Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01060/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 January 2015	**On 19 January 2015**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DAWID MICHAL RADŁO

Claimant

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Claimant: In person

DECISION AND REASONS

1. The respondent appeals with permission against the determination of First-tier Tribunal (a panel comprising First-tier Tribunal Judge Page and First-tier Tribunal Judge Sweeney), promulgated on 4 November 2014 in which they allowed the appeal of Mr Radło (to whom I refer to as the claimant) against the decision of the respondent made on 27 May 2014 to make a deportation order against him.

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2. The claimant is a citizen of Poland and has lived in the United Kingdom since 10 October 2008. He has, however, between 18 August 2009 and 3 February 2014 received eleven convictions for twenty offences including battery, harassment, breach of restraining order, threats to damage or destroy property, failing to comply with the requirements of a community order and the possession of class B drugs. In addition he is convicted of failing to surrender to custody at the point of time, theft (shoplifting), driving a vehicle otherwise in accordance with licence, three counts of driving whilst excess alcohol, driving uninsured and driving whilst disqualified.

3. The respondent took the decision to deport the claimant on the basis that it was considered that his personal conduct represents a genuine, present and serious threat to safety and security of the public of the United Kingdom.

4. The claimant's case is that his removal would be in breach of his rights pursuant to European law, specifically that it was not justified pursuant to Regulation 21 of the Immigration (European Economic Area) Regulations 2006 on the basis that he is established here and has a daughter from a previous relationship with another Polish national, Ms Prus, and that he is in contact with her every weekend and during the week.

5. The First-tier Tribunal found:-

   (i) that the appellant had not acquired a permanent right of residence [18] as his periods of imprisonment had interrupted his period of residence in the United Kingdom;

   (ii) that he is currently employed [23];

   (iii) that the claimant has regular contact with his daughter whose interests are a primary consideration [28], [29];

   (iv) that the case was finally balanced [31];

   (v) that given the age of the daughter [32] that there would have to be substantial grounds for removing a father and it would not be sufficient for her to be cared by her mother alone;

   (vi) that those grounds would be made out if the threat that the appellant posed to the public in the period of his offending was still present [32];

   (vii) that they accepted that the claimant's resolve to avoid alcohol and drugs was genuine [33];

   (viii) that he had attended AA meetings to address his problems with alcohol and is still no longer drinking [34]; and

   (ix) that they had to give weight of the requirement identified in **Essa (EEA: rehabilitation/integration) [2013] UKUT 00316**;

(x) that an EEA national should be given an opportunity to become rehabilitated in the EEA Member State where the offences have taken place; and

(xi) that on balance the appellant should be given the opportunity to further his rehabilitation to continue working and have contact with his daughter and that there was no evidence that he poses a present threat but that "this is finely balanced".

6. The respondent sought permission to appeal on the grounds that:-

(i) that the Tribunal's finding [34] that the appellant should be given an opportunity to further his rehabilitation indicated that they believed he required continuing rehabilitation yet this was contradicted by the further finding that there is no evidence that he poses a present threat and thus findings were perverse to the degree that they were irrational;

(ii) that the Tribunal had failed to provide adequate reasons for the finding that the claimant did not pose a present threat in that the persistence of his offending demonstrates a genuine present and serious threat to the safety and security of the public of the United Kingdom and a finding that he has abstained from alcohol and re-offending for a period of less than four months was not sufficient to demonstrate that he was no longer a present and genuine threat for the purposes of Regulation 21(5)(c);

(iii) that the Tribunal had materially misdirected themselves with respect to **Essa** in that the requirement to facilitate rehabilitation, a factor that the panel had taken into account, was not a factor to be taken into account given that this relates only to those who have acquired permanent residence.

7. On 1 December 2014 Designated First-tier Tribunal Judge Macdonald granted permission stating:-

> "For reasons given the panel concluded that there was no evidence the appellant posed a present threat. They referred to **Essa** concluding that an EEA national should be given an opportunity to become rehabilitated in the EEA Member State where the offences have taken place.
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> For the reasons given in the grounds it is arguable that the panel have misunderstood what the Upper Tribunal was saying in **Essa** and to do so is an arguable error in law. Given that this was a finely balanced case (paragraph 35) permission to appeal is granted for reasons given in the grounds."

8. Ms Everett submitted that it is clear from its determination that the First-tier Tribunal had misdirected themselves in law with regard to **Essa** and that it was clear that they had, impermissibly, given weight to the possibility of future rehabilitation. She submitted that this was a material error given that they had said that the matter is "finely balanced" [35] and [31].

9. In reply, the claimant said that he was a changed person; that he was now living again with his partner and their daughter. He said that he was still working full-time and that his deportation would be unfair.

10. In **Essa** the Upper Tribunal held:-

> 23. As we observed in our ruling and directions the Court of Justice in Tsakouridis used the term 'genuinely integrated' to describe those for whom the prospects of rehabilitation were a relevant issue in the assessment of the balance.
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> …
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> 26. We agree that the Court's reference to genuine integration must be directed at qualified persons and their family members who have resided in the host state as such for five years or more. People who have just arrived in the host state, have not yet become qualified persons, or have not been a qualified person for five years, can always be removed for non-exercise of free movement rights irrespective of public good grounds to curtail free movement rights. If their presence during this time makes them a present threat to public policy it would be inconsistent with the purposes of the Directive to weigh in the balance against deportation their future prospects of rehabilitation.
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> …
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> 32. We observe that for any deportation of an EEA national or family member of such national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending. In such a case, if there is acceptable evidence of rehabilitation, the prospects of future rehabilitation do not enter the balance, save possibly as future protective factors to ensure that the rehabilitation remains durable.
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> 33. It is only where rehabilitation is incomplete or uncertain that future prospects may play a role in the overall assessment.

11. Two propositions flow from this: first that rehabilitation or rather a prospect of future rehabilitation can arise logically only if there is a propensity to re-offend. Second, the consideration of future prospects of rehabilitation can only be taken into account in respect of those who have acquired permanent residence. In this case the panel found, as they were entitled to find, that the claimant had not acquired permanent residence. They could not therefore have taken into account the possibility of future rehabilitation nor is it a matter to which they could properly have given weight in assessing proportionality.

12. There is in this case a tension between the panel's finding "There is no evidence that the appellant poses a present threat: but should the appellant go on to commit

further offences he would have difficulty claiming that he was a changed man again" indicating that he did not require further rehabilitation, see **Essa** at [32]. The panel could not properly have taken into account the prospects of rehabilitation having found that the appellant had not acquired the right of permanent residence. That would not, however, be a material error if it could be established that they had properly concluded that he did not represent a present threat then the prospects of future rehabilitation would not properly enter into the factors to be weighed in the balance.

13. There is significant merit in the respondent's submission that the panel's findings of the prospect of future rehabilitation were to be taken into account, which are predicated on assumption that he still presents a threat, and the apparent finding that he does not.

14. Whilst the panel concluded [35] that the respondent had not shown that the appellant presents a genuine and serious threat, that conclusion was infected by taking into account the possible rehabilitation. Accordingly, I am satisfied that the decision did involve the making of an error of law in that the panel wrongly took into account a factor - possible future rehabilitation - which should not have been taken into account in assessing either proportionality of removal or as appears to be the case, whether the claimant represents a genuine present and serious threat.

15. I have considered whether the matter should be remade within the Upper tier. I consider that it should not. The claimant says that he is now once again living with his partner and their child. If that is so, and findings on that issue would need to be reached, then that is a significant factor which would need to be taken into account in assessing proportionality; it would also be necessary to evaluate and reach findings on whether the claimant is still abstaining from alcohol and has avoided any further arrests or criminal convictions. I therefore remit the appeal to the First-tier Tribunal.

SUMMARY OF CONCLUSIONS

1 The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2 I remit the appeal to the First-tier Tribunal to make a fresh decision on all issues.

Signed Date: 15 January 2015

Upper Tribunal Judge Rintoul