Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01871/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
on 8 April 2014	**On 11 April 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JACEK MARCIN KOBIALKA

Respondent

For the Appellant: Mr A Mullen, Senior Home Office Presenting Officer
For the Respondent: Ms D Friel, of Livingstone Brown, Solicitors

No anonymity order requested or made

DETERMINATION AND REASONS

1) This determination refers to parties as they were in the First-tier Tribunal.

2) The SSHD appeals against a determination by a panel of the FtT comprising Judge P A Grant-Hutchison and Mrs E Morton, promulgated on 9 December 2013. The panel allowed the appellant's appeal against the respondent's decision of 30 August 2013 to deport him to Poland under Regulation 19 of the Immigration (European Economic Area) Regulations 2006.

3) The first substantial point raised in the SSHD's grounds of appeal to the UT is at paragraph 2:

> The FtT fails to grasp the seriousness of the appellant's offending. It is perverse to refer to the appellant having a minimal criminal record in the UK (paragraph 23) when that record includes a conviction for the illegal supply of drug resulting in a 30 month prison sentence.

4) Paragraph 22 of the determination quotes the Sheriff's sentencing remarks, which refer to the courts dealing with such matters "very seriously"; to the significant amount of illegal drugs involved, and to the fact that significant amounts of harm and significant amount of misery are caused thereby; and to the appellant pleading guilty to "2 serious charges" regarding drugs "of significant value" [£63,000.00].

5) Ms Speirs pointed out that the respondent's decision was made on the basis that the appellant was involved in supply of Class A drugs, whereas the copy indictment which the appellant produced showed that he was involved in supplying Class B drugs only. She accepted that this did not mean that the offence was less than serious. She was unable to suggest how paragraph 22 could be reconciled with paragraph 23, where the panel says, "We accept that the appellant has a minimal criminal record in the UK, although he has a more problematic conviction in Poland."

6) Paragraph 3 of the SSHD's grounds appeal to the UT says:

> The [panel] fails to give any reason for taking a lenient view of the appellant's offending in Poland, described in paragraph 25 as "an unfortunate one-off event".

7) Ms Speirs (who appeared also in the FtT) observed that the appellant's conviction in Poland was known only because he disclosed it in course of preparation of a criminal justice report and in his witness statement. She explained that there had been both evidence and submissions going to the nature of the offence in Poland. However, she was unable to refer to any reasoning in the determination to justify its description of the Polish offence.

8) I note that the appellant describes the Polish offence in his statement as a "minor assault", but it was sufficient for the Polish government to extradite him and for the Polish court to impose a sentence of 2 years' imprisonment. There is at paragraph 10(a) of the determination a record of the appellant's evidence in cross-examination that he did not know the person he assaulted, and that he kept telling the authors of the criminal justice report that it was "a minor assault". The only explanation to be drawn from the determination is that the offence was to be minimised because the appellant said so. That is a point which might more obviously have counted against him.

9) I cannot find reasoning in the determination to explain the conclusion that the Polish conviction, which attracted a significant sentence, could effectively be written off. Such a finding may have been tenable, although at first sight unlikely; but it is not one which can stand without an adequate explanation.

10) The fourth paragraph of the grounds of appeal is as follows:

> The judge erred in finding at paragraph 25 that the respondent "has provided no evidence of how the appellant's offence represents a sufficiently serious threat to British society in the future". The judge

had evidence of the appellant's record of offending and in particular his most recent drugs offence, the gravity of which was not given adequate weight.

11) Mr Mullen submitted that the criminal justice report disclosed a risk of re-offending, even if it was a low one, and that the nature of the appellant's offending was a manifest threat to society. Ms Friel submitted that the above was a passing observation open to the panel, and not a misconception about a legal test.

12) On the point arising from the fourth paragraph, I do not think that either the determination or the ground of appeal is clearly expressed. It might have been open to the panel to conclude that there was no significant threat to the public. I do not find it necessary to analyse this any further, because of the errors disclosed at paragraphs 2 and 3 of the grounds.

13) The grounds identify another error, in that the panel purported to allow the appeal "under the Immigration Rules". The case did not involve the Immigration Rules, but the Immigration (European Economic Area) Regulations 2006. That would have required correction, if the rest of the determination was sound.

14) The determination reads rather as if something may have gone wrong in its preparation, not picked up before it was promulgated. The finding that the appellant's UK criminal record as "minimal" is self-contradictory on its face, and not one properly open to any panel to have reached. There is no sustainable explanation of why the Polish criminal record was thought to be an insignificant matter. These are errors of law, such that the determination has to be **set aside** in its entirety. The case is not of a nature whereby the Upper Tribunal could proceed to substitute a fresh decision, based upon the evidence which was before the FtT and upon submissions. A fresh judicial fact finding exercise is required, of a nature and extent such that under section 12(2)(b)(i) of the 2007 Act and Practice Statement 7.2 it is appropriate to **remit the case to the First-tier Tribunal**. The members of the First-tier Tribunal chosen to reconsider the case are not to include Judge P A Grant-Hutchison or Mrs Morton.

Hugh Macleman

10 April 2014
Judge of the Upper Tribunal