Upper Tribunal
(Immigration and Asylum Chamber)

MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **On 5 August 2015**	**Decision & Reasons Promulgated** ……

Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MC
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr H Solebo, Legal Representative, Charles Hill & Co Solicitors

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]).*

DECISION AND REASONS

1. To what extent is the prospect of rehabilitation to be taken into account in an EEA deportation appeal? To what extent do the so-called Essa principles still hold good? These are the principal questions raised by this appeal.

2. The appeal is brought by the appellant (hereafter the Secretary of State or SSHD) against the determination of First-tier Tribunal (FtT) Judge Burnett allowing the respondent's (hereafter the claimant's) appeal against the decision of 14 May 2014 to

make a deportation order in accordance with regulations 19, 21 and 24 of the Immigration (European Economic Area) Regulations 2006 (as amended) (hereafter the 2006 EEA Regulations). Regulation 21, which is the main provision of concern in this appeal, provides:

"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.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b)the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

(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.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease to which section 38 of the Public Health (Control of Disease) Act 1984 applies (detention in hospital of a person with a notifiable disease) shall not constitute grounds for the decision; and

(b) if the person concerned is in the United Kingdom, diseases occurring after the three month period beginning on the date on which he arrived in the United Kingdom shall not constitute grounds for the decision."

3. The claimant is a citizen of Portugal aged 30 who claims to have arrived in the UK in May 2005. His history of offending began in July 2008 when he was arrested for wounding. On 9 January 2009 he was sentenced to fifteen months' imprisonment for an offence of wounding. In the same month the Home Office sent him a letter saying that should he come to the adverse interest of the authorities again they would consider deporting him. On 2 July 2013 he was convicted of sexual assault on a female and/or 24 July he was sentenced to two years' imprisonment and placed on the Sex Offenders register for ten years. The sentencing judge considered it was a disgraceful offence which happened late in the evening and involved the claimant grabbing a woman who was struggling at her front door to find her keys. He sexually assaulted her, then went away and came back, repeating the attack. On 16 September 2013 he was notified of his liability to deportation. On 14 May 2014 he was notified of the decision to make a deportation order.

4. At the date of hearing before the FtT judge the claimant had a child, E, with a Ms M and a stepson K, aged 2 years 9 months. His partner, Ms M, had two younger brothers aged 17 and 14, and another child. The claimant produced a number of items of evidence to the FtT including a NOMS report and an OASys Report dated 29 October 2014 which indicated the claimant's licence conditions ended in May 2015. The report also disclosed that he had a conviction for an offence he had committed in Portugal aged 17. At 2.6 this report stated that the claimant did not accept responsibility for the wounding offence despite his guilty plea, he stating it was self-defence despite the fact that the victim was stabbed in the back. The report noted the claimant's problems with alcohol and his drug misuse, including cocaine.

5. The FtT judge held that as the claimant had not been in the UK exercising Treaty rights for a continuous period of five years, he was entitled only to the lowest level of protection set out in regulation 21 ([100]).

6. The FtT Judge concluded that despite the claimant's expressions of remorse and contrition there was a real likelihood that he may offend again. He concluded that the claimant represented a genuine, present and sufficiently serious threat to one of the fundamental interests of society ([101]).

7. The judge then turned to the considerations listed in regulation 21(6). He noted that the claimant had a mother in Portugal; had been educated in Portugal; his partner and her family were Portuguese; these considerations were seen by the judge to show he still had social and cultural links to Portugal.

8. The judge considered the various children with whom the claimant was involved as stepfather, uncle and father. The judge considered he had no real contact with his stepson and that he had exaggerated the extent of his ties with his sister's children. However, as regards the claimant's daughter, he concluded that whilst his relationship with her would not prevent the risk of re-offending "it may yet help in his rehabilitation and reduce the future risk of re-offending" ([98]), and that "it is in the best interests of [X] to have her father in her life if he will successfully rehabilitate his offending behaviour. It is too early to be conclusive about the risks that the [claimant] poses as to the future."

9. The judge then turned to consider the factor of rehabilitation more specifically. Citing Essa (Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC)), he described this factor as "the prospects of rehabilitation as between this country and Portugal and an awareness of the interest 'of the European Union in general'." At [119] he referred to the reports in the case describing the "further work which is needed to address [the claimant's] motivation to address offending behaviour." At [120] he said that although the claimant's relationship with Ms M and their child had not stopped his offending in the past, "this does not mean that the claimant cannot rehabilitate and that his support would not help reduce the risk of offending in the future."

10. At [122] he noted that the Presenting Officer had sought to rely on [35] of the Upper Tribunal decision in Essa where it was stated that appellants who act with impulses to commit sexual or violent offences and the like, may well fall into the category where little weight is given to rehabilitation as a factor. The judge responded that "[I]t should be remembered though that the sentencing judge did not impose a sentence for the protection of the public which he could have, if the appellant posed such a risk". At [123] – [127] he concluded:

> "123. I have considered the potential result of a deportation to Portugal of the appellant and the likely diminution of the family support for the appellant and a withdrawal of the discipline of the licence conditions which he now faces since his release and the benefits of regular supervision in the community. I have considered whether this will have the capacity in the future to reduce the risk of re-offending he currently presents. If this combination of support significantly reduces the appellant's risk of offending, it could undermine to a significant degree the proportionality of the appellant's removal.
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> 124. It appears to me that none of the reports suggest that the appellant is incapable of rehabilitation. The appellant however needs to fundamentally change his current attitude and approach. The report suggests that Mr C's behaviour needs to be monitored. As between Portugal and the United Kingdom, I consider that the appellant is more likely to address his offending behaviour in the United Kingdom with the current support he has around him. The support factors can encourage the appellant to develop stability in his life and his relationships and these support factors are significantly stronger in the United Kingdom.

125. The appellant can be under no doubt however what would be the consequences if he offends again in the future.

126. I have carefully balanced all the factors in this case and the issues raised in respect of the proportionality of the decision. I consider though that the decision of the respondent is not justified on the grounds of the prevention of disorder and of further crimes and is not a proportionate response. Although the appellant represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society his deportation would not be proportionate.

127. I allow the appeal under the EEA regulations."

11. The judge went on to consider the claimant's Article 8 grounds of appeal, concluding at [129] that given his "findings of fact above", it was "difficult to see that a decision which is disproportionate under the Regulations would justify a different conclusion in respect of Article 8". Accordingly he also allowed the appeal on Article 8 grounds as well.

12. The SSHD's grounds of appeal were twofold. First it was submitted that in allowing the appeal under the 2006 EEA Regulations the judge's decision to treat the prospect of rehabilitation as a substantial relevant factor amounted to a misunderstanding of the guidance given in Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC). The judge had wrongly treated Essa (2013) as enunciating the general principle that every EEA national should be given the opportunity to be rehabilitated in the EU member state where the offences were committed. The judge had also misunderstood that the Tribunal in Essa (2013) had held that the prospect of rehabilitation could only be weighed in the balance against deportation in respect of those who had acquired a right of permanent residence. In the claimant's case the judge had found that he had not been exercising Treaty rights for the requisite five years.

13. The SSHD's second ground averred that the judge's decision to allow the appeal on Article 8 grounds was flawed by inadequate reasons as well as a failure to consider this case under the Immigration Rules or Part 5A of the Nationality, Immigration and Asylum Act 2002 in respect of the weight to be accorded to the public interest.

14. In submissions to us, Mr Melvin sought permission to amend the SSHD's grounds so as to enable her to rely on the further guidance on the issue of rehabilitation in EEA deportation cases given by the Court of Appeal in Secretary of State for the Home Department v Dumliauskas & Ors [2015] EWCA Civ 145**.** Mr Melvin submitted that if the judge had had the benefit of this guidance he would have concluded that little weight should be attached to the claimant's prospects of rehabilitation. In turn he would not have found a breach of Article 8 because he would have had to treat failure under the EEA Regulations as strengthening the public interest in deportation.

15. In amplifying the original grounds Mr Melvin emphasised that the judge's findings on rehabilitation were in any event contradictory, finding on the one hand that the claimant was unlikely to rehabilitate and on the other that he was likely to do so.

16. Mr Solebo submitted that whereas the SSHD's written grounds had said that the judge was wrong to treat rehabilitation as a relevant factor at all, now she was only challenging the degree of weight the judge attached to it. Weight was a matter for the judicial fact-finder. Further the judge's determination demonstrated that he correctly concluded that none of the reports suggested the claimant was incapable of rehabilitation and that he did consider rehabilitation by reference to factors that were relevant to it such as remorse and family and children.

17. Mr Solebo said that it is also clear from the analysis conducted by Sir Stanley Burnton in Dumliauskas that there was no intention to resile from the earlier statements of principle in Daha Essa in the Court of Appeal that EEA deportation cases involve a "European dimension" in the sense that the European Union has a collective interest in promoting the rehabilitation of all EU citizens who have lapsed into crime. It was emphasised that whilst therefore "all Member States have an interest in reducing criminality, and that deportation merely exports the offender, leaving him free to offend elsewhere":

18. Mr Melvin in response pointed out that the judge had not made any clear findings about the comparative prospects of rehabilitation in Portugal, even though the judge found he was educated there and had family there. There was nothing to show the claimant would not be entitled to rehabilitative treatment there. As regards Article 8, the judge was obliged to consider not just the claimant's interests but also those of the wider society.

Essa principles recast

19. Invocation by both parties of "Essa" principles or criteria highlights a common source of confusion arising from the fact that there are indeed three cases all relating to the same individual: Essa, R (on the application of) v Upper Tribunal (Immigration & Asylum Chamber) & Anor [2012 EWHC 1533 (QB), 1 June 2012); Essa, R (on the application Of) v Upper Tribunal (Immigration & Asylum Chamber) & Anor [2012] EWCA Civ 1718 (21 December 2012); and Daha Essa v Secretary of State for the Home Department [2013] UKUT 316 (IAC) 3 June 2013**)**.

20. Daha Essa is a Somali by birth who became a Dutch national at an early age. He moved to the UK at the age of 12. He began committing criminal offences when 17. In the High Court judgment of June 2012, Lang J stated at [46] that:

> "In my judgment, the judgment of the ECJ in Tsakouridis [2011 C-145/09, 23 November 2010] establishes that the decision maker, in applying regulation 21 of the EEA Regulations, must consider whether a decision to deport may prejudice the prospects of rehabilitation from criminal offending in the host country, and weigh that risk in the balance when assessing proportionality under regulation 21(5)(a). In most cases, this will necessarily entail a comparison with the prospects of rehabilitation in the receiving country, as illustrated by Batista v Secretary of State for the Home Dept

[2010] EWCA Civ 896 where the Court of Appeal considered that in the UK the claimant's English girlfriend might provide the support which he needed to avert a 'drift back to crime', whereas such support would be 'practically non-existent' in Portugal."

21. In rejecting the application for judicial review against an Upper Tribunal refusal of permission to appeal Lang J concluded that the FtT had taken the factor of rehabilitation into account and reached sustainable conclusions.

22. When this judgment went to the Court of Appeal, Maurice Kay LJ referred at [9] to the "European dimension which widens consideration beyond the interests of the expelling Member State and those of the foreign criminal": see also [12]. Maurice Kay LJ concluded that the FtT had not undertaken "a conscious consideration of the prospects of rehabilitation as between this country and the Netherlands or an awareness of the interest 'of the European Union in general'."

23. On remittal from the Court of Appeal Daha Essa's case came again before the Upper Tribunal in Essa (2013). The Tribunal affirmed that for any deportation to be justified the claimant must represent a present threat to public policy. In cases short of the most serious threats to public safety of the state, this tended to mean that a candidate for EEA deportation had to represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending ([32]).

24. The Tribunal went on to distinguish two rehabilitation scenarios: (1) where there is acceptable evidence of completed rehabilitation; and (2) where rehabilitation is incomplete or uncertain ([32]). At [33] it stated that "[i]t is only where rehabilitation is incomplete or uncertain that future prospects may play a role in the overall assessment". Having identified the most likely class of persons to whom rehabilitative consideration applies as being young adult offenders, the Tribunal concluded at [34] – [35]:

> "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.
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> 35. At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, we cannot see how the prospects of rehabilitation could constitute a significant factor in the balance. Thus recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with impulses to commit sexual or violent offences and the like may well fall into this category."

25. In re-making the decision (having set aside the decision of the First-tier Tribunal) the panel also dealt with the interrelationship between length of residence as a qualified person and rehabilitation. At [26] it stated:

> "We agree that the [Court of Justice's] reference [in Tsakouridis] 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."

26. At [28] the panel added "… the longer the residence the greater the degree of integration is likely to be, and the weightier the prospects of rehabilitation would be as a factor against removal."

27. The Upper Tribunal concluded at [57]:

> "Making our own assessment on the material now available to us we conclude:-
>
> i. The appellant would constitute a threat to public policy in this case if he were to commit a future violent offence. We consider that the current assessment of the risk of his doing so is low and this assessment has been tested by his release into the community for over two years.
>
> ii. The appellant has resided in the United Kingdom for 13 years and just over half his life. He has strong family connections here and is well integrated. His prospects of preserving and developing his rehabilitation are significantly improved by continued residence here. Deportation to the Netherlands would remove important support factors and incentives to behave and would appear to be positively detrimental to his future rehabilitation.
>
> iii. In all the circumstances of his case, deportation now for the conduct leading to his conviction would be disproportionate."

28. In addition to these three cases on Essa, the recent Court of Appeal judgment in Dumliauskas has significantly recast what have been referred to as Essa principles. Whereas the Tribunal in Essa had concluded that the prospects of rehabilitation in the offender's home state are relevant to the decision to deport only if he has acquired a permanent right of residence, Sir Stanley Burnton (LJJ Floyd and Jackson concurring) disagreed, stating at [46]:

> "Whilst I have considerable sympathy with this approach, I am unable to agree with it. I can think of no other example of a factor bearing on proportionality being relevant to those who qualify in a certain respect (here, lawful residence) but not others. Once proportionality is engaged, the factors to be taken into account do not vary with the qualifications of the individual concerned… What is however affected by length of legal residence (in the sense used in Article 16.1) is the weight to be given to the respective prospects of rehabilitation. In addition, it seems to me that the decision of

the Upper Tribunal in Daha Essa is inconsistent with what was said by Maurice Kay LJ in Daha Essa."

29. We do not understand Dumliauskas to have overruled the entirety of the guidance given by the Upper Tribunal in Essa (2013); indeed Maurice Kay LJ expressly approved parts of it. However, in light of the further analysis provided in Dumliauskas it may assist if we seek to summarise cumulatively what these principles are, as now modified by this judgment:-

a. 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.

b. 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).

c. 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]).

d. 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]).

e. 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.

f. 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]).

g. Such prospects are to be taken into account even if not raised by the offender (Dumliauskas [52]).

h. 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]).

i. 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])

j. 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 recognises 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]).

The claimant's case

30. Mr Solebo did not resist Mr Melvin's application to amend the grounds, but in any event we accept his application, as it originates from a proper concern that this Tribunal applies the law as it has now been clarified by the Court of Appeal in Dumliauskas.

31. The original ground relied on by the SSHD was that the judge erred in treating rehabilitation as a relevant factor notwithstanding the fact that the claimant had not acquired five years' residence. Understandably, in light of the Court of Appeal analysis in Dumliauskas, that ground is now abandoned and replaced by the contention that the judge erred in attaching substantial weight to rehabilitation notwithstanding that the claimant lacked permanent residence.

32. In the context of this amended ground two things are clear. First, the judge found the claimant not to have acquired permanent residence and it is not in dispute that he was right in that finding. Second, the judge attached substantial weight to the claimant's prospects of rehabilitation (see e.g. [123] as cited earlier at paragraph 10; indeed it was the only factor he appeared to weigh on the claimant's side when conducting the proportionality assessment enjoined by regulation 21.

33. Given (i) that attaching substantial weight to rehabilitation who has not acquired permanent residence was found by the Court of Appeal in Dumliauskas to be legally erroneous; and (ii) that it was only because he attached substantial weight to this factor that the judge allowed the appeal under the 2006 EEA Regulations, we are bound to find that the judge materially erred in law in this case.

34. We also think that the judge wrongly construed the existing guidance as to what it meant by prospects of rehabilitation. We have already noted in the earlier summary of the (recast) Essa principles that prospects of rehabilitation must be *reasonable* prospects not simply the possibility of rehabilitation (see paragraph 29(5) above). Contrary to that principle, the FtT judge treated as weighty to the claimant's case that the reports did not show he was "incapable of rehabilitation" (see e.g. [123]) above). Mere capability of rehabilitation is not to be equated with reasonable prospect of rehabilitation and in the absence of the latter we cannot see that there can be anything of significance to weigh in the balance.

35. We would also observe that the judge's conduct of the comparative exercise was notably deficient in that he simply assumed that the prospects of rehabilitation would be worse for the claimant in Portugal than in the UK: see [124]. He did not refer to any evidence regarding the situation in Portugal. In this regard we find particularly significant what was said by Maurice Kay LJ in Dumliauskas at [53] (see above paragraph 29(8)).

36. In light of our conclusion that the judge materially erred in law in allowing the appeal under the 2006 EEA Regulations, we do not need to address the second ground. We set aside the First-tier Tribunal decision.

Re-making the decision

37. Both parties agreed that we were in a position to re-make the decision if we chose to do so. The claimant did not seek to adduce further evidence. We have very full evidence about his history and recent circumstances from the body of materials placed before the First-tier Tribunal. Whilst we have set aside the decision of that Tribunal there has been no challenge by either party to the findings of fact save in respect of the issue of rehabilitation.

38. On the logic of the Essa principles as revised by the Court of Appeal in Dumliauskas it is not open to a Tribunal re-making the decision in an appeal concerning an EEA national who has not acquired permanent residence to attach substantial weight to the prospects of his rehabilitation. In the claimant's case the factors weighing against him in assessing the proportionality of the deportation decision are very considerable. In addition to his having been found to pose a genuine, present and sufficiently serious threat to the fundamental interests of society ([101], he has been found not to have accepted responsibility for the 2013 offence; he had not been exercising Treaty rights for five years ([100]); he had some continuing links with Portugal (e.g. he had a mother who lived there); although he has been found to have significant family relationships with his partner and their child in the UK, it has also been found that these have been exaggerated and that they had not prevented him from re-offending in 2013, and it was not accepted that his relationship with his child would prevent the risk of him offending in the future ([98]). He has been found to continue to have problems relating to alcohol and drug misuse ([82] – [83], [99], [106]).

39. The claimant was found to have exaggerated his involvement with E, his stepchild and his partner's children ([111] – [112]). He was found to have difficulties in his relationship with Ms M ([113]). Although the judge clearly thought the claimant's relationship with his child would assist his prospects of rehabilitation, he also found the best interests of the children, including this child, to be a neutral factor.

40. The factors weighing in favour of the claimant included, of course, the fact that he has been in the UK over 10 years; that he has family here and that in the time he has been here he has integrated into UK society in a number of ways. Given, however, the very considerable number of factors weighing against the claimant, we do not

consider the factor of rehabilitation is one which either significantly adds to the factors to be counted in his favour or alters the overall balance of considerations. Whatever the state of the relative prospects of his rehabilitation in the UK as compared to Portugal (and there was no evidence to show it would be significantly different), such a factor cannot amount in his case to one which carries substantial weight.

41. For the above reasons the claimant's appeal against the deportation decision cannot succeed as that decision was in accordance with regulation 21.

42. As regards the claimant's Article 8 grounds of appeal, even assuming they can be engaged in a case such as this, we do not consider they have any merit. Although there are important differences between the criteria set out in the 2006 Regulations and those applicable under Article 8, separate examination of the latter would only be justified if there was some material basis for considering that the Article 8 assessment would be more beneficial to a claimant. In the claimant's case, none has been shown and the principal basis on which the judge allowed the Article 8 appeal – that the decision was not in accordance with the EEA Regulations – has fallen away.

43. For the above reasons:

The FtT judge materially erred in law and his decision is set aside.

The decision we re-make is to dismiss the claimant's appeal.

An anonymity direction is made.

Signed Date

Upper Tribunal Judge Storey