



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/16361/2012**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 11 May 2017

Promulgated

On 20 June 2017

Before

UPPER TRIBUNAL JUDGE BLUM

Between

A L

(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Loughran, Counsel, instructed by Sutovic & Hartigan Solicitors

For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Lenier (FtJ), promulgated on 11 October 2016, dismissing the appellant's appeal against the respondent's decision of 05 July 2012 to make a deportation order against him.

Factual Background

2. The appellant is a national of Kosovo, date of birth 05 November 1983. He entered the United Kingdom on 17 October 1999 and claimed

asylum the following day. He fled Kosovo because of the conflict between Serbians and ethnic Albanians and left behind his parents and sister. His asylum claim was refused on 14 March 2000 but he was granted Exceptional Leave to Remain until 14 March 2004. He was subsequently granted Indefinite Leave to Remain (ILR) on 3 February 2005. The appellant worked as a cleaner and a construction worker in the UK but, due to his mental illness, he has been unemployed since 2010.

3. The appellant received one caution for shoplifting in 2003. Between 2008 and 2010 he received 9 convictions, mainly for dishonesty offences and breaches of court orders. 2 of his convictions during this period resulted in the appellant being sentenced twice to 12 weeks imprisonment. On 6 July 2010 the appellant was convicted of an offence of possession with intent to supply a Class A drug (105.3 g of cocaine) and received a three-year prison sentence on 10 September 2010. The sentencing judge accepted that the appellant was acting as a caretaker for the drugs and that he was 'a vulnerable sort of person' because of his mental health difficulties. Following his release he was convicted of battery on 18 August 2012, 2 offences of criminal damage on 31 August 2012 and 3 March 2013, an act of outraging public decency on 8 March 2013, and a conviction for public nuisance in June 2016 (exposing himself to a medical worker).
4. The appellant has received a diagnosis of paranoid schizophrenia and has been admitted to a psychiatric ward on 6 occasions since 2008. His mental illness first manifested itself around 2004 or 2005. While serving his custodial sentence for his index offence the appellant was transferred to hospital on 10 October 2011 under the Mental Health Act 1983. He remained detained as a patient after his custodial detention ended. He was sentenced to a hospital order, without a restriction order, on 28 May 2013 for the act of outraging public decency (exposing himself on the tube). At the time of the appeal before the First-tier Tribunal he remained subject to a Community Treatment Order (CTO) under the care of Brent South CMHT and saw a care coordinator weekly.
5. In deciding to make a deportation order on 5 July 2012 the respondent regarded the appellant's drug conviction as particularly serious and considered that the escalating nature of his offending established a risk to the public. After considering evidence relating to the availability of mental health treatment in Kosovo the respondent concluded that the appellant's deportation would not breach article 3. Whilst accepting that the appellant had established a private life in the UK the respondent was of the view that the decision to deport him did not interfere with his private life and that he could reasonably readjust to life in Kosovo.
6. On 15 December 2014 the FTT allowed the appellant's appeal against the respondent's decision to make a deportation order. The

respondent successfully appealed this decision to the Upper Tribunal and the case was remitted to the First-tier Tribunal for rehearing, which occurred on 08 August 2016.

The decision of the First-tier Tribunal

7. The appellant produced two witness statements and gave oral evidence at his hearing. The FtJ summarised the evidence from the appellant, which included assertions that he no longer took illegal drugs, that he wanted to be employed, that he would have no support in Kosovo which would worsen his illness, and that he had not spoken to his parents for over 6 years and had lost contact with them and his sister. The appellant had cousins in the United Kingdom and was said to be close to one in particular whom he saw at least twice a week (although none of the cousins attended the hearing and none provided witness statements [132]). His family members helped him to curb his offending and supported him financially. They came from Kosovo and often returned there. The appellant had last been admitted to hospital some 6 or 7 months prior to the hearing and remained in hospital for 3 months having been sectioned. He had been sent to the hospital because he was found talking to himself in the street and hurting his arm. He took medication 3 times a day which he collected from his doctor and went to a clinic to have two injections once every two weeks. The appellant saw a care coordinator once a week for an hour. The FtJ recorded the appellant's description of his life and recorded the details of the applicants offending and his hospital admissions.
8. The FtJ made a number of very detailed findings, extending from [66] to [162], based on the documentary evidence before her, including a medical report from Dr Obuaya dated 30 June 2016. The following findings are, for the purposes of this decision, particularly relevant. Other than the public nuisance offence in June 2016 the appellant had remained out of trouble since May 2013, which suggested some rehabilitation [73]. He had committed no other drug offences since the index offence but had a long history of using illicit drugs [74] to [75] and the FtJ had serious reservations about the appellant's claim to have stopped his drug abuse [96]. The appellant's offending history displayed a "disturbing trend of sexualised behaviour to women". Medical reports supported a link between the appellant's sexualised behaviour and relapses in his mental health [77], and his history supported a correlation between his mental health relapses and his criminal offending [78] to [83] and [85] to [88] and [90]. When the appellant was fully compliant with his medications Dr Obuaya noted that he had shown a reasonably good symptomatic response and that there was a moderately good improvement with a robust treatment plan [92]. The FtJ accepted that "... the greater the degree of intervention and support, the better the appellant responded, although there remained periods of mental relapse, and offending had not stopped completely" [93]. The appellant's risk of suicide and self-harm, as of the date of the hearing, was low [94].

9. Having regard to the appellant's unemployment since 2010 the Ftj found it unlikely that he would be capable of regular employment and that he was likely to struggle with finding and keeping employment in Kosovo given the regular relapses in his mental health [98] and [134]. Despite a number of inconsistencies in the appellant's account the Ftj accepted that he had not been in contact with his parents for 6 years [100].
10. Having satisfied herself that the appellant was a foreign criminal and that sections 117A-D of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) applied, the Ftj found that the appellant could not meet the requirements of paragraph 399A of the immigration rules because he had not been lawfully resident in the UK for most of his life [107], although the Ftj was (just) satisfied that the appellant was socially and culturally integrated in the UK given his long length of residence despite his history of offending and drug use and the absence of any witnesses at the hearing [108] to [111]. The Ftj additionally found that there were 'very significant obstacles' to the appellant's integration into Kosovo in light of the inadequate medical treatment available and the appellant's loss of contact with family members [113].
11. Having found that the appellant could not meet the requirements of paragraphs 399 or 399A of the immigration rules, the Ftj proceeded to consider whether there were 'very compelling circumstances' over and above those described in 399 or 399A. In determining the existence of 'very compelling circumstances' the Ftj took account of the cumulative factors identified in Ms Loughran's skeleton argument which included the circumstances of his arrival in the UK, his lawful leave, the severity and level of support required for his mental health problems, his lack of ties to Kosovo, the obstacles to return, and the links between his mental health and offending history, which was said to reduce the public interest in deportation [117]. In considering these factors the Ftj placed particular emphasis on the appellant's very serious mental health issues which included his history of compliance with his medication and illicit drug use.
12. The Ftj found that Dr Obuaya's concerns about the appellant's ability to access available and affordable medication in Kosovo and his poor compliance with medication [123] - [124] were legitimately held. The Ftj was satisfied that, without a robust and ongoing intervention, the appellant was likely to 'slip through the net' in Kosovo with consequences of deterioration in his mental state, reawakening of delusional beliefs, paranoia and a greatly increased likelihood of offending [125]. The background evidence considered showed that the appropriate level of treatment was unlikely to be available in Kosovo [126] to [129], that there were no social grants for housing in Kosovo or institutions or facilities that provided housing assistance to vulnerable people [133], and it was unclear whether the appellant would fulfil the criteria for some social assistance or whether he would have the mental capacity to apply for assistance [135]. The appellant

would struggle to maintain employment and access accommodation [141], that as his mental health situation deteriorated he would be prone to increased self-neglect, and would struggle to eat and drink [142].

13. The Ftj did not accept that much family support would be available and that if it was initially offered it may well crumble given the extent of the appellant's needs [130] to [131]. The Ftj accepted that there was a risk of the appellant manifesting inappropriate sexual behaviour towards women [136], that there was a significantly increased likelihood of offending in Kosovo due to the lower level of mental health support, and that if he did approach women whilst in a psychotic and disinhibited state there would be a risk of others reacting in an angry or violent way to him [138].

14. Having considered the authorities of *MM (Zimbabwe) [2012] EWCA Civ 279* and *GS (India) [2015] EWCA Civ 40* the Ftj accepted that the appellant had established a private life in the UK given his residence of nearly 17 years, his "well established relationships with his cousins", his employment, his friendships, his social and cultural integration, and the relationships formed with medical professionals [147]. At [148] the Ftj indicates that she had considered the factors in the case of *Maslov v Austria [2008] EHR 546*.

15. At [150] the Ftj states,

On return to Kosovo, the appellant would be immensely vulnerable. The most likely scenario, given the availability of medication, but limitations of state help, would be a gradual dismantling of his physical and moral integrity, and sense of identity, for the reasons above. However, the root cause of this disintegration would be his naturally occurring mental illness.

16. At [151] the Ftj states,

However, even taking into account all the cumulative factors weighing in favour of the appellant's private life, with some regret, I find that these remain insufficient to bring the appellant within the "exceptional" category in *GS*.

17. At [152] the Ftj explains that the risk of suicide was low and that the appellant was not so ill, physically or mentally, that he could approach the level of tests in *N. v the United Kingdom* (App no. 26565/05) or *D. v the United Kingdom* (2 May 1997, Reports of Judgments and Decisions 1997-III).

18. At [153] the Ftj states,

Moreover, when assessing proportionality in deportation cases, the scales are not evenly balanced. Greater weight has to be given to the public interest. In the appellant's case, the public interest is very strong. He committed a serious drugs offence, (albeit some time ago, and acting only as a "caretaker"), committed previous offences, and has continued to

offend. Despite the underlying reasons behind offending, (and I accept it generally mirrored relapses in his mental state), there remains a strong public interest in the prevention of disorder and crime.

19. The FtJ proceeded to consider Lord Bingham's step-by-step approach in *Razgar* [2004] UKHL 27, accepted that the appellant's removal amounted to an interference with his private life, and indicated that she had considered the nature of his private life and would "...not repeat the findings" [155]. The FtJ indicated that she took into account, when assessing proportionality, the factors set out in sections 117B and 117C of the 2002 Act [156] to [159]. The FtJ concluded, having indicated that she considered all the evidence, that there were no very compelling circumstances over and above those described in paragraph 399 and 399A immigration rules, sufficient to outweigh the public interest requiring the appellant's deportation [162]. The appeal was dismissed.

The criticism of the First-tier Tribunal's decision and discussion

20. The grounds of appeal, amplified by Ms Loughran at the hearing, are threefold. It is firstly contended that, at [153], the FtJ misdirected herself in law. By stating that "greater weight has to be given to the public interest" the FtJ proceeded on the basis that the public interest in deportation proceedings could not be outweighed. In so doing the FtJ treated the public interest considerations as a "trump card" instead of weighing all the factors in the balance in a fact specific way.
21. I have no hesitation in rejecting the 1st ground. Properly considered in the context of [153], and the decision as a whole, it becomes apparent that the FtJ's reference to "greater weight" being placed on the public interest is an expression of the strong public interest considerations at play in a deportation decision, as opposed to a decision on a human rights claim that does not involve criminality. The sentence immediately preceding that relied on by the appellant refers to the scales being unevenly balanced when assessing proportionality in deportation cases. I take this to reflect the significant public interest factors necessary to assess proportionality in deportation cases including the need to deter offending by foreign nationals, the expression of society's revulsion at serious offending, the need to ensure social cohesion and public confidence, and the serious impact that criminality has on society, as identified by the FtJ at [157]. The FtJ summarises the strong public interest factors at play in the instant appeal in the sentence immediately following that relied on by the appellant, and then goes on to undertake a proportionality assessment, something that would not be necessary if, as argued by Ms Loughran, the public interest factors acted as a 'trump card'. Far from treating the public interest factors as a 'trump card', incapable of ever outweighing the particular circumstances of an individual case, the sentence, reasonably and holistically understood, indicates that the FtJ has engaged in a proper proportionality assessment weighing

up the strong factors in the appellant's favour, which she identified at length, against the strong public interest factors for his deportation.

22. The 2nd ground of challenge contends that the FtJ failed to consider that the "gradual dismantling" of the appellant's moral and physical integrity (at [150]) formed part of the aggregation of matters which could collectively constitute "exceptional circumstances" within the meaning of paragraph 398, notwithstanding the finding that it was not sufficient to bring him within the "exceptional category" in *GS* (at [151]). It was argued that the FtJ failed to take into account her own findings of the serious impact on the appellant if deported such as his increased risk of suicide, his increased self-neglect, and that he would struggle to eat and drink. These factors were capable of amounting to 'very compelling circumstances' but were not adequately considered in the balancing exercise because the FtJ focused, at [151], on whether the appellant fell within the "exceptional" category in *GS*, and she failed to make a finding as to whether the cumulative impact on his private life, established over 17 years in this country, would be disproportionate.
23. The FtJ's consideration of *GS* cannot be read in isolation, and her assessment at [150], [151] and [152] did not constitute the end of her consideration as to the existence of 'very compelling circumstances'. At [155] the FtJ indicates that, as she had already considered the nature of the appellant's private life, she will not repeat those findings. As summarised at paragraphs 8 to 13 above, the FtJ made a large number of very detailed findings relating to the nature and extent of the appellant's private life, the impact on his mental integrity if deported to Kosovo, and the likely consequences of a deterioration in his mental integrity. At [162] the FtJ indicates that she considered "all the evidence", which included the factors identified in sections 117B and 117C of the Nationality, Immigration and Asylum Act 2002 and those *Boultif v Switzerland* (2001) ECHR 497 and *Maslov v Austria* (App no. 1638/03). There is nothing in the structure or content of her decision to indicate that she failed, in concluding the absence of 'very compelling circumstances', to take into account her findings relating to the gradual dismantling of the appellant's physical and moral integrity and the very significant impact on him of the deportation decision. The decision, read holistically, suggests that the FtJ very carefully considered the significant impact on the appellant's private life against the significant public interest factors at play. From [156] to [161] the judge refers to relevant and material factors in her proportionality assessment, and at [162] she indicates that all the evidence has been considered in determining the existence of 'very compelling circumstances'. There was no need for the FtJ to have repeated her findings when it came to balancing the competing interests. Her decision was ultimately one rationally open to her for the reasons given.

24. The 3rd ground contends that, despite properly directing herself in accordance with the decision in *Maslov*, the FtJ nevertheless fails to give 'very serious reasons' to justify the appellant's expulsion.
25. In *Akpinar, R (on the application of) v The Upper Tribunal (Immigration and Asylum Chamber)* [2014] EWCA Civ 937 the Court of Appeal concluded that *Maslov* did not establish a new rule of law to the effect that, unless the state can show that there are "very serious reasons" for deporting a settled migrant who has lawfully spent all or the major part of his childhood and youth in the UK, that his article 8 rights will prevail. In so concluding the Court of Appeal considered a wide range of decisions from the European Court of Human Rights which highlighted the danger of treating "very serious reasons" as if they were a legislative requirement, as well as a number of domestic authorities. I find there was no misdirection by the FtJ.
26. I am satisfied, in any event that the FtJ has adequately considered the factors identified in *Maslov*. These included the nature and seriousness of the offence committed, the length of the individual's stay in the country from which they were to be expelled, the time elapsed since the commission of the offence and the person's conduct during the period, the nationalities of the various persons concerned, the persons family situation, and the solidity of cultural, social and family ties with the host country in the country of destination. The decision, again read holistically, indicates that the FtJ has considered all of these factors. The judge was acutely aware that the appellant had resided in the UK for 17 years [147] and [148], the nature and seriousness of his offending [153], the history of the appellants criminal offending [79] to [90], his age when he arrived in the UK [107], [118] and [148], his family situation in both the UK and Kosovo [132], [146] and [147], and the nature of the private life established in the UK [147] and impact on his private life if deported [130], [131], [142] and [143]. It is not arguable that the FtJ failed to substantively consider the *Maslov* criteria.
27. In the circumstances I find that the judge did not materially err in law and I formally dismiss the appeal.

Notice of Decision

The First-tier Tribunal did not materially err in law. The appeal is dismissed.

Signed



Upper Tribunal Judge Blum
2017

Date: 19 June

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed



Upper Tribunal Judge Blum
2017

Date: 19 June