Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00677/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 January 2014	**On 30 January 2014**
Prepared 17 January 2014	

Before

UPPER TRIBUNAL JUDGE MCGEACHY
UPPER TRIBUNAL JUDGE MCKEE

Between

MARIUSZ EUGENIUSZ FRACKIEWICZ AKA CIETALOWICZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Mold, of Counsel instructed by Messrs Malletts Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Poland born on 11 January 1974 appeals, with permission against a decision of the Secretary of State made on 21 March 2013 to make a deportation order under the provisions of the Immigration (European Economic

Area) Regulations 2006 Regulation 19(3)(b) which states that the Secretary of State may remove an EEA national from the United Kingdom where it is decided that removal is justified on the grounds of public policy, public security or public health.

2. The appellant's appeal was heard in the First-tier Tribunal on 11 June 2013 and allowed. The Secretary of State appealed and in a decision promulgated on 2 December 2013 the Upper Tribunal (Lord Boyd of Duncansby, sitting as a Judge of the Upper Tribunal and Upper Tribunal Judge Kekić) set aside the decision of the First-tier Tribunal and they ordered that there be further submissions before the Upper Tribunal to determine the appeal.

3. The decision of the Upper Tribunal setting aside the decision of the First-tier Tribunal sets out all relevant issues and the background to the decision and we consider that it is appropriate that we should set that out in full. We note that the Upper Tribunal, when referring to the determination of the First-tier Tribunal, incorrectly referred to the determination of the First-tier Tribunal as the decision letter, and that they refer to the decision to deport as the determination.

4. Their decision reads as follows:

> "1. This is the appeal of the Secretary of State for the Home Department (the Secretary of State) against the decision of the First-tier Tribunal (Judge O'Garro) sitting with Mr B Bompas, (non-legal member) at Hatton Cross on 11 June 2013 with the determination promulgated on 12 July 2013. That decision upheld the appeal of the respondent (hereafter "claimant") against the determination of the Secretary of State dated 21 March 2013 to make a deportation order by virtue of Section 5(1) of the Immigration Act 1971.
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> 2. Before proceeding with the substantive issue raised in the appeal by the Secretary of State there is a preliminary matter of jurisdiction. We were informed that the claimant was deported to Poland on 13 June 2013 - that is two days after the hearing before the First-tier Tribunal. It is common ground that the First-tier Tribunal was unaware of the impending extradition and it may very well be that the Home Office Presenting Office was himself unaware of this. In any event it was the Secretary of State's position that having been extradited to Poland in order to serve an outstanding prison sentence he had left the United Kingdom. Accordingly, as a preliminary point, Mr Melvin submitted that the appeal against the Secretary of State's decision had been effectively abandoned. He referred us to Section 104 of the Nationality, Immigration and Asylum Act 2002. We pointed out that that would leave the determination of the First-tier Tribunal in place, namely that the decision of the Secretary of State to deport the claimant is not proportionate and not in accordance with the law. However Mr Melvin submitted that the true position was that the claimant's appeal against the decision of the Secretary of State would be abandoned. Presumably it would be as if the First-tier tribunal hearing and determination had never occurred.
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> 3. Mr Mold submitted that was not right. In his submission the EEA Regulations trump the 2002 Act because of the supremacy of Europe Union law.

4. This is a decision taken under the Immigration (European Economic Area) Regulations 2006 (SI No. 1003) (the 2006 Regulations). Paragraph 25(4) states: 'A pending appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom'. The appellant in this case is of course the Secretary of State herself rather than the claimant but we note in paragraph 25(2) that '… an appeal is to be treated as pending during the period when notice of appeal is given and ending when the appeal in finally determined, withdrawn or abandoned'. In this context we regard the appeal by the claimant against a decision of the Secretary of State as an ongoing process. While the claimant was successful before the First-tier Tribunal, the appeal against the decision of the Secretary of State cannot be regarded as fully determined unless and until the process is finally at an end. Accordingly we consider that we have jurisdiction to determine the appeal by the Secretary of State.

5. Having determined that we have jurisdiction we turn now to the merits of the appeal itself.

Background

6. The claimant is a Polish citizen who came to the United Kingdom on either 10 or 11 February 2007. Before coming to this country he lived in Poland where he had a criminal record for offences committed between July 1999 and December 2004. In 2001 he was convicted of trafficking, facilitating authorised entry and residence of persons, illegal destruction/concealment of a document and selling another person's identity. He served prison sentences for these convictions. In 2004 he was charged with robbery. He was kept on remand for more than two years before being granted bail in 2007. It was at that point that he left Poland for the United Kingdom. He was convicted of this offence in his absence in 2011 and sentenced to five years, six months' imprisonment.

7. In 2012 the claimant discovered that he had been convicted of robbery in Poland. On finding this out he changed his name, taking his wife's surname and then arranged for the issuance of false identity documents for his own use. On 14 August 2012 he was arrested in the United Kingdom in connection with his use of false identity documents. On 28 August 2012 he was convicted at Canterbury Crown Court on two counts of possession of an identity document with improper intent and sentenced to sixteen months' imprisonment. He did not appeal against his conviction or sentence. On 21 February 2013 the claimant was notified of his liability to deportation.

8. As the claimant is an EU citizen the issue of his exclusion and removal from the United Kingdom falls to be determined under the 2006 Regulations. These are set out at paragraph 29 of the decision letter. Before the First-tier Tribunal it was argued that the claimant had been in the United Kingdom for a continuous period of five years. The First-tier Tribunal rejected that submission noting that as at the date of his conviction he had not completed five years' of legal residence (paragraph 46). Mr Mold did not dispute that the claimant had not completed five years' of legal residence. Accordingly the issue for the First-tier Tribunal was whether or not the claimant's exclusion was justified on the grounds of public policy, public security or public health in accordance with Regulation 21 (see Regulation 19(1)).

9. At paragraph 59 of the determination the First-tier Tribunal concluded that on the evidence they were not satisfied that the appellant's personal conduct as it is today poses a present threat to the requirements of public policy. Accordingly they found that the decision to deport was not proportionate and not in accordance with the law.

10. The grounds of appeal against that determination are succinct. The first ground is that the decision was perverse because it gave no consideration to the fact that between 1999 and 2004 the appellant was in prison for trafficking and destroying documents, was on bail for robbery when he fled Poland in 2007, was convicted in his absence and sentenced to five and a half years in prison and upon finding this out, obtained false documents so that he could not be returned to Poland. Accordingly it was perverse to find that, with no other evidence cited, the appellant did not pose a present threat.

11. The second ground is of failing to give reasons or adequate reasons for a material finding. There was no consideration given to the sentence in his absence to five and a half years in prison for his latest conviction or to having already spent four and a half years in prison for trafficking. These offences did not play any part, it was submitted, in the assessment of the First-tier Tribunal as to future risk. Accordingly there was an inadequate analysis for the purposes of Regulation 21 as to the claimant's own conduct when he found out about the conviction in Poland. Nor was there any consideration that the Sentencing Judge had recommended his deportation something which should at least have played a part in the overall assessment of present threat to public policy.

12. In oral submissions Mr Melvin referred to paragraphs 18 to 22 of the Secretary of State's letter of 21 March 2013 giving reasons for deportation. None of these matters had been addressed by the First-tier Tribunal in their determination. He accepted that the claimant had been here for nearly five years but he was in the UK knowing that he faced a criminal trial in Poland. On finding out about his conviction and absence he had shown criminal intent to avoid the consequences.

13. For the claimant, Mr Mold submitted that the decision letter was well-structured and reasoned. It did not repeat itself. The First-tier Tribunal had referred to the relevant case law and at paragraph 55 had pulled together the principles which they had gleaned from are these cases. They correctly identified that they had to look at the personal conduct and determine whether or not it constituted a present threat to the requirements of public policy.

Decision

14. Having considered the terms of the decision letter of the First-tier Tribunal, the grounds of appeal and the submissions of parties we do not consider that the decision is one that crosses the threshold of perversity. However we are satisfied that full or adequate reasons have not been given by the First-tier Tribunal for their decision to allow the appeal. The operative parts of the decision letter in which the First-tier Tribunal draw together the evidence can be seen from paragraphs 55 to 59.

15. In paragraph 57 the First-tier Tribunal states that the appellant has lived in the United Kingdom since 2007 and there is no evidence that he has committed any offence similar to that which he committed in Poland. In our opinion that is not factually accurate. The offences of which he was convicted in this country are two counts of possession/control of identity documents with intent. The intention was to avoid returning to Poland in order to serve his sentence. In our opinion such a conviction is analogous with the conviction in Poland of trafficking which involved illegal destruction/concealment of a document and selling another person's identity card.

16. The Tribunal states that there is no evidence before them that the appellant has a propensity to re-offend. In coming to that conclusion they made no reference to either of the very serious convictions in Poland which resulted in significant periods of imprisonment. That conclusion is based on the claimant's statement that he regretted his past criminal activities and that was the reason he chose to leave Poland to live in the United Kingdom.

17. In reaching that conclusion the First-tier tribunal ignored relevant material, namely the offences committed in Poland, and made a material factual error in considering that the conviction in the UK was not analogous with any of the offences in Poland. The tribunal committed an error of law in their assessment of the propensity to re-offend. Accordingly we allow the appeal. It falls to be re-made.

18. Mr Mold submitted that in the event of the appeal being allowed there should either be a re-hearing before the First-tier Tribunal or alternatively we may consider that the evidence from the claimant was properly set out at page 4; the issue would be one of the applications of the law to the evidence. In that event he would wish to make further submissions.

19. It is clearly impractical to have a re-hearing before the First-tier Tribunal in which the claimant gives evidence. He is presently in prison in Poland. Nor would it be desirable to leave the final determination of this issue until he was released from prison. Having regard to the matters which are set out in the decision letter we cannot see that further evidence will be required. Accordingly we will accede to Mr Mold's alternative solution and that is to list the case for further submissions before the Upper Tribunal.

Summary

20. We allow the appeal and quash the decision of the First-tier Tribunal. The case will be re-listed before the Upper Tribunal for submissions."

5. At the hearing of the appeal before us Mr Mold referred to the judgment of the Court of Appeal in Northern Ireland in **Flaneur's application [2011] NICA 72** where in paragraphs 15 through to 18 of the judgment Morgan LCJ set out the provisions of Articles 27.1 and 27.2 of Directive 2004/38/EC, the relevant provisions in Regulation 21(5) of the Immigration (European Economic Area) Regulations 2006 and relevant case law of the European Court of Justice regarding the limitations on the ability of Member States to deport persons who have committed criminal offences and set out

a summary of the relevant guidance in the judgment in **Bouchereau [1977] ECR 1999.** He wrote: :

"15. The relevant measures governing restrictions on freedom of movement for EU nationals are now contained in Directive 2004/38/EC. Articles 27.1 and 27.2 of the Directive provide:

'1. Subject to the provisions of this Chapter, Member States may restrict the freedom of and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted'.

16. That provision is implemented by Regulation 21(5) of the Immigration (European Economic Area) Regulations 2006 ("the Regulations") which provides:

'(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'.

17. The case law of the ECJ[1] established the following limitations on the ability of Member States to deport persons who have committed a criminal offence. These

[1] *Orfanopoulos* [2004] ECR 1-5257 at paras 64-68; *Calfa* [1999] ECR 1-11 at paras 21-25; *Nazli* [2000] ECR 1-957 at paras 57-64; *Bouchereau* [1977] ECR 1999 at paras 25-37

principles are reflected in the terms of the Regulations set out above. They can be summarised as follows:

(i) Derogations from free movement must be interpreted restrictively, particularly in the case of citizens of the EU.

(ii) Such measures must be based exclusively on the personal conduct of the person concerned. Previous convictions cannot *in themselves* justify deportation.

(iii) There must be a *genuine, present and sufficiently serious* threat to the requirements of public policy.

(iv) Such a (present) threat exists only where the personal conduct 'indicates a specific risk of new and serious prejudice to the requirements of public policy'[2] which must, as a general rule, be satisfied at the time of the expulsion[3].

(v) EU law prevents the deportation of an EU citizen for general preventative reasons aimed at deterring other foreign nationals.

18. In <u>*Bouchereau*</u> [1977] ECR 1999 the European Court of Justice said:

> '27. The terms of Art 3(2) of the Directive, which states that 'previous criminal convictions shall not in themselves constitute grounds for the taking of such measures' must be understood as requiring the national authorities to carry out a *specific appraisal* from the point of view of the interests inherent in protecting the requirements of public policy, which does not necessarily coincide with the appraisals which formed the basis of the criminal conviction.
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> 28. The existence of a previous criminal conviction can, therefore, only be taken into account insofar as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy.
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> 29. Although, in general, a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy.
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> 30. It is for the authorities and, where appropriate, for the national Courts, to consider that question in each individual case in the light of the particular legal position of persons subject to Community law and with the fundamental nature of the principle of the free movement of persons'."

[2] Case C-340/97 *Nazli* [2000] ECR 1 at para 61
[3] *Orfanopoulos* [2004] ECR 1-5257 at paras 79

6. Mr Mold asserted that if we decided that the appellant was not a genuine threat then that was the end of the matter. However, even if we decided that he was a threat relevant factors regarding the proportionality of removal similar to those in an Article 8 assessment should be considered. It would be necessary to consider an offender assessment or an assessment of the appellant's likelihood of re-offending.

7. He argued that while it was the case that the Secretary of State had in the letter setting out the reasons for deportation relied on the judge's sentencing remarks these were not made within the context of European Union law.

8. It was the case that any restriction on free movement should be narrowly construed. The appellant's offence did not, he argued, cross the threshold of an offence for which the appellant should be removed. He referred to the circumstances in which the appellant had come to Britain – he had been on remand in Poland for two years but had not been tried and had therefore fled to Britain. It is the appellant's case that he had not committed the robbery for which he was tried in his absence and sentenced in 2011.

9. Of relevance was the issue as to whether or not the appellant was a general threat. He argued that the appellant was not and he pointed out that the reason behind the offence for which the appellant was sentenced here was to avoid what the appellant considered was an unfair prison sentence.

10. The Secretary of State was wrong he claimed to say that there had been no change of circumstances. Since the appellant had come here he had committed no offences in Britain apart from that relating to documents to facilitate his residence here. He was two months short of the five year period of residence which would give him increased protection. He was settled with his wife and child here.

11. He argued that there was no risk of re-offending – the appellant had put behind him the issues for which he had been convicted in Poland. He emphasised that our concern should be only with the question of whether or not the appellant was a present risk and not the fact that he had been convicted in the past. He argued that the appellant was not a genuine or sufficiently serious threat to warrant deportation.

12. With regard to the issues relating to the appellant's rights under Article 8 of the ECHR and his son's rights under Section 55 of the Borders, Citizenship and Immigration Act 2009 he asked us to take into account, when assessing the proportionality of the decision, that the appellant had lived in Britain for just under the five year period, he and his wife were both exercising Treaty rights here and that his son, who had been born on 7 March 2009 had lived here all his life. It was not, he argued, proportionate to break up the family unit which had only ever existed in Britain.

13. It was Mr Mold's view that when assessing the Article 8 rights of the appellant under the European Convention on Human Rights that they should be looked at as a

freestanding right rather than being intertwined with the provisions of Immigration Rules 398 and 399 and that that test was the same as that under Regualation 21 (5).

14. In reply Mr Melvin relied on written submissions in which he referred to a consideration of the rights of an EEA national who has permanent residence here. Mr Mold, at this stage, made it clear that he was not arguing that the appellant had enhanced rights which would come once he had been resident in Britain for five years exercising Treaty rights.

15. Mr Melvin went on to argue that it was relevant that the appellant was not genuinely integrated into Britain referring to the decision of Advocate General Bot in C-378/12 **Onuekwere**. He argued that the periods of residence in prison indicated that the person concerned was only integrated to a limited extent, particularly where that person was a multiple recidivist.

16. He argued that the appellant was 40 and given the length of time he had been in Britain, albeit that he had a child here, it was proportionate for him to be removed. He stated that it was recognised that the interests of appellant's son might be best served by remaining in Britain with his mother who is his primary carer but it was open to them to join the appellant in Poland as they were both Polish nationals.

17. He went on to emphasise that the issue of the appellant's propensity to re-offend was relevant and he stated that there was nothing to show that that was lessened. He referred back to the list of the appellant's offences between 1999 and 2004 and asserted that said to the appellant was a career criminal. He had not engaged in a rehabilitation programme either here or in Poland. His offending showed an escalation over the years – his latest sentence, in 2011 had been for five and a half years. Moreover, he had broken his bail conditions by entering Britain and had continued to do so by continuing to remain here. He argued that it was perverse to suggest that the appellant was in these circumstances exercising Treaty rights. His situation here had been, at best precarious. He pointed to the fact that the appellant had spent most of his life in Poland and was in good health and argued that it would be entirely appropriate to deport him. He asked us therefore to dismiss the appeal.

18. In reply Mr Mold stated that the burden lay on the Secretary of State to show that the appellant remained a risk and stated that integration was a relevant factor to be taken into account. He emphasised the appellant had, he claimed committed no other offences since entering Britain in 2007 apart from those relating to the identity documents for which he received a prison sentence here and that that offence was, he argued because he had found that he had been unfairly convicted in Poland.

Discussion

19. It is accepted on behalf of the appellant that he is not entitled to permanent residence here under the provisions of Regulation 15(1) as he has not lived in Britain for a continuous period of five years. He is therefore not entitled to the enhanced protection to which a permanent right of residence under Regulation 15, would entitle him. We accepted that, under the provisions of Regulation 21 the decision to deport the appellant must be made on the grounds of public policy, public security or public health and may not be made to serve economic ends.

20. As is made clear in paragraph 27 of **Bouchereau** Article 3(2) of the Directive states that previous criminal convictions shall not in themselves constitute grounds for the exclusion or deportation of an EEA national. A specific appraisal from the point of view of the interests inherent in protecting the requirements of public policy must be undertaken. Paragraph 28 of the judgment in **Bouchereau** emphasises that the existence of a previous criminal record can, therefore, only be taken into account insofar as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy. Paragraph 29 sets out the further guidance that a finding that such a threat exists implies the existence in the individual concerned of a propensity to act in the same way in the future.

21. The reality in this case is that the appellant's offences in Poland involved not only the facilitation of unauthorised residence, and the destruction of documents but also trafficking in human beings, a particularly serious crime. Moreover, in 2004, the appellant committed the robbery for which he was sentenced in 2011. Mr Mold argued that he had committed no offences since 2004 (although, of course, he accepted that the appellant had committed the offence which had led to his deportation here) but the reality is that the appellant was detained for approximately two years after he committed the offence of robbery and then left Poland while on bail which was itself a further offence and that that offence continued as he did not surrender to bail thereafter. This was the context in which the appellant committed the further crime of obtaining possession of an identity document with improper intent.

22. We note the sentencing remarks of His Honour Judge O'Mahony where he states:-

> "You have committed serious offences and they are serious offences because the circulation and use of false documents threatens the integrity of our borders, and the borders of other countries as well for that matter, and potentially threatens national security, not that I am suggesting that anyone has anything very much to fear from you in that regard of course not. But there is an aggravating feature here and that is that you were doing this to evade justice in another country, what that justice would lead to it is not for me to say, but there it is, and that is not the usual situation that applies here."

23. In his sentencing remarks the judge therefore highlighted the serious nature of a crime which "potentially threatens national security".

24. We consider that taking into account the context in which the appellant committed the crime, indeed taking also into account the escalating offending shown by the appellant the appellant's crime could properly be considered to be a present threat and we conclude that the removal of the appellant is justified on the grounds of public policy and public security in accordance with the provisions of Regulation 21.

25. We must also consider the issue of the proportionality of removal both under the European Union legislation and under the ECHR. The reality is, of course, that the appellant is not in Britain, he is not living with his wife and child and given the sentence which he has received and indeed that there is no evidence that he has appealed against that sentence, there is no realistic possibility of his living with his family here again for some very considerable time.

26. Having said that it is relevant that we consider factors such as integration of the appellant into this country. We accept Mr Melvin's submission that the fact that the appellant has been imprisoned here and indeed was in Britain because he was seeking to evade a trial and possible prison sentence in Poland are factors which militate against the conclusion that he is integrated in this country.

27. We received after the hearing the judgment of the European Court of Justice in the case of **Onuekwere** Case C-378/12 in which at paragraphs 25 and 26, the importance of integration of an EEA national into the host member state, is considered. That paragraph reads as follows:-

> "25. Such integration, which is a pre-condition of the acquisition of the right of permanent residence laid down in Article 16(1) of Directive 2004/38 is based not only on territorial and temporal factors but also on qualitative elements, relating to the level of integration in the host Member State (see *Case C-325/09 Dias [2011] ECR 1–6387*, paragraph 624), to such an extent that the undermining of the link of integration between the person concerned and the host Member State justifies the loss of the right of permanent residence even outside the circumstances mentioned in Article 16(4) of Directive 2004/38...
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> 26. The imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society or the host Member State in its criminal law, with the result that the taking into consideration of periods of imprisonment for the purposes of the acquisition by family members of a Union citizen who are not nationals of aMember State of the right of permanent residence for the purposes of Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that Directive in establishing that right of residence."

28. We consider that that lack of a willingness to integrate is a relevant factor in the proportionality exercise.

29. A further factor that should be taken into account is the possibility of rehabilitation within the host member country. That however can hardly be relevant in this case where the appellant has been extradited to Poland and is likely to be in Poland for

some time. Any rehabilitation which will take place should surely be the responsibility of the Polish courts and other authorities there.

30. The issues of integration and rehabilitation are specific factors we take into account in the balancing exercise when considering the proportionality of removal within the context of the Directive. The other factors which we consider are relevant and would be relevant in an assessment of the appellant's rights under Article 8 of the ECHR relate to the appellant's family life here and the fact that he had started a business. There is very little evidence of the business activity before us and we were not directed to any specific information thereon. We accept that the appellant's wife and child are living in Britain and that clearly is a very strong factor regarding the rights of the appellant under Article 8 but, given that he himself is not living in Britain and indeed cannot do so, that factor is of less relevance. In all, we conclude that the removal of the appellant is not disproportionate under either EU law or under the provisions of Article 8 of the ECHR.

32. It follows from the above that the decision of the First-tier Tribunal having been set aside we re-make the decision and dismiss this appeal on both immigration and human rights grounds.

Signed Date

Upper Tribunal Judge McGeachy