IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004652
First-tier Tribunal No:
HU/00077/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 12 February 2025

Before

UPPER TRIBUNAL JUDGE RUDDICK
DEPUTY UPPER TRIBUNAL JUDGE Ó CEALLAIGH KC

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NIKODEM JAKUB LOPATA
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Andrew Mullen, Senior Home Office Presenting Officer
For the Respondent: Jonathan Holt, instructed by Intime Immigration Solicitors

Heard at Field House on 22 January 2025

DECISION AND REASONS

Introduction and background

1. The Secretary of State for the Home Department appeals with permission against the decision of First-tier Tribunal Judge Ali who allowed Mr Lopata's appeal against her decision to refuse his human rights claim and his application under the EU Settlement Scheme, pursuant to a decision to deport him. In order to avoid confusion, we will refer to the parties as they appeared below. Accordingly, while the Secretary of State is formally the appellant in this appeal, we shall refer to her as "the Respondent" and Mr Lopata as "the Appellant".

2. The Appellant is a national of Poland born on 10 August 2002. He entered the United Kingdom on 15 August 2006 when he was four years old and has lived here since that date.

3. On 1 February 2020 the Appellant applied for leave under the EU Settlement Scheme ("EUSS").

4. The Appellant has an unenviable list of convictions given his young age. The first, committed in 2019 when he was 16 years old, involved possession of cocaine with intent to supply and led to a sentence to a community order. This was followed in December 2021 with a conviction for motor vehicle offences and possession of cannabis, which led to 6 points on his license and a fine.

5. On 28 February 2022 at Chester Crown Court, the Appellant was convicted of dangerous driving, possession of cocaine/heroin with intent to supply, possession of a knife or blade in a public place, and possession of cannabis. The offences had been committed in June 2021 and January 2022.

6. On 11 April 2022 at Chester Crown Court the Appellant was sentenced to 54 months' imprisonment in a Young Offenders' Institution, with a victim surcharge of £190. The Court also made an Order for the forfeiture of cash in the sum of £673.00.

7. Following these events the Secretary of State decided to pursue deportation. In the course of 2023, she served various notices on the Appellant, informing him of her intention to deport him.

8. On 31 January 2023 the Appellant submitted representations as to why he should not be deported, which were treated as a human rights claim in respect of his family and private life in the UK.

9. On 21 December 2023, the Respondent made two separate decisions, which were both served on the Appellant 09 January 2024. One was a refusal of his application for leave to remain under the EU Settlement Scheme and the other was a decision to refuse his human rights claim and to deport him pursuant to Regulation 23 of the EEA Regulations, section 5(1) of the Immigration Act 1971 and section 32(5) of the UK Borders Act 2007.

10. It is the latter decision that is the subject of this appeal.

11. The matter came before FTT Judge Ali sitting in Manchester on 9 August 2024. the Appellant and his mother gave evidence. The FTTJ records the following matters agreed between the parties [16]:

> "It was accepted that the Appellant had been lawfully resident in the UK for most of his life. It was accepted that the length of total lawful residence in the UK at the time of the decision was 15 years and 5 months. It was accepted that given the Appellant was 21 years old, that he had been

lawfully resident in the UK for more than half of his life. It was acknowledged by the Respondent that the Appellant had spent the majority of his life in the UK, including his formative years and attended school in the UK, and it was accepted that he is likely to have built friendships/ties outside of the family unit. It was also accepted that the Appellant would have little physical family support in Poland given that his mother and uncles are resident in the UK, and he do[es] not appear to have had any contact with his father."

12. Although there is reference in the determination (at [11]) to the Appellant's case being made under the Community Treaties, it is clarified (at [17]) that the parties agreed that the sole issue for determination was whether or not his deportation would amount to a breach of Article 8 ECHR.

13. On 17 September 2024, Judge Ali allowed the appeal under Article 8 ECHR.

14. On 23 September 2024, the Secretary of State appealed in time. On 8 October 2024, permission to appeal was granted by FTTJ O'Garro.

15. On 9 December 2024, the Appellant filed and served a Rule 24 response.

Grounds of appeal

16. The Secretary of State's grounds of appeal may be summarised as follows:

a. Ground 1: The FTTJ erred in law by requiring the SSHD to show, in reliance on the decision in Maslov v Austria [2009] INLR 47, that there were "very serious reasons" to justify Mr Lopata's deportation, which is said to be contrary to s117C(6) of the 2002 Act, which requires the deportation of foreign criminals who have been sentenced to at least four years' imprisonment unless there are "very compelling circumstances". The approach of the FTTJ is said to have been a reversal of the burden of proof. Alternatively, if the FTTJ had applied the correct test, there was nothing in the findings of the FTTJ that demonstrates that there are very compelling circumstances over and above the statutory exceptions. The FTTJ had impermissibly relied on the Appellant's lack of reoffending, which should have been treated as a neutral factor.

b. Ground 2: The FTTJ failed to give adequate reasons for his conclusion that there were very significant obstacles to Mr Lopata reintegrating into Poland. The Secretary of State rejected the finding of the FTT that Mr Lopata does not speak Polish and says that this conclusion was not adequately reasoned. The Secretary of State also argues that Mr Lopata could learn Polish within a reasonable period or could get by speaking English, or that his family might travel with him to Poland.

17. On 6 November 2024 the Secretary of State filed a skeleton argument. By this document it is argued that: (i) the FTTJ failed to undertake the "delicate and holistic" assessment that is required in deportation appeals brought by criminal offenders who came to the UK at a very young age in accordance with Sanambar v Secretary of State for the Home Department [2021] UKSC 30; and (ii) that Sanambar supports the Secretary of State's position that there would not be very serious obstacles to his reintegration.

18. On 9 December 2024 Mr Lopata served a Rule 24 response drafted by Mr Holt. This set out his position inter alia that: (i) the FTTJ had applied the "very compelling circumstances" test; (ii) the FTT had indeed undertaken the "delicate and holistic" assessment that is required; (iii) the FTTJ's decision did not turn solely on his answer to "the Maslov question" (whether there were very serious reasons to justify the appellant's expulsion); he considered that question as part of the "very compelling circumstances" assessment, which was a lawful approach for him to have taken.

The hearing

19. The Secretary of State was represented by Mr Mullins who helpfully focussed his submissions on the key issues. His submissions were these:

    a. First, the FTT had failed to identify the circumstances which amounted to "very compelling circumstances" over and above those described in Exceptions 1 and 2 for the purposes of s117C(6) of the 2002 Act;

    b. Second, the FTT Judge appeared to give too much weight to the question of Mr Lopata's rehabilitation. Mr Mullins considered that the FTTJ should have found that Mr Lopata had only relatively recently been released from prison, and consequently little reliance could be placed on the lack of offending since. Moreover, he relied on the judgment of the Supreme Court in HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22 (in particular at [58]) in support of the proposition that rehabilitation would only "rarely" carry significant weight.

20. It was Mr Mullen's view that the matter should be remitted to the FTT for a full rehearing.

21. In response to questioning from the Panel, Mr Mullen accepted that the Tribunal had correctly directed itself, albeit he considered that it had applied the correct "form" of the test but not its "substance". It was his submission that Mr Lopata had only made a "bare case", which was not sufficient to meet the elevated threshold in s117C(6). There had to be something "over and above" separation from family and potential difficulties in Poland. He considered the finding that Mr Lopata did not speak Polish to be "very odd" but did not pursue the submission in the

grounds that it was not one the FTT was entitled to reach. In his submission, the fact that there was a serious Class A drugs offence meant that the threshold in Maslov (of "very serious reasons") was reached. It was difficult to imagine a much more serious offence.

22. For Mr Lopata, Mr Holt in his very helpful submissions elaborated on his Rule 24 response. He accepted that had the Maslov question dealt with at [58] of the determination been the only analysis of Article 8 ECHR he would be in considerable difficulty. However it was not. The determination had to be read holistically, and the FTTJ had repeatedly referred to the correct test, so plainly had it in mind. It was clear from Sanambar that the Maslov guidance needed to be considered in the context of that holistic analysis, and the FTTJ had clearly undertaken that exercise when the determination was read as a whole.

23. In respect of the question of rehabilitation, he submitted that the weight to be accorded to rehabilitation is ultimately a matter for the Tribunal. Both rehabilitation and, separately, risk of reoffending were considered in what was in reality a careful judgment.

24. At the end of the hearing we reserved our decision.

Discussion

25. Notwithstanding Mr Mullen's careful submissions we consider that the decision of the First-tier Tribunal does not contain an error of law.

Ground 1

26. As Mr Mullen candidly accepted, the FTTJ correctly directed himself in law, referring to the proper test on several different occasions but in particular at [49]. This is the beginning of the detailed reasoning undertaken and it is quite clear on a holistic analysis that what follows thereafter is his search for whether or not there are "very compelling circumstances" beyond those in Exceptions 1 and 2 for the purposes of the 2002 Act. Insofar as the Secretary of State submitted that the FTTJ had applied the "form" and not the "substance" of that test, we do not agree.

27. In HA(Iraq) Lord Hamblen held at [72]:

> "It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:
>
> (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. 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 Secretary of State for the Home Department [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.

(ii) 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 Secretary of State for the Home Department [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.

(iii) 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 First-tier Tribunal (Social Entitlement Chamber) [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope."

28. In this case the Judge was clear as to the test he was applying, and purported to apply it. Mr Holt was right to accept that had the Maslov question been the sole issue considered, the criticisms of the Secretary of State might have more weight. But it is clear from e.g. Sanambar (at [49]) that caselaw of the European Court, including in particular the judgment in Maslov, is relevant to the "delicate and holistic" assessment required before deciding that the deportation of a settled migrant who has lived most of his life in the host country is proportionate under Article 8. That is what the FTTJ undertook, with a detailed analysis of Mr Lopata's (largely accepted) connections to the United Kingdom and level of integration [47]; his lack of connections to Poland [48]; and his risk of reoffending and rehabilitation [55-57]. The Judge's finding that there were "very compelling circumstances" over and above those in Exceptions 1 and 2 was rationally open to him on the facts.

29. Similarly, the FTTJ was entitled to take account of Mr Lopata's rehabilitation and lack of reoffending. He had evidence of these matters before him which he considered carefully. While Mr Mullen is right to say that HA(Iraq) supports the proposition that rehabilitation will only rarely be of great weight, the Supreme Court was also clear in that judgment that the weight to be accorded to that factor would be "a matter for the fact finding tribunal" [119]. The FTTJ was accordingly entitled to place weight on the lack of reoffending and findings in respect of rehabilitation, and his conclusions were open to him.

Ground 2

30. We were not specifically addressed in detail at the hearing on Ground 2 but have considered it in any event.

31. In our view, the conclusion of the FTTJ that Mr Lopata did not speak Polish was one properly open to him on the facts. The fact that he visited Poland for a week long holiday when he was nine does not further the Secretary of State's case in this regard. While the grounds assert that the Secretary of State considers the claim that he does not speak Polish to be "highly dubious", we note that Mr Lopata has lived in the United

Kingdom since the age of four and it is difficult to see how such a conclusion could be challenged on a Wednesbury basis. Indeed, neither Mr Mullen nor the author of the grounds of appeal sought to do so.

32. Insofar as there is a reference in the OASYS report to Mr Lopata speaking primarily Polish: (i) that does not appear to have been put to the FTTJ; and (ii) appears likely to have been a typographical error. It was not a point pursued by Mr Mullen.

33. Nor do we accept that the conclusion that Mr Lopata would face very significant obstacles to reintegration was otherwise inadequately reasoned. Having set out the correct test at [44], the FTTJ held as follows:

> "It was accepted by the Respondent that the Appellant would have little physical family support in Poland given that his mother and uncles are resident in the UK, and he does not appear to have had any contact with his father and so these factors weigh in his favour. I find that these factors taken together with the fact that he does not [speak Polish] and has not live[d] in Poland and has no experience of life in Poland would amount to significant obstacles to his integration. I therefore find this Appellant meets part 13.2.3 (c)."

34. The FTTJ's conclusion in substance was that a person who had lived in the United Kingdom since the age of four, who does not speak Polish and would have little or no family support in Poland, would face very significant obstacles to reintegration into Poland. In our view this is a conclusion that was adequately reasoned and open to the FTTJ on the facts.

35. The suggestion in the grounds that Mr Lopata's family would travel with him to Poland is not only one that does not appear to have been made to the FTTJ, but is in fact contrary to the concession before him that Mr Lopata would have little physical family support. Mr Mullen quite rightly did not pursue that submission.

Notice of Decision

The Decision of First-tier Tribunal Judge Ali promulgated on 17 September 2024 did not involve the making of an error of law. I therefore uphold that decision. The Secretary of State's appeal against that decision is dismissed, with the consequence that Mr Lopata's appeal against the Secretary of State's decision to refuse his human rights claim is allowed.

Greg Ó Ceallaigh KC

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 February 2025