IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001016
UI-2023-001017

First-tier Tribunal No:
HU/56944/2021 EA/15332/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

24th November 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR SEBASTIAN ANDREW KEDZIERSKI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Jones, Counsel instructed by UK Migration Lawyers
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 13 November 2023

DECISION AND REASONS

BACKGROUND

1. This appeal was originally listed before me at error of law stage on 31 August 2023. For reasons which are set out in my adjournment decision of that date, which is appended hereto, I considered it necessary to adjourn of my own motion for the parties to file further documents and/or set out their case.

2. The Appellant appeals against the decision of First-tier Tribunal Judge L K Gibbs promulgated on 10 February 2023 ("the Decision"), dismissing the Appellant's appeal against the Respondent's decision dated 22 October 2021.

3. The facts of this case can be shortly stated. The Appellant is a Polish national. He came to the UK in 1983 as a child. Between 2003 and 2020, he amassed eighteen convictions for twenty-nine offences which included crimes of violence, largely directed at partners with whom he was in a relationship.

4. On 29 June 2021, the Appellant applied for status under the EU Settlement Scheme. That application was refused by the decision dated 22 October 2021, making a deportation order against the Appellant under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") and refusing a human rights claim based on the Appellant's family and private life in the UK. Although that family life is relevant to the grounds of appeal, the Judge's findings in that regard are not the direct subject of the challenge to the Decision.

5. Based on that chronology, there are two decisions here under appeal. The first is a decision to deport the Appellant under the EEA Regulations. The second is to refuse the Appellant's Article 8 human rights claim.

6. Judge Gibbs was asked to adjourn the hearing before her on the basis that the Appellant's partner, Ms Taylor, wished to give evidence but could not attend the hearing. The Appellant was at the time of the hearing subject to a restraining order preventing him having any contact with Ms Taylor. It appears to be accepted that, for that reason, he and she could not both have attended the hearing. Judge Gibbs was told however that the restraining order had been or was in the process of being discharged so that Ms Taylor would be able to attend a further hearing. Judge Gibbs did not accept that this was likely to happen in the short term and refused the adjournment request.

7. In so doing, the Judge referred to a "witness statement" from Ms Taylor which she said she was willing to accept in its entirety. It was the absence of that statement among the papers before me on the last occasion which led to one of the reasons why I considered an adjournment to be necessary. In short, I could not consider whether Judge Gibbs' refusal to adjourn was fair without seeing what evidence Judge Gibbs was willing to accept and whether it would have made a difference if Ms Taylor had been permitted to attend a hearing to attest to that statement.

8. In relation to the decision under the EEA Regulations, the Judge accepted, as it was agreed between the parties, that the Appellant was entitled to the highest form of protection under EU law (that is to say imperative grounds). Although the Judge cannot be criticised for that

acceptance given the parties' position, as I pointed out at the previous hearing, the Respondent had proceeded in his decision on a legally erroneous basis. He had assumed simply because the Appellant had been in the UK for ten years that he should benefit from that level of protection. As I pointed out in the adjournment decision, that is legally incorrect. To determine that issue, it is necessary to count back from the date of decision and not forward from the date of arrival. Time in prison does not count and where there has been a term of imprisonment, the issue to be considered is whether that has broken the continuity of residence.

9. It was for that reason that I directed the Respondent to file a further rule 24 response dealing with this issue and indicating whether he continued to concede this point or wished to change his position, having considered the issue on the correct legal basis.

10. Following the adjournment decision, the parties purported to comply with my directions. The Respondent filed a supplementary rule 24 statement dated 15 September 2023, indicating that he now considered that the Appellant had established only permanent residence. He pointed out that the Appellant had been subject to a total of forty-one months in prison over the period 2014 to 2020. That was in the ten years prior to the decision under appeal. He therefore submitted that the Judge was wrong to accept that imperative grounds apply. However, he also submitted that the error was not material as if the Judge had accepted that the Appellant could be deported if imperative grounds applied, it would follow that he could also be deported on serious grounds.

11. The Appellant filed witness statements from Ms Taylor and from the Appellant's stepson. However, both are dated 14 September 2023 and could not be those before Judge Gibbs (as Ms Jones accepted). In fact, having now seen the Respondent's original rule 24 response dated 5 April 2023, it appears that Judge Gibbs may have been referring to a letter from Ms Taylor which appears in the Respondent's bundle and not to a formal witness statement. I was not addressed further in relation to the detail of that letter or indeed the two more recent statements (for which there was no rule 15(2A) application).

12. The Appellant challenges the Decision on two grounds as follows:
Ground one: the refusal to adjourn was unfair. The Judge had failed to consider whether a fair hearing was possible in the absence of Ms Taylor's oral evidence.
Ground two: the Decision was irrational so far as concerned the finding that there were imperative grounds to deport the Appellant, based on the risk he poses. It is also said that there is an overlap between the two grounds as, if Ms Taylor had been permitted to give evidence, that would have strengthened the Appellant's arguments that there were not imperative grounds.

13. Permission to appeal was granted by First-tier Tribunal Judge Monaghan on 24 March 2023 in the following terms so far as relevant:

> "..3. The Judge has arguably made a material error of law in failing to take into account her findings at paragraph 21 that the Appellant had stopped drinking, had not offended since his release on 23 August 2021 and that there was no suggestion either that he had breached a restraining order in reaching her conclusions as to whether the higher test of imperative grounds justifying deportation had been made out. The Judge arguably reached her conclusions on this issue at paragraph 18 before she reached her findings at paragraph 21.
> 4. The other grounds whilst less cogent are still arguable."

14. As I have already noted, the Respondent filed a rule 24 response dated 5 April 2023 seeking to uphold the Decision. In the supplementary rule 24 response dated 15 September 2023, the Respondent sought to uphold the Decision. He accepted that the Judge's analysis in relation to imperative grounds was legally erroneous but suggested that such error was not material so that the Decision could be upheld.

15. In addition to the documents to which I refer above, I had before me a core bundle of documents relevant to the appeal before me as well as the Appellant's and Respondent's bundles before the First-tier Tribunal and the Appellant's skeleton argument before the First-tier Tribunal. I do not need to refer to those documents in any detail given my reasoning below.

16. Having heard from Ms Jones and Ms Isherwood, I indicated that I found there to be an error of law, principally on the second ground. I accepted however that this could overlap with the first and therefore accepted that an error of law was made out on both grounds. I indicated that I would provide my reasons for those conclusions in writing which I now turn to do.

DISCUSSION

Ground One

17. The Judge's reasoning in relation to deportation under the EEA Regulations is at [11] to [25] of the Decision. The Judge accepted at [11] of the Decision that she had to be satisfied that deportation was required on imperative grounds. As Ms Jones pointed out, the Judge could not be criticised for that statement given that the parties had indicated that this was the test (as also appears in the Respondent's decision under appeal). However, as a result of the Respondent's decision, the Judge was led into the legal error of failing to consider whether the terms of imprisonment which the Appellant had served had broken his continuity of residence.

18. More importantly, and as Ms Isherwood fairly conceded, when directing herself to the relevant legal tests, the Judge made no reference at all to that threshold and what it requires. Apart from the reference at [11] of the Decision to that threshold, there is little indication by the Judge that she was applying that threshold.

19. The only other reference to that threshold appears at [18] of the Decision which reads as follows:

> "The appellant has never received a lengthy prison sentence, the longest being 16 months. This could indicate that his offending is not particularly serious but I am persuaded that this would be an accurate conclusion in the appellant's case. I find that the nature of the appellant's crimes, combined with breaching restraining orders is evidence of his volatility. I find that he will have other intimate relationships, indeed he is in a relationship with Ms Taylor albeit that they cannot be together and I am led to the conclusion that the appellant's deportation is required on imperative grounds of public security."

20. Although the Judge there again refers to the threshold, she gives no indication of what she considers that threshold to require (the burden of demonstrating it falling of course on the Respondent). That is an error albeit I accept not quite the one which is identified in the pleaded grounds. As this Tribunal stated in LG and CC (EEA Regs: residence; imprisonment; removal) Italy [2009] UKAIT 00024 ("LG and CC"), "[a] clear distinction is required to be drawn between the three levels of protection against removal introduced in the 2006 Regulations, each level being intended to be more stringent and narrower than the immediately lower test."

21. LG and CC were appeals remitted by the Court of Appeal, the Tribunal in those cases having been found to have erred in law in its findings that imperative grounds applied, and that this threshold was met. The facts of those individual cases appear in the Tribunal's decision. I do not need to repeat them save to say that, whilst not wishing to diminish the Appellant's continuous offending, the crimes in LG and CC were of an entirely different and more serious nature.

22. The Tribunal in LG and CC explained at [74] to [83] of its decision how the test for imperative grounds operates. As Ms Jones submitted and I accept, there is not a hard and fast rule that someone who has been in prison for ten years prior to deportation cannot benefit from the imperative grounds test. What has to be considered based on LG and CC and later case-law is whether the imprisonment has broken the chain of social and cultural integration so as to disentitle a deportee from relying on imperative grounds. In any event, as is said in LG and CC, the period of residence outside prison is still relevant to proportionality.

23. The Tribunal in LG and CC also dealt at [94] to [111] with the qualitative aspect of the imperative grounds test. What is said at [107] of that decision (by reference to the Respondent's own guidance at that time) is particularly instructive and recognises the very high threshold which applies. As the Tribunal concluded at [110] of the decision whilst the severity of the underlying offence(s) may be a starting point "there must be something more, in scale or kind, to justify the conclusion that the individual poses 'a particularly serious risk to the safety of the public or a section of the public'". The Tribunal accepted that this was not limited to terrorism or national security threats but made clear that the offending had to be "serious enough to make expulsion 'imperative' and not merely desirable as a matter of policy".

24. Returning to the Decision, notwithstanding Judge Gibbs' reference to imperative grounds, one finds no self-direction in the foregoing terms nor any reasons why the offending in this case would reach that high threshold.

25. As I say, this is not the way in which the Appellant's case was pleaded. However, the second ground based on irrationality is sufficiently wide to include that term based on a failure to take into account a relevant consideration.

26. Turning then to the way in which this ground was pleaded and the terms of the permission grant, I have set out at [19] above, [18] of the Decision. At [21] of the Decision, the Judge went on to say this:

> "In the appellant's favour, and consistent with his claim to have given up alcohol, I find that he has not offended since his release on immigration bail on 23 August 2021. However, the fact is that the appellant has not been in a relationship since that time, other than with Ms Taylor whom he is unable to see her because of the restraining order. I therefore find that the appellant has not been 'tested' in the context of an intimate relationship since his last offence. Given what I find to be the appellant's prolific history of violence against women I am not persuaded that I can simply accept his word that he will not offend again in the absence of any other objective evidence. I therefore find that the appellant presents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society taken [sic] into account his past conduct and reminding myself that the threat need not be imminent."

27. As Judge Monaghan pointed out, there is some tension between what is there said and the Judge's findings at [18] of the Decision that the Appellant had breached restraining orders and continued to pose a risk based on his abuse of alcohol. However, what is said at [18] of the Decision has to be read with what precedes it. At [14] of the Decision, the Judge set out the sentencing remarks. Those provided evidence of the repeat pattern of the Appellant's offending following earlier convictions. Those remarks also suggest that there had been breaches of orders of the court and "total disregard of what the court has tried to achieve". The Judge's findings at [18] of the Decision must also be

read in the context of the OASys report set out at [15] of the Decision which shows a pattern of violent offending.

28. Whilst it might be said that Judge Gibbs at [18] of the Decision fails to factor in the Appellant's abstinence from alcohol and compliance with the restraining order imposed at the time of the hearing, read in context, I am satisfied that there is no error in this regard.

29. However, for the reasons I have already given, I consider that the error lies in the Judge's failure to have regard to the high threshold which, on the case before her, had to be met. It may be that a second Judge will find that imperative grounds do not have to be met (although serious grounds would still apply). However, in the context of the case as argued before her, Judge Gibbs erred in her application of the threshold which at the hearing was accepted to apply.

Ground one

30. I can deal more shortly with this ground given my conclusions on the second ground. It is recorded at [5] of the Decision that the Appellant's representative asked for an adjournment so that Ms Taylor could attend. Judge Gibbs was told that the restraining order had been quashed at a hearing at Uxbridge Magistrates Court on 7 January 2023. Judge Gibbs concluded that this was not what the paperwork showed. What that showed was that the hearing on 7 January had been adjourned until 31 January 2023 "for the police to carry out a risk assessment".

31. Judge Gibbs dealt with the adjournment request at [6] of the Decision as follows:

> "I had concerns regarding the length of time that this matter would take to resolve, and also took into account the possibility of a negative decision from the Magistrates Court. I did not consider that the adjournment was necessary for a fair hearing and therefore refused Mr Martin's application after indicating to him that I was willing to accept the contents of Ms Taylor's witness statement."

32. Ms Jones pointed out that the hearing before Judge Gibbs was on 25 January 2023. She informed me that in fact the restraining order had been discharged at the hearing on 31 January 2023 although Judge Gibbs clearly could not have known that at the time of the hearing before her. However, Judge Gibbs considered that timescale. As she said, however, she also had to factor in that the Magistrates Court might refuse to discharge the restraining order.

33. It cannot be said that Judge Gibbs did not consider whether there could be a fair hearing. As she said, however, she was willing to accept Ms Taylor's statement (in fact letter). I have read that letter against the Judge's findings. Most of what is there said is taken into account in the Judge's findings.

34. I note that Ms Taylor's letter, whilst undated, was apparently submitted by the Appellant's solicitors in February 2018 and therefore prior to the most recent episode of violence (in December 2020). There was no further statement from her following the conviction for those offences which were perpetrated against Ms Taylor and which, according to the sentencing remarks in the Respondent's bundle, were committed when the Appellant was drunk following "a considerable period of abstinence". Whilst Ms Taylor's evidence about the Appellant's contrition and risk he posed would have to be considered against that backdrop, I accept that what Ms Taylor might have had to say could add to (or even detract from) the Judge's assessment of current risk. For that reason, there is, I accept, some overlap with the second ground.

35. Whilst I would not have found an error to be made out on the first ground alone, taken with the second ground, I accept that the Judge has failed to consider what difference Ms Taylor's evidence could make, in particular to the risk assessment. For that reason, I also accept that the first ground discloses an error.

NEXT STEPS

36. Having discussed with the parties' representatives how the resumed hearing should be dealt with, I concluded that the appropriate course is to remit the appeal to the First-tier Tribunal. I do that for two reasons.

37. First, I have found there to be an error based in part on procedural unfairness. The relevant practice direction suggests that remittal would be the appropriate course in most such cases.

38. Second, as indicated above, the Respondent has altered his position in relation to whether imperative grounds apply. As Ms Jones pointed out, the Respondent may have overstated the position in his supplementary rule 24 response; he has gone from the extreme of accepting that imperative grounds apply to a conclusion that this threshold cannot apply. However, in fairness to the Appellant, he should have the opportunity to have that changed case determined at first instance.

39. The First-tier Tribunal may wish to consider issuing a direction for the Respondent to provide a further decision setting out his final position in relation to the threshold which applies given the legal errors he has made in assessing the position to date.

NOTICE OF DECISION

The decision of Judge L K Gibbs promulgated on 10 February 2023 contains errors of law which are material. I set that decision aside and remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge L K Gibbs.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

14 November 2023

APPENDIX: ADJOURNMENT DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001016

First-tier Tribunal No:
HU/56944/2021; IA/16092/2021;
EA/15332/2021

THE IMMIGRATION ACTS

Directions Issued:

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Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR SEBASTIAN ANDREW KEDZIERSKI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Miah, Counsel instructed by UK Migration Lawyers
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

ADJOURNMENT DECISION AND DIRECTIONS

DIRECTIONS

1. **The error of law hearing is adjourned until the first available date after Monday 9 October 2023 with the following directions.**
2. **By no later than 4pm on Friday 15 September 2023, the Appellant shall file with the Tribunal and serve on the Respondent (marked for the attention of Mr N Wain) the witness statement(s) of Ms Taylor to which reference is made at [6] of**

the decision of First-tier Tribunal Judge L K Gibbs promulgated on 10 February 2023 ("the Decision").

3. **Also by no later than 4pm on Friday 15 September 2023, the Respondent shall file with the Tribunal and serve on the Appellant an amended rule 24 statement setting out her position in relation to the application of the imperative grounds threshold and whether the assertion in the decision under appeal that such threshold applies is intended to be a concession that it does or arises from the application of the wrong test.**
4. **The error of law hearing will be relisted before Judge Smith on the first available date after Monday 9 October 2023 face to face with a time estimate of 1.5 hours. No interpreter is required.**

REASONS

1. This appeal was listed before me at error of law stage on 31 August 2023. Counsel appearing before me was not Counsel who appeared before Judge Gibbs or Counsel who drafted the grounds. He cannot therefore be criticised for one of the reasons why an adjournment became necessary.

2. The Appellant appealed the Decision on two grounds. The first ground turns on whether the Judge's refusal to adjourn was procedurally unfair. That in turn relates to evidence which it was intended would be given by the Appellant's former partner, Ms Taylor. There is or was a restraining order in place against the Appellant obtained by Ms Taylor. However, it was said that notwithstanding this, Ms Taylor wished to give evidence orally at the hearing. Mr Miah said that this was apparent from the fact that she had given a witness statement.

3. However, it then emerged that neither I nor Mr Miah or Mr Wain had a copy of that statement. I had assumed (perhaps wrongly) that the evidence of Ms Taylor was limited to a handwritten letter from her which is at [RB/148-152]. If that were her evidence however it appears to have been written some time ago when she was still living with the Appellant. Mr Miah was able to tell me on instructions (from the Appellant's mother who was in Court) that Ms Taylor had given a formal witness statement but in spite of Mr Miah's endeavours to obtain a copy from his instructing solicitors by email, no copy was forthcoming.

4. I had thought that it may be possible to deal with this issue after the hearing by permitting the Appellant to file and serve the statement(s), and giving the parties the opportunity thereafter to make written submissions on the fairness issue. Mr Miah was reluctant to seek an adjournment for that reason.

5. However, having turned to the second ground, it became apparent to me that this issue was not ready to be determined either. The second ground is in essence that the Decision that the Appellant's offending met the requisite threshold is perverse and/or inadequately reasoned. Mr Miah accepted as did the Judge granting permission to appeal that Judge Gibbs had not considered for herself whether the imperative grounds threshold

properly applies in this case. As Mr Wain pointed out, Judge Gibbs was told that it was agreed that it did. However, that is based on what is said in the Respondent's decision under appeal and it was not clear to me that this was a concession having applied the correct test or an application of the wrong test.

6. Again, I had thought that it would be possible to proceed without a determination of this issue. If the Judge was entitled to find that the imperative grounds threshold is reached then it would follow that the lower threshold would also be reached. If she was not, then the Decision would fall to be set aside and at that point the issue whether the imperative grounds threshold is reached would need to be considered. However, having heard from Mr Miah it became clear to me that what is being argued is that the Decision that the imperative grounds threshold is reached is itself perverse and/or inadequately reasoned viz-a-viz that threshold. That is made clear also in the permission grant. Accordingly, it may be necessary to consider whether that threshold applied at all.

7. For that reason, I enquired of Mr Wain whether the Respondent was conceding that the imperative grounds threshold did apply, having considered this on the appropriate test or whether the Respondent had not addressed her mind to it on the correct basis.

8. Mr Wain pointed out that the Appellant has lived in the UK since 1983 from a very young age. However, the fact that he had lived here for ten years before he started offending is nothing to the point. Nor is the fact that he had lived here for ten years prior to the deportation decision as the Respondent's decision appears to suggest. The test is as set out in the case of Secretary of State for the Home Department v MG (CJEU C-400/12). We ascertained that the Appellant was sentenced to a total of 43 months in prison during the ten years in question which is relevant to the issue whether the custodial sentences broke integration.

9. For that reason, and since it is necessary to ascertain whether the Respondent intended to concede this issue, I directed that the Respondent file and serve an amended rule 24 statement dealing in particular with this issue. I observe incidentally that the Tribunal does not appear to have the original rule 24 statement which Mr Wain said had been filed but as I understood it, the original rule 24 statement does not deal with this issue.

10. Having concluded that it was not possible to proceed given the absence of necessary information/documentation on both grounds, I indicated that I would adjourn the hearing of my own motion and I gave directions as set out above.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 August 2023