).*
> *4. Rehabilitation is not an issue to be addressed in every EEA deportation or removal decision taken under regulation 21; it will not be relevant, for example, if rehabilitation has already been completed (Essa (2013) at [32]-[33]).*
> *5. Reference to prospects of rehabilitation concerns reasonable prospects of a person ceasing to commit crime (Essa (2013) at [35]), not the mere possibility of rehabilitation. Mere capability of rehabilitation is not to be equated with reasonable prospect of rehabilitation.*
> *6. Where relevant (see (4) above) such prospects are a factor to be taken into account in the proportionality assessment required by regulation 21(5) and (6) ((Dumliauskas [41]).*
> *7. Such prospects are to be taken into account even if not raised by the offender (Dumliauskas [52]).*
> *8. Gauging such prospects requires assessing the relative prospects of rehabilitation in the host Member State as compared with those in the Member State of origin, but, in the absence of evidence, it is not to be assumed that prospects are materially different in that other Member State (Dumliauskas [46], [52]-[53] and [59]).*
> *9. Matters that are relevant when examining the prospects of the rehabilitation of offenders include family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like (Essa (2013) at [34]). However, lack of access to a Probation Officer or equivalent in the other Member State should not, in general, preclude deportation (Dumliauskas [55])*
> *10. In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor (Dumliauskas [44] and [54]). Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 EEA Regulations require is a wide-ranging holistic assessment. Both recognise that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence (Dumliauskas at [46] and [54]).*"

31. The self-direction in the First-tier Tribunal decision by this experienced judge, and the analysis at [88]-[95] are careful and thorough. They are not legally erroneous and I reject the respondent's contention to that effect.

32. Turning to the Article 8 consideration, in this decision that appears at [96]. Although robustly expressed, again I find that the First-tier Tribunal did not err in law in the manner in which Article 8 was approached and that its conclusions were open to the judge on the evidence.

**DECISION**

33. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law. The decision of the First-tier Tribunal shall stand.

Date: 3 March 2016 Signed *Judith AJC Gleeson*

Upper Tribunal Judge Gleeson