Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01614/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
on 16 June 2015	**On 24 June 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MIROSLAW ANTONI DUL

Respondent

Representation

For the Appellant: Mr M Matthews, Senior Presenting Officer
For the Respondent: Mr A Knox, Hamilton Burns & Co, Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but the rest of this determination refers to them as they were in the First-tier Tribunal.

2. The appellant is a citizen of Poland, born on 1 October 1975. By notice dated 1 August 2014 the respondent decided to make an order to deport him to Poland. Full reasons are set out in a letter of the same date.

3. First-tier Tribunal Judge McGrade allowed the appellant's appeal by determination promulgated on 6 January 2015.

4. The SSHD's first ground of appeal to the UT is that the FtT failed to give adequate reasons for its finding that the appellant had exercised treaty rights in the UK (that is to say, that he had been here as a worker) when there was only the evidence of the appellant and his partner and that had not been subjected to any scrutiny.

5. The second ground of appeal is that the Judge materially misdirected himself in law by finding the appellant's degree of offending not to reach the threshold of a genuine present and sufficiently serious threat affecting the fundamental interests of society. This was inconsistent with the Judge's finding that he is a persistent criminal who will not reform.

6. The first ground of appeal relates to a point not critical to the outcome of the case. The threshold for deporting the appellant is the same whether he has been exercising treaty rights or not. However, as Mr Matthews pointed out, it is a finding based on only very vague assertions in the statements of the appellant and his partner that he had been working for unspecified periods for unspecified employers, not backed up by the evidence which might have been expected such as employers' letters or wage slips, or relating to payment of tax and national insurance. Mr Knox submitted that although the evidence was slender the Judge was entitled to find that the appellant had been in employment. That is possibly so, and any error here would not by itself call for the determination to be set aside. However, in the context of my other conclusions I do not think this is a finding which should be preserved for future proceedings, where findings on the appellant's employment history may have some relevance.

7. The appellant's history of offending both in Poland and in the UK speaks for itself and need not be fully detailed again here. Mr Matthews observed that the offending was ongoing, recent and multiple. He said that the Judge failed to take into account that all offences have victims, likely in this case to be property owners and insurance companies. There is also extensive cost to the public in detecting and prosecuting offences, detaining the appellant, social work involvement, and so on. The Judge thought that the appellant's offending in the UK was less serious than in Poland but that might reflect the response of the courts rather than the nature of the offences which were of a broadly similar nature.

8. Mr Knox pointed out that the threshold of offending was not the only issue which should have been considered. There was evidence of the appellant being in the UK with his family comprising his partner and their three children, two of whom were born here. Even if the threshold had been reached there was a proportionality exercise to be carried out regarding the merits of his removal. Such an exercise was contained in the respondent's reasons letter. It was disputed by the appellant but the matter was not analysed in the determination. Mr Knox submitted, somewhat hopefully, that it might be inferred from the determination that the Judge had carried out the proportionality test and come to the conclusion that the degree of integration of the appellant and his family in the UK outweighed the public interest in his deportation.

9. I reserved my determination.

10. The question posed by the regulations is whether the appellant's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

11. One of the fundamental interests of society must be its protection from offences of dishonesty. Indisputably the threat the appellant presents is genuine and present. The Judge's decision appears to be based on finding the threat not to be "sufficiently serious". That criterion must relate to the level of the threat. It is not a requirement that the offending should be at the more serious end of the criminal scale.

12. There may be cases where minor and infrequent offending, although likely to be repeated, does not amount to a sufficiently serious threat. I do not see how that can be said of offences which are above the trivial level and where convictions are incurred on several occasions every year: most recently, in 2013, convictions on 7 occasions of 10 offences; in 2014, a conviction on 24 January of a bail offence, sentence deferred; on 4 February, a bail offence, admonished; on 10 April, possession of tools with intent to steal, imprisonment for three months; and on 16 May, theft by house breaking, sentence deferred to 24 June 2014, outcome unknown. There is no reasoning in the determination to justify a conclusion that such a history, coupled with a finding that offending would continue, did not amount to a sufficiently serious threat in terms of the Regulations. The findings point in the opposite direction.

13. Mr Matthews did not ask for the determination to be remade on the basis of the evidence led in the First-tier Tribunal. He agreed that even if a finding of a threat at a sufficient level were to be made, there would have to be a proportionality assessment which was entirely absent from the determination. As noted above, Mr Knox concurred on the absence of such findings. There is a considerable amount of relevant discussion in the respondent's decision which is not reflected in the determination.

14. The determination is **set aside** for absence or inadequacy of reasoning to justify its conclusion on the threat posed by the appellant, and for absence of consideration of further issues, including proportionality. No findings are to stand. Under section 12(2)(b)1 of the 2007 Act and Practice Statement 7.2 the nature and extent of judicial fact-finding necessary for the decision to be re-made is such that it is appropriate to **remit the case to the First-tier Tribunal**. The member(s) of the First-tier Tribunal chosen to reconsider the case are not to include Judge McGrade.

19 June 2015
Upper Tribunal Judge Macleman