Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00058/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
on 27 October 2015	**on 29 October 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

DAWID KAZANOWSKI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Caskie, Advocate, instructed by Maguire, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Poland, appeals against a determination by a panel of the First-tier Tribunal comprising Judge Blair and Dr Winstanley, dismissing his appeal against deportation under the Immigration (European Economic Area) Regulations 2006.

2. The appellant sought permission to appeal to the Upper Tribunal on various grounds, including the following:

> "At paragraph 82 the Tribunal indicate their view that there was a "real risk that it was quite probable the appellant might re-offend." The use of the words "real risk", "quite probable" and "might" leaves the informed reader with no real understanding of what standard of proof the Tribunal thought they might be applying."

3. Permission was granted on that ground only. The judge granting permission observed:

> "It is unclear whether the panel in fact found at paragraph 82 that the appellant's conduct represented a genuine, present and sufficiently serious risk to one of the fundamental interests of society."

4. In a Rule 24 response the SSHD said:

> "It is clear from the careful and detailed [determination] that the FtT found that the appellant constituted a present threat. This is consistent with the clear findings that there is a risk that the appellant may well re-offend, which cuts to the very heart of the requirements of Regulation 21(5) complained of in the grounds."

5. Mr Caskie firstly stated the background, thus. The appellant was born on 7 July 1991. He was aged 16 at the time of his first offence in 2007, and 19 at the age of his last offence. By the time of the hearing on the First-tier Tribunal he had committed no offences for over 4 years and was aged 24. He spent the period from March 2013 until August 2015 out of the UK. He has no convictions here. He had moved to another country, formed a stable relationship and become a father. At the date of the hearing he plainly did not present a threat in terms of the regulations. There was in reality no risk that he would re-offend.

6. Mr Caskie then submitted that paragraph 82 left it entirely unclear what standard of proof the Tribunal applied. It contained three mutually inconsistent possible standards. Nothing else in the determination could make good that error. The appellant was no longer "a young thug", but a young man with no history of offending for almost half a decade. The determination should be set aside. The Upper Tribunal should substitute a decision to allow the appeal, as originally brought to the First-tier Tribunal.

7. Mrs O'Brien relied on the Rule 24 response. She conceded that paragraph 82 of the determination might have been better expressed, but said that it was clear that overall the Tribunal found, to the appropriate standard, the balance of probability, that the personal conduct of the appellant did represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. There was no error such as to require the Upper Tribunal to interfere.

8. In reply, Mr Caskie said that it was not conceded that the Tribunal did make a finding regarding the threat posed by the appellant, but even if such a finding had been made, the reader simply did not know what standard had been applied. The use of the word "might" could be taken to imply that it was for an appellant to establish that there was *no* possibility

of re-offending, a standard which no-one could reach. The appellant is now an adult with a wife and child, in short a rehabilitated and different person, and a decision should be substituted accordingly.

9. I thanked the representatives for their clearly focused submissions, and reserved my determination.

10. It was appropriate for the background to be set out, but doing so amounted to a concise statement of the appellant's position as it could best be represented at first instance. It did not reflect the facts as found. The Tribunal did not find the appellant a credible or reliable witness (paragraph 45), and saw significant shortcomings also in the evidence from his wife and in the other evidence. Those adverse findings were reached after thorough consideration. Permission was not granted to dispute them. The panel gave a number of good reasons for not accepting that the appellant's rehabilitation was well established, as he claimed.

11. The determination contains a clear self-direction at paragraph 22:

> "The burden of proof is on the appellant to discharge and the standard of proof is the balance of probabilities."

12. The gist of the determination is clearly to the effect that the appellant does represent a risk in terms of the language of the regulations. See paragraphs 71 - 86, read together, and in particular 74, "an established pattern and acquisitive offending within a short time frame and moreover … many of the offences indicated a propensity to use violence or threats of violence"; 75, marriage and children not having much bearing on his propensity to break the law; 76, 80, 81, 84, little evidence of rehabilitation, or prospects of rehabilitation; 77, recent history suggesting a man with a propensity to offend; 86, principles of regulation 21(5) respected by the decision of the respondent.

13. The first sentence of paragraph 82 is muddled. That should not be taken out of context so as to undermine the entire determination. It is part of the Tribunal's overall assessment that there had been no serious rehabilitation, and that there was an ongoing threat. I do not think it shows that the panel went wrong in law by misunderstanding the standard of proof, which it had earlier stated accurately. In particular, I do not think it shows that the panel imposed a standard higher than the law requires upon the appellant, or one which no appellant could realistically meet. The appellant did not lose his case because too stringent a standard of proof was imposed, but because for good reasons his evidence of rehabilitation was not found persuasive. One sentence is imprecise, but determinations are to be read as a whole, not as if they were to be expressed in every line with the exactitude of a statute.

14. I also note the next part of the determination, paragraphs 87 – 111, dealing with the case under Article 8 of the ECHR, but on much the same considerations. See, in particular, paragraph 106, live concerns over risk; little cogent evidence to show risk properly managed here, or that the risk

of re-offending could be kept within reasonable bounds; and 109, "… a present threat at this time. The factors relevant to integration … did not suggest … reasonable prospects of rehabilitation".

15. The appellant continues to insist that he is a rehabilitated person who presents no threat of reoffending. However, the panel was entitled to find to the contrary, and on my reading of the determination plainly did so, to the appropriate standard of proof, and for reasons which are sound in law. Any error along the way was incidental and immaterial.

16. The determination shall stand.

Upper Tribunal Judge Macleman
28 October 2015