Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06256/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 21 December 2015	**On 8 March 2016**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

KRZYSZTOF RYSZARD BOGUSZEWSKI

[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr J Parkinson, a Senior Home Office Presenting Officer
For the respondent: In person

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the Secretary of State's decision to remove him from the United Kingdom pursuant to Regulation 19(3)(b) of the European Economic Area Regulations 2006 (as amended). The index offence was a conviction for conspiracy to commit burglary.

Background

2. The appellant is a citizen of Poland and thus an EEA citizen, born in September 1979. It is accepted that he has permanent residence in the United Kingdom because he has completed a period of 5 years in accordance with the Regulations.

3. On 7 May 2013 he was convicted of burglary from the John Lewis warehouse where he had been working. It was a sophisticated operation, involving a conspiracy by 7 men, 3 of whom had worked at the warehouse. One defendant remained unidentified. The remaining 6 were arrested 6 months after the burglary and all had Polish surnames.

4. The sentencing judge found that the burglary was planned by the appellant and another of the defendants, a Mr Martin Bakowski, who had also stolen repeatedly from John Lewis while he was employed by them, those offences being dealt with at the same time. The gang had bagged up £200,000 of property to steal: it was not clear why they only took with them goods worth £82,000, but that was still a substantial amount. The appellant disabled the burglar alarm: the sentencing judge found that he was one of the two men who planned the burglary and that a serious breach of trust was involved.

5. The sentencing judge took into account that the offence required 'significant planning and professionalism, multiple offenders going equipped with implements to facilitate the commission of the offence, targeting of particular premises and the theft of property of a significant value'. He gave credit for the appellant's previous good character and imposed a sentence of 5 years 6 months. The appellant did not plead guilty and continues to deny involvement in the offence.

Procedural history

6. The First-tier Tribunal found as a fact that the appellant had been in the United Kingdom for 'a number of years' and had acquired the right of permanent residence. The Tribunal accepted that the appellant had a partner here and that Article 8 ECHR was engaged by his removal. It went on to perform a full *Razgar* assessment, finding that the appellant was in reality still living in the Polish community in the United Kingdom and that the principal element of his private and family life was with his Polish citizen partner who visits him weekly in prison. They have no children, either separately or together. There were no significant or insurmountable obstacles to the appellant's reintegration in Poland, where both he and his partner had spent most of their lives.

7. The appellant had committed a serious crime and showed no remorse. He had undertaken some courses in prison. Part 5A of the Nationality, Immigration and Asylum Act 2002 was inapplicable to this appellant, because he is an EEA citizen.

8. The First-tier Tribunal dismissed the appeal.

Grounds of appeal

9. The appellant appealed, relying on his private and family life in the United Kingdom, his lawful residence here and on Regulation 15 of the EEA Regulations. He argued that as his partner had a permanent residence card, he should be treated as a family member with a retained right of residence. He pointed out that the co-conspirator with whom he was convicted had won his appeal against deportation and been allowed to remain in the United Kingdom. He also relied on the provisions of the Immigration Rules at E-LTRP 10 and on Article 45(1) and (2) of the European Union Charter of Fundamental Rights (the free movement provision).

10. The appellant sought to distinguish the decisions of the Court of Appeal in *Essa v Secretary of State for the Home Department* [2012] EWCA Civ 1, *Dumliauskas v Secretary of State for the Home Department* [2015] EWCA Civ 145 and *AA (Nigeria) v Secretary of State for the Home Department* [2015] EWCA Civ 1249, arguing in relation to *Essa* that he is himself an EEA citizen and not from Somalia, and that he lives in the United Kingdom, rather than Norway or the Netherlands; and in relation to *Dumliauskas,* that he had not the multiple convictions which Mr Dumliauskas had, and that OASys assessed him as presenting a low risk of reoffending and no indication of risk of serious public interest.

Permission to appeal

11. The Upper Tribunal granted permission to appeal on the basis that the First-tier Tribunal had arguably erred in law in failing to address the 'serious grounds' test adequately or to give sufficient reasons thereunder, with particular reference to the OASys report relied on by the appellant.

12. When granting permission, Deputy Upper Tribunal Judge Cox also noted that the First-tier Tribunal had not referred to Regulation 21(5)(e) which provides that previous criminal convictions do not themselves justify a decision to remove an EEA citizen who has permanent residence in the United Kingdom.

Rule 24 Reply

13. The respondent filed a reply under rule 24, opposing the appeal, and arguing that the jj had directed himself appropriately. The Reply continued:

> "3. The judge of the First-tier Tribunal noted at [47] that the appellant had acquired permanent residence in the United Kingdom and proceeded to examine whether in substance and implicitly serious grounds to deportation were met. On the facts of this case, given the seriousness of the offence of £200,000 theft of good from John Lewis in breach of trust as an employee, the lengthy sentence of 5½ years and the risk of reconviction being medium, such grounds did exist. The failure to expressly mention

> 'serious grounds' does not reveal a material error of law, given that on the facts of this case, they are clearly made out. The judge further goes on to consider rehabilitation and Article 8 in an impeccable manner. …"

Error of law decision

14. On 22 October 2015, the Upper Tribunal found a material error of law. The Tribunal noted that it was common ground that the appellant had acquired a permanent right of residence under the EEA Regulations and that the Regulation 21(3) test of 'serious grounds of public policy or public security' (the 'serious grounds' test) must be met before he could be deported to Poland. In addition, all the requirements of Regulation 5 must be satisfied if the respondent's decision were to be lawful. Absent any mention of 'serious grounds' in the First-tier Tribunal decision in the discussion at [53] and following, the Upper Tribunal concluded that a material error of law had occurred in relation to Regulation 21(3).

15. In relation to Regulation 21(5)(c) and (e), and the failure to distinguish between the National Offender Management Service (NOMS) report in June 2013, which found that the appellant posed a medium risk of reoffending, and the OASys Assessment prepared in February 2014, in which he was assessed as presenting a low risk of further offending, the Upper Tribunal considered the First-tier Tribunal's reasoning to be inadequate, as envisaged by the Court of Appeal in *R (Iran) & Ors v Secretary of State for the Home Department* [2005] EWCA Civ 982 at paragraph 90.2 in the judgment of Lord Justice Brooke. The Tribunal had failed adequately to assess whether the appellant's personal conduct now presented a 'genuine, present and sufficiently serious threat to the fundamental interests of society' (the 'sufficiently serious' test) as Regulation 21(5) requires.

16. The Upper Tribunal found a material error of law on both heads and set aside the decision to be remade in due course, before any judge of the Upper Tribunal. They did not consider that any of the other grounds advanced constituted an error of law. In particular, in relation to the appellant's co-conspirator, they were not aware whether his appeal judgment had been before the First-tier Tribunal nor were they prepared to indicate whether it would be relevant when the decision was reheard.

17. That was the basis on which the appeal came before me for remaking.

Evidence before the Upper Tribunal

18. The NOMS report was prepared in June 2013, not long after the appellant and his co-defendants were sentenced. It recorded the appellant's lack of previous convictions in the United Kingdom and that it was not known whether he had any convictions for offences committed abroad. The NOMS report is sketchy, as little information was available to whoever prepared it Section 3 (assessment of risk of serious harm) and section 4 (likelihood of reconviction) are not completed. Section 5 records that the appellant was at HM Prison Woodhill and that the OASys assessment would be completed by the Prison Service.

19. In response to a question concerning the risk of serious harm to others, the report says that the appellant 'is currently assessed as a Tier 3 offender indicating a medium risk of serious harm. This is an interim assessment pending completion of a full OASys assessment'. There had been no pre-sentence report and the risk of reconviction was assessed as 8% in the first year after release and 15% after 2 years, on the basis that there were no overseas convictions. It would be reassessed if any such convictions were discovered.

20. The full OASys report was completed 8 months later, in February 2014. There was still no information available other than what could be ascertained by interviewing the appellant. The appellant continued to deny his involvement and to say that the iPad found in his possession had been bought by him from Mr Bakowski, who also worked at the warehouse, and that he did not know it was stolen. He had appealed, unsuccessfully, against the conviction and his case was now being considered by the Criminal Cases Review Commission (CCRC).

21. The person who undertook the OASys analysis did not know how many other offenders had been involved. They could not therefore say what peer group influences were involved. Mr Bakowski was also Polish, according to the appellant. The motivation for the offence was assumed to be financial, but as the appellant continued to deny having committed it, it was impossible to take that further. It was noted that the appellant had no documented previous convictions in the United Kingdom or abroad, so there was no question of escalation in offending. There was also no indication that the offence was linked to any risk of serious harm.

22. The appellant had completed his education in Poland age 16 and had no difficulty with reading, writing or numeracy. As a teenager he had tried ecstasy and cannabis once each, but did not like the effect they had on him and did not do it again.

23. In Poland, the appellant took a 3-year course in Electrical Engineering after leaving school, and then worked in his father's small company for 3-4 years. He had also been a clothes shop assistant, returning to work for his father between times. His father was considering selling up his business in Poland and coming to the United Kingdom to live, perhaps investing his money in a business here for a better return on his money. The appellant hoped he might be employed in his father's investment business if that happened.

24. The report recorded that the appellant and his partner had lived in Northampton since 2005. His partner had not been involved in the offence. There were no domestic violence issues and the couple had no children. He did not have much spare time but what there was, he mostly spent with his partner. They led a quiet life: he would go home after work and they would watch television together, or sometimes go to the pub with friends. He would drink a couple of glasses of wine, several times a week, and occasionally 2-3 vodka shots in an evening at a party. He had not consumed any alcohol in prison.

25. The appellant enjoyed travelling round the United Kingdom to see places of interest, or going back occasionally to Poland to visit his parents. They had met at a party in 2005 and been together ever since: she visited him regularly in prison. The appellant intended to go back to the flat and live with her again when released, if he was not deported. If deported to Poland, he could live with his parents, but their intention was to come to the United Kingdom when they retired, which might be before his release.

26. The appellant had worked for John Lewis for 5 years before the offence, earning £1200 a month plus occasional bonuses. His partner worked too and they were doing fine financially until his arrest. Thereafter, the police kept his papers and he could not get work, so they did run into financial difficulty. He had taken a consolidation loan and was paying off £10-15 a month.

27. The appellant had no psychiatric issues or pending treatment. He was not depressed and kept busy in prison, with a positive outlook. He mixed with others on the wing and used the gym a lot. Sometimes he played Monopoly. He had no self-harm or suicide issues. He said he did not have a temper, and there was no evidence to the contrary. The writer of the report said this:

> "11.9 [The appellant] is capable of understanding other people's views, he communicates well and comes across as intelligent in his discussions.
>
> [The appellant] maintained good eye contact throughout the interview and answered my questions intelligently. He maintained throughout the interview that he was not involved interest eh offence and he had just bought an iPad thro a friend he worked with (who has also been convicted of the same offence). It is my opinion that [the appellant's] judgment was clouded in this situation and he was persuaded in some way by others to be involved in this offence, however small, and therefore has been convicted for his lapse of judgment. …
>
> 12.1 [The appellant] did not show any pro-criminal attitudes throughout the interview. This is the first time that [the appellant] has committed any offence and been convicted. He continues to deny his involvement interest he offence but did disclose that he had bought an iPad from a friend and was tied in to the offence through the Police checking the serial number on it. However he has been committed by the courts and the length of sentence suggests that he was more involved than he admits."

28. The appellant said he would definitely not commit any further offences in future. The writer of the report did not consider that a full analysis was required as the appellant was not of a violent nature. He was assessed as presenting a low risk of any future offending.

29. Certificates presented show that on 26 August 2014 the appellant completed his NVQ Level 2 in Barbering. He also achieved OCR Level 2 in IT User Skills (ITQ) and OCR Level 1 CLAiT Plus International Certificate for IT Users. He had a Certificate of Completion for the one module of the Restore Prison Programme, run by the Forgiveness Project. He passed several units of the Level 1 Award in Basic Construction Skills and the OCR Functional Skills qualification in English at Entry 3,

the Cleaning Professionals Skills Suite, and modules in the Level 1 Certificate in Creative Techniques in 2D.

The appellant's evidence

30. On 18 December 2013, the appellant had applied for a review of his conviction by the Criminal Cases Review Commission (CCRC). On 3 March 2015, the CCRC rejected his application, stating that there was no real possibility that the conviction would be quashed or his sentence reviewed. They invited further submissions, not later than 31 March 2015. The appellant replied, saying that the CCRC had misunderstood him and his case, that someone else had blamed the burglary on the appellant, and that he was an innocent man wrongly convicted. He had been unable to obtain copies of the initial police interviews, which the police said were lost, and he asked the CCRC to use its powers to obtain those. He accused the CCRC of 'simply trying to close my case', and said that he would be instructing solicitors to make a fresh application.

31. In oral evidence before the First-tier Tribunal on 7 April 2015, the appellant gave evidence which is consistent with the above summarised material. The only additional evidence to note is that the appellant is an only child; that the reason he worked as a salesman was that he found it difficult to get a job as an electrical engineer in Poland; and that once he was working, he lived away from home in rented accommodation and had only sparse contact with his parents. He was estranged from his parents because of his conviction: his father did not want to talk to him and he had last spoken to his mother in about August 2014. He had cousins in the United Kingdom but they were too scared to attend the appeal hearing to support him.

32. The appellant had last visited Poland in about 2010 with his partner and stayed with friends. During other visits, he had met his partner's mother and stayed with her once.

33. The appellant had family life with his Polish partner. They lived in a property in Northampton which she owned, and the mortgage was in her sole name: the property had been bought at the height of the property boom and was now worth less than she had paid for it, making it hard for her to sell. She had grown up in a small town in Poland, about 100 km from Warsaw, and come to the United Kingdom 8 years earlier (so in about 2006). Her parents still lived in Poland but were separated; she kept in contact with her mother but not her father. Her brother lived in Northampton too, and she had a cousin in the United Kingdom. The appellant's partner worked as a bookkeeper. She could not relocate to Poland as she would have no job and her mother lived in a small apartment. She had not met the appellant's family in Poland.

34. At the Upper Tribunal hearing the appellant gave evidence. He said that if released he would try to overturn his conviction. He confirmed that his partner still had her bookkeeping job. Before that, she had worked as a clerk in a warehouse, but the company had closed and she changed jobs. The salary was similar.

35. The appellant said he was on track to be released and had no trouble in prison. He had undertaken 1 of 9 units on the Forgiveness Project course: he had not been aware of this course before and it was definitely helping.

36. He confirmed that before going to prison he had worked 'all the time' in the John Lewis warehouse, operating trucks in the warehouse and so on. They had managed financially.

37. In cross-examination, the appellant was asked detailed questions on the financial documents he had produced. He said that his partner had the flat, with a mortgage of £90,000 and he paid the food and other expenses. He had earned about £15000 a year at John Lewis. He acknowledged that there were several missed payments on the mortgage and that the arrears were going up, not down. The credit card balance was also going up, with charges for late payment and going over the limit.

38. The appellant produced a job offer from Choice Render. He had only been offered the job in the last few days before the hearing and had been unable to serve the document in advance. The firm wanted to train him, to develop his skills, and he had got the job after a telephone interview. One of his friends was already working there and had recommended the appellant to his employers: he understood that the pay was about £80 a day to begin with. Another friend had written the appellant's skeleton argument for him as he did not have enough knowledge to express himself in writing.

39. In re-examination, the appellant told me that he wanted to put his crime behind him and go back to his partner. He had come to the United Kingdom to work and he now just wanted to live a normal life, with definitely no further crime.

Submissions

40. The appellant relied on his skeleton argument. He told me that he was not a lawyer and was not able to argue his case orally, but with the help of his partner he had put his case in writing. The skeleton argument is short and is as follows:

> "The appellant would like to make the following submission:
>
> 1. It is very lately noticed an important point that even in the NOMS report also risk level is shown as low. However, the right hand side location of tick boxes is giving a wrong impression that risk level of appellant to be medium. Unfortunately, due to human error this little mistake was not identified before First-tier Tribunal as well as the last hearing before this Honourable Court (Upper Tribunal). In fact, was mentioned very clearly mentioned in the report that risk level to 0-40% to be Low Risk, 41-99% to be Medium Risk and 100-168% to be as High Risk. The appellant's risk level was identified as 8% in the first year and 15% for the second year. Hence the risk level of the appellant can be concluded even as very Low.
>
> 2. Another point came for discussion at the last hearing that financial burdens could motivate appellant for re-offending. The appellant humbly claims that such proposition to be untrue in the given circumstances. There is outstanding mortgage on the appellant's family home. However, this is not at all serious financial problem because appellant's partner is earning handsome money and the payment of £400 mortgage cannot be an unaffordable burden. The appellant's partner can even maintain appellant with her sole earnings. The

> appellant is a model prisoner who has gained skills from prison and achieved certificates in Hospitality, Hair Cutting and Gym Course etc. The job offer is also readily available for the appellant to take up employment upon release.
>
> In view of the above stated reasons and circumstances appellant humbly pray the Honourable Court to allow this appeal and to grant permission to the appellant to join his spouse in the interest of justice."

41. For the respondent, Mr Parkinson said that there were very significant difficulties in assessing the risk of reoffending in the case of someone who, like this appellant, did not accept the basis of his conviction. He was not well paid even when he worked and he had financial problems; his partner could not manage financially while the appellant was in prison.

42. The proposed job offer came too late and was too vague. It was inadequate to establish a real likelihood of employment in the future. It seemed that the appellant had made no real attempt to address budgetary or financial issues which were the key to his problems.

43. The appellant was a convicted criminal who had been released on licence having been convicted of a serious offence involving a breach of trust and high value burglary: the appellant had been the 'inside man'. He was not now a man of good character with a blameless record and obtaining employment which paid enough to keep him out of trouble financially would be difficult. Mr Parkinson suggested that the appellant would earn, at best, the minimum wage.

44. Mr Parkinson submitted that there was a significant likelihood that the appellant would return to criminality if his financial difficulties recurred. He contended that on the facts, Regulation 21(5) did not avail the appellant and he should be deported.

45. I reserved my decision, which I now give.

Material facts

46. In the light of the evidence I have read and heard, I find the following facts to be established:

(a) The appellant has permanent residence in the United Kingdom.

(b) He has a genuine relationship with his partner, and their finances were stable until he committed the present offence. The appellant's partner has struggled to cope financially without him working too, since he lost his job after the index offence and the respondent has his documents. The appellant and his partner have no children. They have some extended family in the United Kingdom but their private and family life is principally with each other.

(c) The appellant's parents, and those of his partner, still live in Poland. The appellant is not close to his parents: his father will not speak to him since his conviction, and he has not heard from his mother since April 2015. His partner is

close only to her mother. I place no weight on the appellant's suggestion that his parents will retire to the United Kingdom and reinvest in a business which will employ him: given the estrangement between the appellant and his parents, any such assertion is unrealistic.

(d) The appellant's offence was a very serious one and his role was as one of the two central planners, but there is no evidence of general criminality in his background in the United Kingdom and no evidence has been produced that he has committed any crimes elsewhere.

(e) The appellant is hard working and ambitious to better and redeem himself. He has taken every training opportunity available to him while in prison and has identified a job which he may be able to take up if he is released. His relationship with his partner has survived the strain placed upon it by his imprisonment.

47. I have considered the NOMS and OASys reports. The NOMS report is so vague that it can be given hardly any weight. I find that the risk of re-conviction identified therein is 8% in the first year after release and 15% in the second, which is not 'medium' but 'low'. There is no conflict between the two reports on that risk.

48. The OASys report is more thorough but the assessment there made is hampered because the appellant does not accept that he committed the index offence and has gone to great lengths to try to clear his name. The usual methods of assessing the likelihood of reconviction are less effective. Both reports assess the appellant as having a low likelihood of reconviction, and in the OASys report he stated clearly that he had no intention of committing any more crimes. He said the same in his First-tier Tribunal hearing and before me.

Legal framework

49. The relevant provisions of the EEA Regulations are to be found in Regulation 21:

> **"Decisions taken on public policy, public security and public health grounds**
>
> 21.—(1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.
>
> (3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security …
>
> (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—
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> (a) the decision must comply with the principle of proportionality;
> (b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
(e) a person's previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."

50. Further assistance as to how to apply Regulations 21(5) and 21(6) is available from the Court of Appeal decision in *Dumliauskas* and the Upper Tribunal's decision in *MC (Essa principles recast)* [2015] UKUT 520 (IAC). It is accepted here that the appellant does have permanent residence but it is not asserted that he can meet the higher 'imperative grounds' level of protection which Regulation 21(4) affords.

51. At [54] in the judgment of Sir Stanley Burnton, with whom Lord Justices Jackson and Floyd agreed, the Court of Appeal in *Dumliauskas* held that:

"54. Lastly, in agreement with what was said by the Upper Tribunal in *Vasconcelos*, I do not consider that in the case of an offender with no permanent right of residence substantial weight should be given to rehabilitation. I appreciate that all Member States have an interest in reducing criminality, and that deportation merely exports the offender, leaving him free to offend elsewhere. However, the whole point of deportation is to remove from this country someone whose offending renders him a risk to the public. The Directive recognises that the more serious the risk of reoffending, and the offences that he may commit, the greater the right to interfere with the right of residence. Article 28.3 requires the most serious risk, i.e. "imperative grounds of public security", if a Union citizen has resided in the host Member State for the previous 10 years. Such grounds will normally indicate a greater risk of offending in the country of nationality or elsewhere in the Union. In other words, the greater the risk of reoffending, the greater the right to deport."

52. In *MC (Essa recast),* the Upper Tribunal gave further guidance in its judicial headnote, 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])."

53. On 8 December 2015, in *AA (Nigeria),* Lord Justice Richards, giving the only reasoned judgment in the Court of Appeal said this:

> "35. …nothing in *Dias*, *Onuekwere* or *MG* is directed towards the criteria to be applied under the Directive, in particular pursuant to Article 27(2) and Article 28(1), when determining whether expulsion is justified by serious grounds of public policy or public security; criteria which are mirrored in regulation 21 of the EEA Regulations and were applied by the tribunals in this case. The CJEU decisions are concerned with the test for acquisition of the relevant status, not with the approach to be adopted towards the justification of expulsion once that status is acquired.
>
> 36. I nevertheless think it appropriate to look in greater detail at the way in which the tribunals dealt with the issue of justification for the respondent's deportation, in order to show that the effect of the offence and the sentence of

imprisonment on his integration within the United Kingdom were taken specifically into account. Examination of the reasoning will also help to explain an outcome that may at first sight seem surprising,

37. The First-tier Tribunal pointed out that the respondent to the present appeal (the appellant before the tribunal) had resided in the United Kingdom well in excess of ten years, though the period had been interrupted after eight and a half years by his imprisonment. ... The tribunal proceeded, however, to determine the appeal on the agreed basis that *serious* grounds of public policy or public security had to be shown. …

38. In considering whether there were serious grounds of public policy or public security to justify deportation, the tribunal took into account the seriousness of the offence itself but also noted *inter alia* that regulation 21(5)(e) requires that the personal conduct of the person concerned should represent "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society", and that regulation 21(6) requires account to be taken of considerations such as age, state of health, family and economic situation, length of residence in the United Kingdom, social and cultural integration into the United Kingdom and the extent of links with country of origin.

39. The tribunal considered that the question whether the respondent represented a genuine, present and sufficiently serious threat was the central issue. It examined a range of considerations in reaching a finding that the respondent was unlikely to reoffend; and in the light of that finding it concluded that the respondent did not represent such a threat and that the decision to deport him must for that reason fail.

40. In case it was wrong on that point, the tribunal went on to consider the factors personal to the respondent which appeared to relate to the proportionality of the decision to deport him. It described it as beyond doubt that the respondent "has established a private and family life in the UK and to that extent is socially and culturally integrated into the United Kingdom in such a way that these links, including the very real probability of continued employment, have been maintained notwithstanding the period of imprisonment" (paragraph 56). On the other hand, it accepted that the family could relocate to Norway without much difficulty and that it would not be unreasonable to look to the family to migrate there together to re-establish their family life. Finally, it considered the issue of rehabilitation, whilst regarding the question as superfluous in view of its finding that the respondent was not a present threat. It concluded that he was "well advanced" in rehabilitation, that "there is a substantial degree of integration in the UK" and that it would be disproportionate to proceed to deportation in these circumstances (paragraph 59). It added that there might well be a deterioration in the respondent's rehabilitation were he returned to Norway, because of difficulties in the job market there and other factors. …

42. I agree with the Upper Tribunal Judge that the First-tier Tribunal did not err in law. ..."

54. That is the legal basis on which the material facts of this appeal are to be approached.

Discussion

55. The facts in this appeal are not dissimilar to those in the *AA (Nigeria)* case. The appellant's family life has continued strong despite his incarceration; there would not be much difficulty in his re-establishing himself in Poland if he is required to do so as he is young, fit, healthy, well qualified and has retained his social (if not his family) links with Poland. As far as Regulation 21(6) is concerned, the factors therein set out do not prevent his removal.

56. However, Regulation 21(6) on these facts is not reached: under Regulation 21(5), a decision to remove an EEA citizen with permanent residence must be proportionate; that it must be based exclusively on his personal conduct, which must represent a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. The decision cannot be justified by 'matters isolated from the particulars of the case or which relate to considerations of general prevention' or by the previous criminal convictions alone.

57. The personal conduct of this appellant amounts to this: he has led a quiet, economically productive life in the United Kingdom, but he also committed a very serious offence, amounting to a criminal conspiracy based on his own significant breach of trust. The motive for the offence appears to have been financial: that was also the reason the appellant came to the United Kingdom and remained here, and the reason he worked to acquire further qualifications in prison, so that he could put right his family finances by working in a well-paid job when he was released.

58. It is right that the appellant continues to protest and seek to prove his innocence of the offence of which he was convicted. That is an element of personal conduct, showing no insight into the offence, but it is not criminal behaviour nor does his attempt lawfully to set aside the conviction or reduce the sentence represent a threat to the fundamental interests of society. I note that the claimant in *AA (Nigeria)* had committed a crime which attracted a sentence of similar length.

59. The appellant does not drink heavily, is not violent, and does not use drugs. He has worked in the United Kingdom and until he went to prison, his credible evidence is that he and his partner managed financially, although their incomes were not great. While in prison, he used the opportunity to obtain further qualifications to help him work when he was released, and also addressed the effect of his offending through the Forgiveness Project. He has stated clearly and repeatedly that he does not intend to repeat his crime and has learned his lesson.

60. There is no evidence of any other criminal or reprehensible behaviour by this appellant, either before he came to the United Kingdom, or during his stay here. The respondent's decision is therefore based on his single criminal conviction alone. The respondent has not demonstrated that the appellant presents a sufficiently serious threat to one of the fundamental interests of the United Kingdom. Deportation of this EEA citizen is not lawful.

61. The question of rehabilitation does not, therefore, arise: if it had, on a proper reading of the NOMS and OASys reports they agree that this appellant presents a very low risk of re-conviction. The burden of showing the contrary is on the respondent, if she wishes to prove that she can legally remove him: however, the respondent has produced no evidence of criminality in the United Kingdom or any other country.

DECISION

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

The making of the previous decision involved the making of an error on a point of law. I set aside the previous decision. I remake the decision by allowing the appeal under the EEA Regulations.

Date: 26 February 2016 Signed *Judith AJC Gleeson*

Upper Tribunal Judge Gleeson