



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/02164/2013

**THE IMMIGRATION ACTS**

Heard at The Royal Courts of Justice,  
Belfast  
On 21 October 2015

Decision and Reasons Promulgated  
On 25 November 2015

Before

The President, The Hon. Mr Justice McCloskey

Between

ANTONIO MANUEL ABEGOIA VARANDAS

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

Appellant: Ms C Tierney, of Counsel, instructed by Gerard Maguire Solicitors  
Respondents: Mr P Duffy, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. By my decision dated 20 June 2014, the decision of the First-tier Tribunal (the "FtT") was set aside. My decision is attached at Appendix 1 hereto.

## THE APPELLANT'S CRIMINALITY

2. In brief compass, the underlying decision is that made by the Secretary of State for the Home Department (the "*Secretary of State*"), dated 21 October 2013, whereby it was determined that the Appellant, a national of Portugal now aged 50 years, should be deported to his country of nationality under Regulation 21 of the Immigration (European Economic Area) Regulations 2006 (the "*EEA Regulations*"). The decision recites the Secretary of State's assessment that the Appellant was considered to pose a genuine, present and sufficiently serious threat to "*the interests of public policy/public security*" thereby meriting his deportation. The immediate impetus for the decision was the convictions made in respect of the Appellant for offences of forgery and theft. The Appellant first resided in Northern Ireland in 2006.
3. The Appellant's criminal record in this jurisdiction has four basic components. In 2009 he was convicted of a series of offences of dishonesty committed in 2006, punished by a suspended sentence. Next, in 2010, he was sentenced to six months imprisonment for the commission of two offences of theft and three breaches of his suspended sentence. Third, in 2011, he was convicted of three offences of theft, punished by three months imprisonment. Finally, on 28 June 2012, he was convicted, on indictment, of 13 counts of forgery and two counts of theft, attracting imprisonment for one year followed by a licence period of one year. All of his previous offences had been prosecuted summarily.
4. The Secretary of State's decision was based on the Appellant's criminal record. It made reference to the Probation Service assessment of the Appellant, which identified a medium likelihood of reoffending. It recited the assessed risk factors, which included in particular the Appellant's previous heroin addiction. The decision maker also considered the comments of the sentencing Judge, who pronounced himself satisfied that the Appellant did not present a risk of serious harm to the public under the Criminal Justice (NI) Order 2008. The decision maker also considered the various representations made on the Appellant's behalf, together with a clinical psychologist's report. (considered in greater detail *infra*). The decision maker asserted that the Appellant had relayed a significant untruth to the psychologist, instancing this as proof of the Appellant's continued engagement in deceit and a reason to call into question any favourable assessment of him based on a history provided by him. The decision states:

"It is not considered reasonable to leave the public vulnerable to the effects of your reoffending".
5. As regards proportionality, it was stated:

"Given the threat that you pose to the public it is considered that your personal circumstances do not preclude your deportation being pursued. The decision to deport you complies with the principle of proportionality."

Finally, the decision letter considered the issue of rehabilitation. The assessment was made that, given his family circumstances, the Appellant could expect family support upon return to Portugal. It further noted that no obstacle to his partner

returning to Portugal had been identified. The Appellant's claim that he had successfully attended a rehabilitation centre in Portugal was also considered. It was further noted that such support as the Appellant had received from friends in Northern Ireland had proved inefficacious in breaking his cycle of criminality. This assessment culminated in the following conclusion:

"Therefore the view is taken that there is no reason why you could not continue to work towards rehabilitation in Portugal with the support of family members living there and that you do not need to remain in the United Kingdom to become rehabilitated. Having regard to all the available information, it is concluded that deportation to Portugal would not prejudice the prospects of your rehabilitation. In any event it is considered that interference in your rehabilitation would be proportionate and justified when balanced against the continuing risk you pose to the public."

### Decision of the FtT

6. The decision of the FtT was promulgated in January 2014. The FtT noted the roles of the agencies NIACRO and the Probation Service in the Appellant's rehabilitation. It evidently accepted the Appellant's assertion that the reason for his criminality was his addiction to heroin. It noted that, at that stage, the Appellant had been free of drugs for almost two years and continued to undergo appropriate monitoring and therapy. He was also complying fully with the requirements of his licence and had secured employment. The positive opinion of the Clinical Psychologist was highlighted. Based on this and other pieces of evidence, the FtT made the following main conclusion:

"We are therefore satisfied at this time and on the basis of the current evidence that the Appellant does not pose a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'."

In this passage the Tribunal was quoting from regulation 21(1)(c) of the EEA Regulations. Finally, the FtT addressed its mind to the factors in regulation 21(6) which it was obliged to consider. The appeal was allowed accordingly.

### The Decision Remade

7. The Appellant's representatives are to be commended for the lengths to which they have gone in the preparation and presentation of this appeal. Their endeavours include the collation of relevant updated evidence and well composed bundles. While it would have been preferable to relist this appeal considerably sooner, I should record that the delay was occasioned mainly by complications in securing public funding.
8. I have considered the following:
  - (a) All of the evidence available to the FtT.
  - (b) The testimony of the Appellant.
  - (c) The testimony of the Appellant's partner.

- (d) The updated documentary evidence, which consists of a brief medical report; evidence of employment; character testimonials; and written statements of the Appellant and his partner.

I have also had the benefit of the oral and written submissions of Ms Tierney of counsel.

9. It is not disputed that the Appellant has been drug free for a period of some 3 ½ years. Given this consideration, it is appropriate to reflect at this stage on the report of Dr Pollock, dated 01 September 2013. Dr Pollock is an experienced and respected Consultant Forensic Clinical Psychologist, with particular expertise in working with convicted offenders. Applying recognised tools of assessment, Dr Pollock, in his characteristically comprehensive report expresses, firstly, the opinion that the Appellant has the designation of “*low risk of harmful conduct in the future*”.
10. Next, giving effect to the various tools applicable to the risk of future reoffending, Dr Pollock notes that the Appellant is a person of average intellectual abilities; he had secure attachment in childhood; he has empathy and, in particular, “... *shows genuine regrets and guilt for his actions during past offending*”; and shows partial evidence of self-control. Dr Pollock then turns to consider the seven motivational factor tools: all of these are positively present in the Appellant’s life. The same applies to all of the so-called “*external protective factors*”. Dr Pollock expresses the following omnibus opinion:

“... Mr Varandas has sustained lengthy periods of time without relapsing to drug misuse .... He presents with a range of protective factors within his current lifestyle .... He presents as motivated to address underlying problems and .... he is actively seeking to engage with services that will assist him to achieve meaningful changes. He does not present with antisocial or psychopathic personality disorder predictive of recidivism .... [he] is capable of showing some insight into his behaviour ....

I do take note that Mr Varandas has made positive efforts whilst imprisoned towards improving his chances of sustained recovery through participation in certain substance related programmes and educative work ....

[He] should not be considered to represent a serious risk of harm to others through offending. He represents a low risk of serious harm to others if he reoffends. .... [He] presents as a moderate/medium risk of acquisitive reoffending, most likely to become evident if the client relapses to drug misuse in response to stress or when placed under social pressure.”

Dr Pollock completes his opinion in the following terms:

“I would express the opinion that, if the client remains abstinent from drug misuse, the summary judgment of medium risk is likely to diminish significantly and that, if the client engages with programmes of work with professionals towards improving his emotional regulation and stress tolerance, this summary judgment will be diminished further. I find, therefore, that if the client is able to sustain abstinence, he is less likely to commit further acquisitive offences in the future.”

As these passages demonstrate, there is an inextricable nexus between the Appellant's heroin misuse and the issues of both past and future offending.

11. The main benefit arising out of the delay in relisting this appeal is that over two years have elapsed since Dr Pollock made the above expert assessment. Based on the further medical evidence now provided (from the General Practitioner) and the evidence of the Appellant and his partner, which was not challenged in this respect, I find that the Appellant has not engaged in illicit substance consumption since mid-2012. I further find that following his release on licence in mid-2013 he has engaged positively with the aforementioned agencies. I make further findings that he has acquired a series of qualifications in English and mathematics (while in prison) and, post-release, the necessary qualifications to be employed as a forklift truck driver. I note, in this respect, the very positive testimonial from the employer concerned. Also of significance is the stable relationship which he has developed with a Lithuanian lady during the past 1 ½ years. It is not without significance that this lady testified that her husband, now deceased, had been addicted to heroin, which I accept. This indicates that the Appellant's conduct and lifestyle generally have provided her with sufficient confidence and assurances to maintain a long term relationship with him and to make plans for the future. Furthermore, she would be more equipped than most to identify the kind of stresses and weaknesses which might precipitate a relapse. Finally, it is clear that the Appellant has had the stabilising influence of employment, with reasonable future prospects in this respect.
12. In summary, the main consequence of the delay in relisting this appeal for final decision is that the Appellant presents a stronger and more compelling case at this stage than he did when he appealed successfully to the FtT in January 2014.
13. In my first decision I rehearsed at some length the statutory framework, in [3] and do not repeat this. I refer also to my consideration of the jurisprudence and governing principles in [14] - [18]. One of the most recent contributions to the jurisprudence in this sphere is the decision of the Upper Tribunal in MC (Essa Principles Recast) Portugal [2015] UKUT 520 (IAC). Having regard to the principles enunciated therein, I am satisfied that this Appellant has participated fully in and has completed a programme of rehabilitation which began during his period of imprisonment and continued for one year during his ensuing licence period. I find further that he has completed this programme successfully.
14. Bearing in mind the various findings rehearsed above, I remind myself that, per regulation 19(3)(b), the overarching question is whether the Appellant's removal is justified on grounds of public policy or public security in accordance with regulation 21. As regards regulation 21(5), this is clearly a case where the Secretary of State's decision was made under (b) and (c). The crucial question is whether the Appellant represents "*a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society*". The application of this test requires an evaluative judgment on the part of the Tribunal. This judgment is made on the basis of material findings relating to the past and the present, coupled with findings of an evaluative and predictive nature. In a case such as the present it is not possible, absent a crystal

ball, to make a concrete finding that the person concerned will not reoffend. Rather, the exercise is one of predictive evaluative judgment.

15. As regards regulation 21(6), consideration whereof is obligatory, I take into account the additional factors – and find – that the Appellant’s connection with this country is one of substantial dimensions, dating from 2006; his partner here is his only “*family*” in the real sense, given that his only sister lives in Australia, his mother resides in a care home in Portugal and they have had no family life for many years; it would not be feasible for his partner to accompany him to Portugal, having regard to her maternal and care duties relating to her children in Northern Ireland; she plays an important role in maintaining the Appellant’s law abiding and abstinent lifestyle; the Appellant’s links with his country of origin are minimal; and his social and cultural integration into the United Kingdom are of an advanced nature. I juxtapose these findings with the expert medical evidence rehearsed above and the other series of findings which I have made. Having done so, I conclude that the test enshrined in regulation 19(3)(b), in tandem with regulation 21(5)(c), is to be applied in the Appellant’s favour.

## DECISION

16. I therefore remake the decision by allowing the appeal.

*Sernand McCloskey.*

THE HON. MR JUSTICE MCCLOSKEY  
PRESIDENT OF THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM CHAMBER

Date: 14 November 2015

Appendix 1



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: DA/02164/2013

**THE IMMIGRATION ACTS**

Heard at Laganside Courts Centre, Belfast  
On 13 June 2014

Determination Promulgated

.....

Before

The President, The Hon. Mr Justice McCloskey

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANTONIO MANUEL ABEGOA VARANDAS

Respondent

**Representation:**

Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer  
Respondent: Mr S McQuitty (of Counsel) instructed by Gerard Maguire Solicitors

**DETERMINATION AND REASONS**

**Introduction**

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (hereinafter the "*Secretary of State*"), dated 26 April 2013, whereby it was determined to deport the Appellant to his country of origin, Portugal.

In thus deciding, the Secretary of State rejected the Appellant's case that deportation would be contrary to the Immigration (EEA) Regulations 2006 (hereinafter "*the 2006 Regulations*") and, further, would infringe his rights under Article 8 ECHR. On appeal to the First-tier Tribunal ("*the FtT*"), the Appellant's case succeeded on both grounds. The grant of permission to appeal to the Secretary of State giving rise to this further appeal is couched in the following terms:

*"The panel allowed [the Appellant's] appeal against deportation because they considered the Appellant's chances of rehabilitation were better if he remained in the United Kingdom than if he returned to his own country. In doing so they arguably erred in law and failed to apply ESSA [2013] UKUT 316 correctly for the reasons set out in the Respondent's grounds."*

The second limb of the grant of permission to appeal focuses on the FtT's approach to the public interest. Thus are the contours of this appeal.

### Factual Matrix

2. The material facts are uncontested and are susceptible to succinct recitation. The Appellant is a Portuguese national, aged 48 years. Between 2000 and 2006, he resided in England and Holland. While in Holland he accumulated eight criminal convictions. In 2006 he went to Northern Ireland. During the ensuing six year period he augmented his criminal record substantially, committing a total of 43 offences in this jurisdiction. These consisted of thefts, burglaries, forgeries, driving offences and possessing Class A and Class B drugs. His most recent convictions were registered at Newry Crown Court on 28 June 2012 where, pursuant to a plea of guilty, he received a determinate custodial sentence of 1 year, to be followed by a licence period of one year, in respect of forgery and theft offences. His licence period expired recently, on 31 May 2014.

### The Impugned Decision

3. On 21 October 2013, the Secretary of State made a decision to make a deportation order. The statutory framework within which this decision was made is shaped by certain provisions of the 2006 Regulations. By regulation 19, it is provided:

*"(3) Subject to paragraphs (4) and (5), an EEA National who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if –*

- (a) That person does not have or ceases to have a right to reside under these Regulations; or*
- (b) The Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21."*



A decision of this *genre* attracts the appellation of a “*relevant decision*”, per regulation 21(1). It is provided in regulation 21(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.”*

This is followed by regulation 21(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.”*

In accordance with regulation 15(1), an EEA National who has resided in the United Kingdom for a continuous period of five years acquires the right of permanent residence. In the instant case, it is agreed that this Appellant did not acquire this right.

4. The Secretary of State’s decision was, predictably, based on the Appellant’s criminal record. It made reference to the Probation Service assessment of the Appellant, which identified a medium likelihood of re-offending. It recited the assessed risk factors, which include in particular the Appellant’s previous heroin addiction. The decision maker also considered the comments of the sentencing Judge, who pronounced himself satisfied that the Appellant does not present a risk of serious harm to the public under the Criminal Justice (NI) Order 2008. The decision maker further considered the various representations made on the Appellant’s behalf, together with a clinical psychologist’s report. The latter noted the Appellant’s history of manipulation, chronic deceit and pathological lying, together with the prevailing assessment of “*moderate/medium risk of acquisitive reoffending, most likely to become evident if the client relapses to drug misuse in response to stress or when placed under social*

*pressure*". The decision maker noted that the Appellant had relayed a significant untruth to the psychologist, instancing this as proof of the Appellant's continued engagement in deceit and a reason to call into question any favourable assessment of him based on a history provided by him. The decision states:

*"It is not considered reasonable to leave the public vulnerable to the effects of your reoffending"*.

As regards proportionality, it is stated:

*"Given the threat that you pose to the public it is considered that your personal circumstances do not preclude your deportation being pursued. The decision to deport you complies with the principle of proportionality."*

Finally, the decision letter considered the issue of rehabilitation. The assessment was made that, given his family circumstances; the Appellant could expect family support upon return to Portugal. It further noted that no obstacle to his Portuguese partner returning to Portugal had been identified. The Appellant's claim that he had successfully attended a rehabilitation centre in Portugal was also considered. It was further noted that such support as the Appellant has received from friends in Northern Ireland had proved inefficacious in breaking his cycle of criminality. This assessment culminated in the following conclusion:

*"Therefore the view is taken that there is no reason why you could not continue to work towards rehabilitation in Portugal with the support of family members living there and that you do not need to remain in the United Kingdom to become rehabilitated. Having regard to all the available information, it is concluded that deportation to Portugal would not prejudice the prospects of your rehabilitation. In any event it is considered that interference in your rehabilitation would be proportionate and justified when balanced against the continuing risk you pose to the public."*

### The FtT's Decision

5. The Appellant appealed to the First-tier Tribunal ("*the FtT*"), successfully. Its determination contains the following passage in [19]:

*"We consider that the prospects of the Appellant's rehabilitation are stronger in the UK where he has the support of NIACRO, the Probation Service and the other state agencies than in Portugal, as it is unclear whether his mother and sister will return there from Australia and for how long they will stay."*

Turning to consider the risk of reoffending, the FtT pronounced itself satisfied that the Appellant had been drug free for almost 2 years, noting the evidence which supported this. The Appellant continued to undergo appropriate monitoring and therapy. He was complying fully with the requirements of his license and had

secured employment. The FtT also highlighted the following passage in the clinical psychologist's report:

*"I would express the opinion that if [the Appellant] remains abstinent from drug misuse the summary judgment of medium risk is likely to diminish significantly and that if [the Appellant] engages with programmes of work with professionals towards improving his emotional regulation and stress tolerance, this summary judgment will be diminished further. I find, therefore, that if [the Appellant] is able to sustain abstinence, he is less likely to commit further acquisitive offences in the future."*

I have supplied the underlining simply for the purpose of highlighting the essentially predictive nature of the psychologist's assessment and the imponderables which it involves.

6. The main finding made by the FtT in favour of the Appellant is contained in [23]:

*"We have considered all of the evidence relating to the risk posed by the Appellant and we are satisfied that if he remains drug free there is a low to medium risk of him reoffending. We are therefore satisfied at this time and on the basis of the current evidence the Appellant does not pose a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. Of course if the Appellant were to return to drug misuse and to reoffending it will be open to the Respondent to reconsider this matter."*

The FtT expressed its omnibus conclusion in the following terms; in [25]:

*"We are satisfied that the decision to remove the Appellant under Regulation 19(3)(b) of the 2006 Regulations is not justified on the grounds of public policy, public security or public health security in accordance with regulation 21."*

This followed a recitation of the factors enshrined in regulation 21(6) which the FtT purported to consider. Duly analysed, these were confined to the Appellant's age (48); the duration of his links with the United Kingdom (seven years); his current employment; and the absence of anything in his personal circumstances weighing significantly in favour of deportation.

## Conclusions

7. Having described the exercise conducted by the FtT noted immediately above, I consider it important to emphasise the function and significance of regulation 21(6) of the 2006 Regulations in the juridical framework under scrutiny. Before doing so, it is appropriate to take cognisance of some of the other central provisions of the regime of the 2006 Regulations:

(a)

8. The effect of this provision is to oblige the decision maker to take into account a range of considerations before making a “*relevant decision*” on the ground of public policy or public security. This exercise is obligatory (“*must*”). It is also appropriate to add that the menu of considerations which follows is not designed to be exhaustive (“*such as*”). Where in any case it is demonstrated that the decision making has failed to discharge the duty thus imposed, the ensuing decision would not be in accordance with the law, unless the error were shown to be immaterial. A decision maker who is mandated by legislation to take into account certain factors has no choice: the Parliamentary edict must be obeyed. This is an elementary public law duty, the non-performance whereof renders the ensuing decision susceptible to being set aside.
9. In the present case, it was not contended that the decision maker had failed to perform the duty contained in regulation 21(6). The exercise which the FtT undertook in [23] of its determination, is, therefore, questionable. It did not stand in the shoes of the decision maker. Rather, the question for the FtT was whether the decision maker had erred in law in discharging the relevant duty. In my judgment, the difficulty with [23] of its determination, quoted in [6] above, is that the FtT has expressed itself as if it had the function of either primary decision maker **or** an appellate tribunal seized of an appeal on the merits. This was not, however, the FtT’s function. Rather, its central function, and duty, was to decide whether the impugned decision of the Secretary of State was in accordance with the law. I base this analysis on the relevant statutory framework. In short:
- (a) the right of appeal against an EEA decision is conferred by Regulation 26(1) of the 2006 Regulations.
  - (b) by Regulation 26(6), the appeal lies to the FtT.
  - (c) Regulation 26(7) provides that specified provisions of the Nationality Immigration and Asylum Act 2002 (“*the 2002 Act*”) apply to appeals of this *genre*. These provisions are contained in Schedule 1.
  - (d) The provisions contained in Schedule 1 include section 84(1) of the 2002 Act, excluding paragraphs (a) and (f)
10. Accordingly, by virtue of section 84(1) of the 2002 Act, as modified in this particular statutory context, the grounds on which a EEA decision may be challenged on appeal to the FtT are the following:
- (a) That the decision is unlawful by virtue of section 19(B) of the Race Relations Act 1976/ Article 20 of the Race Relations (Northern Ireland) Order 1976.
  - (b) That the decision is unlawful under section 6 of the Human Rights Act 1998.
  - (c) That the Appellant is an EEA national or a member of the family of an EEA national and the decision breaches the Appellant’s rights under the

Community Treaties in respect of entry to or residence in the United Kingdom.

- (d) That the decision is otherwise not in accordance with the law.
- (e) That the removal of the Appellant from the United Kingdom would breach the United Kingdom's obligation under the Refugee Convention.

As these provisions demonstrate, the appellate jurisdiction of the FtT is the subject of specific prescription.

11. While it is possible that, in the present case, the FtT did not have its attention focused on section 84 of the 2002 Act, this is understandable to some extent having regard to the formulation of the grounds of appeal. While one of the grounds clearly articulated the Appellant's challenge on the basis that the deportation decision infringed his rights under Article 8 ECHR - which fits within section 84(1)(c) - the other ground embodied an umbrella complaint that his deportation would be contrary to the 2006 Regulations. I do not consider this ground of appeal to have been properly formulated. Having regard to Regulation 26(7) and section 84(1), as modified in this discrete context, this ground was relatively meaningless. Good practice dictates, in this sphere as in all others, that grounds of appeal are formulated with clarity, by precise reference to the appropriate provision/s of section 84 of the 2002 Act and, furthermore, are adequately particularised.
12. The FtT considered the ECHR (Article 8) ground separately. However, before doing so, it made the conclusion in [23] set out in [6] above. In my judgment, the error betrayed in this passage is that the FtT treated the appeal as an appeal on the merits in which it was at liberty to disagree with the Secretary of State's assessment of the requirements of public policy, public security or public health and substitute its own opinion. In my estimation, the test which the FtT should have applied was whether the Secretary of State's decision was in accordance with the law, by virtue of section 84(1)(e) of the 2002 Act. Approaching its task correctly, it was incumbent on the FtT to decide whether a material error of law vitiated the impugned decision. However, this approach was not adopted and, in consequence, no error of law was identified. I consider that the FtT treated the appeal as an appeal on the merits. It thereby committed the error of approaching and discharging its task in an impermissible manner, lapsing into a significant misdirection in law in consequence. This is the first discernible error of law in the FtT's Determination.
13. Secondly, the FtT neither considered nor concluded whether the impugned decision complied with the principle of proportionality. This is a question of law in respect whereof the Tribunal is the ultimate arbiter. I accept that in [25] the FtT may have had the principle of proportionality in mind in pronouncing itself satisfied that the decision was not "*justified*". However, there was a failure in this aspect of the decision to identify the public interest in play and, having done so, to conduct a balancing exercise. Moreover, the Determination makes no reference to Regulation

21(5)(a), which stipulates that a relevant decision must comply with the principle of proportionality. Nor is there any reference to Article 8(2) ECHR. It is important for Tribunals to be aware that, in cases such as the present, the principle of proportionality arises under two separate guises viz under Regulation 21(5)(a) **and** pursuant to Article 8(2) ECHR. This discrete failure features in the second of the grounds upon which permission to appeal to this Tribunal was granted. Furthermore, in that section of its decision addressing Article 8 ECHR, the FtT failed to conduct an orthodox proportionality assessment. This is the second ascertainable error of law in the FtT's decision.

14. Finally, I turn to consider the FtT's approach to the issue of the Appellant's rehabilitation. This is apparent from the passage in [19] reproduced in [5] above. In Essa v Secretary of State for the Home Department [2013] UKUT316 (IAC), the Upper Tribunal, having distilled from the decision of the Court of Appeal in FV (Italy) [2012] EWCA Civ 119 the proposition that, as regards a deportation decision under the 2006 Regulations, the relevant date for evaluating the specified criteria is the date when the decision is made, stated in [26]:

*"We agree that the [the Court of Justice'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**". "*

[My emphasis]

This passage formed the basis of the first ground upon which permission to appeal was sought and was duly granted. It was argued on behalf of the Secretary of State that the injunction contained in this passage is clear: in cases such as the present, it is impermissible to consider the issue of the subject person's future prospects of rehabilitation. This argument is to be evaluated in the light of certain decisions, both domestic and European and the Upper Tribunal's decision in Essa as a whole .

15. The decision of the Upper Tribunal in Essa was the culmination of something of an odyssey, consisting of a deportation order by the Secretary of State, a dismissal of the ensuing appeal by the FtT, a refusal by the Upper Tribunal of permission to appeal, the grant of permission to apply for judicial review challenging such refusal, the dismissal of the substantive application for judicial review, a successful appeal against such dismissal to the Court of Appeal and, ultimately, remittal to the Upper Tribunal. In the course of this somewhat protracted journey, the Administrative Court gave judgment: see [2012] EWHC 1533 (QB). Lang J identified the Claimant's principal ground of challenge as a complaint that the FtT had erred in law by failing

to consider his better prospects of rehabilitation in the host state (the United Kingdom) rather than the country of proposed destination (the Netherlands).

16. At this juncture, it is convenient to consider Regulation 21(6) of the 2006 Regulations, which provides:

*“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 persons length of residence in the United Kingdom, **the person’s social and cultural integration into the United Kingdom** and the extent of the persons links with his country of origin.”*

[My emphasis]

There is no death of authority relating to the central issue identified by Lang J. In Batista - v - Secreary of State for the Home Department [2010] EWCA Civ 896, Carnwath LJ stated, at [27]:

*“I would add a further possible consideration, although it was not an aspect explored in any detail before us. Even in respect of those deemed sufficiently dangerous to justify deportation under the EEA rules, common sense would suggest a degree of shared interest between the EEA countries in helping progress towards a better form of life. The prospects offered by the relationship with Miss Deane in this country may have been fragile, as the tribunal thought, but in Portugal they would be practically non-existent. Although he has siblings in that country, there seems to have been no evidence that they would be able or willing to offer the support needed to prevent what the tribunal saw as his likely drift back to crime. There may be room for argument as to the relevance of such points under the Directive, but as at present advised I see no reason in principle why they may not be taken into account in the overall balance of proportionality. It will be a matter for tribunal to consider whether they have any materiality in the present case.”*

While this was an *obiter* statement, it finds support in subsequent authority. In Land Baden v Tsakouridis [2011] 2CMLR 11 the ECJ gave a preliminary ruling on certain issues concerning the interpretation of Directive 2004/38/EC (the “Citizen’s Directive”). It drew attention to, *inter alia*, recital (24) which states:

*“Accordingly, the greater the degree of integration of Union Citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be.”*

By Article 28(1) of the Directive:

*“Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic*

*situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin."*

This is the genesis of Regulation 21 (6). In its judgment, the ECJ made specific reference to the issue of "social rehabilitation", at [50]:

*"In the application of Directive 2004/38, a balance must be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision is to be made ..... by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity and, if appropriate the risk of re-offending, on the one hand, and, on the other hand, **the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which ... .. is not only in his interest but also in that of the European Union in general.**"*

[Emphasis added.]

The import of this passage would appear to be that social rehabilitation of the person concerned is not merely a permissible consideration to be weighed in the balance. It is, rather, an obligatory factor to be considered.

17. Returning to Essa, the assessment of Lang J, aided by the guidance contained in the two decisions considered above, at [46], was as follows:

*"In my judgment, the judgment of the ECJ in Tsakouridis establishes that the decision maker, in applying Regulation 21 of the EEA Regulations, must consider whether a decision to deport (a) 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 .... "*

On appeal, the Court of Appeal expressly endorsed this approach: see [2012] EWCA Civ 1718 at [12], where Maurice Kay LJ stated:

*"The European dimension, as I have called it, is now part of the proportionality exercise when the Secretary of State seeks to deport an EU citizen."*

The Court pronounced itself in complete agreement with Lang J's interpretation of Tsakouridis. However, it allowed the appeal on the basis that the FtT had not properly considered the relevant provisions of EU law.

18. This elaborate chain of litigation culminated in an order of the Court of Appeal remitting the case to the Upper Tribunal, the grant of permission to appeal against the decision of the FtT and the ensuing decision to which I have referred above: [2013] UKUT 3136 (IAC). The discrete issue of the claimant's prospects of



rehabilitation received considerable attention in the determination of the Upper Tribunal. It said, in [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 very well be disproportionate to proceed to deportation”.*

The Tribunal then considered a rather different scenario, at [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, it cannot be seen 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”.*

As a consideration of these passages demonstrates, it is misleading to consider [26] of the Upper Tribunal’s determination in isolation. It is clear from reading the determination as a whole that it is harmonious with the binding ECJ and Court of Appeal authority rehearsed above. There is no conflict. In summary, the person’s prospects of rehabilitation in the host State may be a significant factor in the proportionality equation.

19. It seems uncontroversial to analyse these decisions as giving rise to the proposition that an examination of the obligatory consideration of social rehabilitation of the person concerned will normally entail some comparison between the facilities, services and conditions in the two States under scrutiny. Since this will entail fact finding on the part of the FtT, I would emphasise that this exercise must be based on evidence and not assumption or conjecture. Having found the necessary facts, the FtT will then be engaged in a process of predictive evaluative assessment, or judgment.
20. Further, at all stages the FtT must be alert to the constraints imposed by its statutory jurisdiction and the grounds of appeal as formulated: see [9]-[11] above. It must also take cognizance of proportionality as a freestanding principle, under Regulation 21(1(a) and proportionality under the different guise which arises where the debate focuses on interference with a Convention Right - typically, though not invariably, Article 8 - in pursuit of a legitimate aim. Finally, the FtT must not treat paragraphs [33] -[35] of Essa as constituting an exhaustive ordinance. Cases of this kind will invariably be intensely fact sensitive.
21. It follows from my analysis of the jurisprudence above that the FtT did not err in law in turning its attention to the question of the Appellant’s rehabilitation prospects.

However, I consider that, having done so, the FtT fell into error in two respects. First, it considered this issue as if it were a primary decision maker, rather than from the perspective of whether the Secretary of State's decision was in accordance with the law or through the lens of proportionality: see [8] - [11] above. Second, there was a failure to engage with the reasoning in the Secretary of State's decision - see [4] above - and, allied thereto, a failure to make clear relevant findings of fact, with supporting reasons. Furthermore, it is clear from the determination as a whole that this error was influential in the decision to allow the appeal. Thus materiality is established.

## DECISION

22. I decide and direct as follows:

- a. The determination of the FtT is infected by material errors of law and must be set aside in consequence.
- b. The decision will be remade in this forum as soon as it is feasible to relist the case.
- c. Upon the relisting of the appeal, consideration will be given to the Appellant's application for further evidence to be adduced under Rule 15(2)(a) of the Tribunal's Procedure (Upper Tribunal) Rules 2008. The Secretary of State must respond in writing to this application by 07 July 2014.
- d. Both parties shall, within 21 days of the date of this decision, make representations in writing relating to the issue of preservation of findings of fact of the FtT.

Signed:

*Bernard McCloskey*

THE HON. MR JUSTICE MCCLOSKEY  
PRESIDENT OF THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM CHAMBER

Date: 20 June 2014