



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002446

First-tier Tribunal No: HU/02029/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 September 2024

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE MAHMOOD
UPPER TRIBUNAL JUDGE LOUGHRAN

Between

JAN WATROBA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E. Nicholson, instructed by HCR Legal LLP
For the Respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 15 August 2024

DECISION AND REASONS

1. The respondent made a decision to deport the appellant on 28 January 2023 because of a conviction for attempted robbery for which he was sentenced to 4 years imprisonment. The appellant is a Polish citizen who was granted Indefinite Leave to Remain (ILR) under the European Union Settlement Scheme (EUSS). The decision to deport attracted a right of appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the CRA Regulations 2020'). There is no evidence before this tribunal to suggest that the appellant lodged an appeal or that an appeal has been determined in relation to the decision to deport.
2. The appellant made representations to the respondent on human rights grounds. The respondent refused the human rights claim in a decision dated 02 October 2023. The index offence relied on by the respondent was one that took place after the date that the United Kingdom exited from the European Union (31 December 2020). For this reason, the respondent considered the application with

reference to the domestic legal framework relating to deportation. The appellant was subject to automatic deportation under the UK Borders Act 2007 ('UKBA 2007'). Because he had received a sentence of at least 4 years imprisonment, the exceptions to deportation contained in sections 117C(4)-(5) of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002') were not available to him (although might form part of an overall assessment). The appellant needed to show that there were 'very compelling circumstances' to outweigh the public interest in deportation with reference to section 117C(6) NIAA 2002. The decision attracted a right of appeal under section 82 NIAA 2002.

3. First-tier Tribunal Judge Buckwell ('the judge') dismissed the appeal in a decision sent on 18 April 2024. The judge summarised the background to the appeal, including the respondent's reasons for refusing the human rights claim [4]-[16]. The judge went on to set out the evidence and submissions at the hearing in some detail [21]-[70]. Under the heading 'Legal Framework and Findings' the judge then set out his reasons for the decision [72]-[87].
4. The judge noted that the appellant argued that he met the exception to deportation contained in section 33 UKBA 2007 i.e. where removal of a 'foreign criminal' would breach a person's rights under the European Convention. The appellant relied on the right to private and family life under Article 8 of the European Convention. The judge went on to identify that Part 5A NIAA 2002 was the relevant statutory provision governing the assessment of Article 8. In particular, section 117C related to the assessment of Article 8 in the context of the deportation of foreign criminals [72].
5. The judge set out the terms of Exception 1 (private life) contained in section 117C(4) NIAA 2002 [72]. He noted that all three elements needed to be met before the exception was satisfied. These were (i) that the person has been lawfully resident in the United Kingdom for most of their life; (ii) that the person is socially and culturally integrated in the United Kingdom; and (iii) that there would be very significant obstacles to the person's integration into the country to which it is proposed that they would be deported. The judge noted that no argument was made in relation to Exception 2 (family life with a partner or children) contained in section 117C(5) [74].
6. The judge then turned to consider the relevant test in a case involving a sentence of at least 4 years imprisonment. He noted that section 117C(6) required the appellant to show that there were very compelling circumstances over and above the exceptions [74]. The judge went on to say:

'Although it is asserted in the skeleton argument that the appellant would meet the requirements of Exception 1, I find that to be incorrect. Whilst I can accept that the appellant has spent the majority of his life in this country it is arguable that he is not fully integrated in the UK, in view of his criminal record.'
7. The judge did not appear to make any further findings in relation to any other circumstances that might be relevant to the assessment of whether the appellant was socially and culturally integrated in the UK for the purpose of section 117C(4) (b) or with reference to any of the principles identified in relevant case law on this issue: see *Binbuga (Turkey) v SSHD* [2019] EWCA Civ 551, *CI (Nigeria) v SSHD* [2019] EWCA Civ 2027, and *AM (Somalia) v SSHD* [2019] EWCA Civ 774.
8. The judge went straight from considering section 117C(4)(b) to stating at [76] that the key question was whether the appellant had established 'very compelling

circumstances' over and above the exceptions that might outweigh the public interest in deportation. He confirmed that he had considered the evidence taken as a whole [77].

9. The judge then turned to consider some of the evidence given by the witnesses, in particular, the appellant's mother, a former neighbour, and the appellant himself. It seems that he found them to be generally credible, although he noted that the appellant had not been honest with his mother about his continued drug taking. The appellant claimed that he now only took drugs once every week or two [78].
10. Without particularising it as such, it seems that the judge touched on the issue of risk of reoffending and rehabilitation at [79]. The judge noted that the appellant had done well to secure employment and found this to be a 'positive factor'. However, the judge expressed concern about the appellant's continued drug taking, which he considered to be a factor that was likely to increase the risk of him committing further offences. He considered a recent letter from the Probation Service, which he said stated 'that the appellant... remained classified as 'high risk'. The judge found that he was obliged to give significant weight to this assessment in light of the appellant's evidence that he continued to take drugs.
11. The decision then returned to issues that were relevant to the assessment of Exception 1, but this time in relation to the test contained in section 117C(4)(c). The judge found that, even though the appellant has been absent from Poland for a period of 16 years, he would not face very significant obstacles to his integration. The judge referred to the relevant guidance given by the Court of Appeal in *SSHD v Kamara* [2016] EWCA Civ 813. The judge went on to note that the appellant continued to have family members in Poland who might be able to provide him with assistance during an initial period of re-integration. His parents could also provide him with assistance from the UK [80]-[81].
12. The judge concluded that there were no 'very compelling circumstances' to outweigh the public interest in deportation. He stated that the provisions contained in Part 5A NIAA 2002 'constitute a complete statutory code'. In assessing proportionality, he had considered the circumstances in the round with reference to the Supreme Court decision in *HA (Iraq) v SSHD* [2022] UKSC 22 [83]. In his broad conclusion towards the end of the decision the judge stated:

'85. Here I find that the appellant has not established that there are factors in his favour which outweigh those factors favouring the respondent in my consideration of proportionality. Overall I have followed a balance sheet approach and have taken every aspect of the evidence into account, whether or not specifically referred to herein.'
13. The appellant applied for permission to appeal to the Upper Tribunal. The grounds are somewhat difficult to follow due to the formatting but the following points are raised.
 - (i) The First-tier Tribunal erred in failing to consider relevant principles outlined in relevant domestic case law and jurisprudence of the European Court of Human Rights. First, the judge failed to consider adequately the fact that the exceptions contained in section 117C(4)-(5) can form part of the overall assessment under section 117C(6): *NA (Pakistan) v SSHD* [2016] EWCA Civ 662 referred. Second, the judge

failed to take a structured approach to the assessment of whether it would be disproportionate to remove a settled migrant: *Maslov v Austria* [2009] INLR 47 referred.

- (ii) The First-tier Tribunal failed to make clear findings in relation to the test contained in section 117C(4)(b). First, in stating that it was only 'arguable' that he did not meet the test. Second, in seeming to require that he was 'fully' integrated'. Third, in failing to have regard to relevant guidance in *CI (Nigeria v SSHD)* [2019] EWCA Civ 2027, which stated that it was hard to see how imprisonment, by itself, would 'destroy the social and cultural integration of someone whose entire social identity has been formed in the UK'.
- (iii) The First-tier Tribunal erred in finding that the appellant would not face 'very significant obstacles' to his integration in Poland in relation to the test contained in section 117C(4)(c). Having failed to adequately assess the level of integration in the UK, it was not possible for the judge to conduct an adequate assessment of this issue. The judge failed to explain why he thought the appellant's extended family members would assist him.
- (iv) The First-tier Tribunal stated that it had taken a balance sheet approach, but in fact failed to conduct a balance sheet assessment.
- (v) A final observation was made about the EUSS element of the case, but this was not relied on at the hearing.

14. We have considered the First-tier Tribunal decision, the evidence before the First-tier Tribunal, the grounds of appeal, and the submissions made at the hearing, before coming to a decision in this appeal. It is not necessary to summarise the oral submissions because they are a matter of record, but we will refer to any relevant arguments in our decision.

15. The Supreme Court in *HA (Iraq) v SSHD* [2022] UKSC 22 reiterated that judicial caution and restraint is required when considering whether to set aside a decision of a specialist tribunal. In particular, judges of the specialist tribunal are best placed to make factual findings. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently: see *AH (Sudan) v SSHD* [2007] UKHL 49 and *KM v SSHD* [2021] EWCA Civ 693. Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account: see *MA (Somalia) v SSHD* [2020] UKSC 49. When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out: see *R (Jones) v FTT (SEC)* [2013] UKSC 19. We have borne those considerations in mind when reaching our decision.

DECISION AND REASONS

16. It is clear from the decision that the judge was aware of the relevant factual circumstances relating to this human rights claim. The appellant was born in Poland but came to the UK with his parents in 2007 when he was only 7 years old. At the date of the hearing before the First-tier Tribunal he was 24 years old. The appellant has spent the majority of his childhood and all of his adulthood in the

UK. This is an important formative period in a young person's life. Although the appellant continues to have relatives in Poland, his evidence was that he does not know them well. He has never lived independently as an adult in Poland. Although the respondent noted previous convictions of a less serious nature, which predated the United Kingdom exiting from the European Union, the index offence that triggered a deportation decision was a far more serious offence that took place after EU-exit. The offence was sufficiently serious to place the appellant in the highest category of offending for the purpose of the statutory scheme relating to the assessment of Article 8 in the context of deportation proceedings. The judge was correct to identify the fact that 'very compelling circumstances' would be needed to outweigh the undoubtedly strong public interest in deportation.

17. However, having ended the decision with generalised statements about a balance sheet approach, we find that there is some force in the submission that this was not the approach that in fact was taken in this case. The judge jumped from what was only a partial assessment of section 117C(4)(b), which did not evaluate any of the appellant's personal circumstances, to statements about 'very compelling circumstances'. The decision then jumps back to considering some factors that might be relevant to section 117C(4)(c), but again, not all relevant factors. The decision touches on issues relating to the strength of the public interest, such as rehabilitation and risk of reoffending, without evaluating how much weight should be placed on those factors or weighing them against the totality of the appellant's personal circumstances.
18. The statutory scheme is designed to reflect where the respondent considers a fair balance is struck for the purpose of Article 8 of the European Convention. For this reason, the Supreme Court in *HA (Iraq)* has made clear that an Article 8 proportionality assessment is at the heart of every case considered under section 117C(6). A balance sheet exercise of the kind suggested by the Supreme Court in *Hesham Ali v SSHD* [2016] UKSC 60 requires an evaluative assessment of all the relevant factors relating to the appellant's personal circumstances balanced against the factors weighing in favour of the public interest in deportation.
19. The Supreme Court has repeatedly stated that this exercise must still be consistent with the jurisprudence of the Strasbourg court. Relevant factors that might need to be considered include the nature and seriousness of the offence, the length of the person's stay in the country, whether formative years were spent in the host country as a child, the time lapsed since the offence was committed and the person's conduct during that period, the nationalities of the various persons concerned, the person's family situation, the solidity of social, cultural and family ties in the host country and the country of destination: see *Unuane v UK* (2021) 72 EHRR 24 and *Maslov v Austria* [2009] INLR 47.
20. Whilst many of the findings made by the judge were open to him to make on the evidence, we find that the decision only makes partial findings and fails to consider other matters that were relevant to the assessment. The findings are not made in a structured way to show what weight was placed on the appellant's private and family life given that he is a settled migrant who has lived in the United Kingdom for most of his childhood and all of his adult life. Whilst the weight to be given to the public interest is perhaps more obvious in a case involving a serious offence attracting a sentence of 4 years imprisonment, there is an absence of clear findings as to how that factor might be affected, if at all, by rehabilitation or the passage of time since the offence.

21. For the reasons given above, we conclude that the First-tier Tribunal decision involved the making of an error of law. The decision is set aside.
22. The broad factual background does not appear to be in any serious dispute. The normal course of action would be for the Upper Tribunal to remake the decision even if it required hearing evidence or making further findings of fact. However, we consider that there is so little evaluation of the facts in the balancing exercise that the case would need to be heard afresh. We take into account the importance of the issues to the appellant who is a settled migrant facing deportation to a country which he left when he was 7 years old. Given the importance of those issues, and the potential loss of the two-tier decision making process, on this occasion, we consider that it is appropriate to remit the case to the First-tier Tribunal for a fresh hearing: see *AEB v SSHD* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC).

Notice of Decision

The First-tier Tribunal decision involved the making of an error of law

The decision is set aside

The appeal is remitted to the First-tier Tribunal for a fresh hearing

M. Canavan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 August 2024