IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001098

First-tier Tribunal No: EA/05202/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 16th of November 2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

TOMASZ MAREK RECZYCKI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Bandegani of Counsel, instructed by the Joint Council for the Welfare of Immigrants
For the Respondent: Mr A Basra, Senior Home Office Presenting Officer

Heard at Field House on 11 September 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.

2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Chohan promulgated on 20 January 2023, in which the Appellant's appeal against the decision to deport him dated 28 April 2022 (served on 6 May 2022) was allowed.

3. The Appellant is a national of Poland, born on 16 March 1984, who claims to have arrived in the United Kingdom around November 2006. He was refused a document certifying permanent residence in the United Kingdom under the Immigration (European Economic Area) Regulations 2016 on 13 September 2017 but who was granted indefinite leave to remain under the European Union Settlement Scheme ("EUSS") on 11 December 2019.

4. On 2 March 2022 the Appellant was convicted of committing an act or series of acts with intent to pervert the courts of justice for which he was sentenced to three years and six months' imprisonment. In addition, the Appellant has a criminal history of some seven previous convictions for eleven offences.

5. The Respondent issued a decision to deport under the Immigration Act 1971 and the UK Borders Act 2007 on 6 May 2022 (although dated 28 April 2022) in which it was stated that she must make a deportation order in respect of the Appellant due to his latest criminal conviction. As the Appellant had been issued with leave to remain under the EUSS, he was notified that he had a right of appeal under Regulation 6 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. The Respondent considered the Appellant's criminal history and his claim to have two children in the United Kingdom, but there was no evidence in relation to them that the Appellant's deportation would adversely affect them.

6. Judge Chohan dismissed the appeal in a decision promulgated on 20 January 2023 on all grounds. The hearing proceeded primarily on the basis of Article 8 of the European Convention on Human Rights, a possible Article 3 claim not being pursued in relation to a claimed risk on return and in the absence of a copy of handwritten submissions said to have been made to the Respondent. The legal framework is set out in paragraphs 8 and 9 of the decision, with reference to sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002 and the family and private life exceptions to deportation. It was found that neither exception was made out and overall the public interest in deportation was not outweighed by the Appellant's circumstances.

The appeal

7. The Appellant appeals on five grounds as follows. First, that the First-tier Tribunal erred in law in considering the appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 rather than under the EUSS Regulations. Secondly, that the First-tier Tribunal had erred in law in failing to consider the Appellant's Article 3 claim raised in a section 120 notice by the Appellant on 24 May 2022, which was a freestanding claim regardless of the fact that he had not claimed asylum. Thirdly, that the First-tier Tribunal erred in law in failing to conider the Article 3 claim as a valid ground of appeal even under section 82 of the Nationality, Immigration and Asylum Act 2002 given that the Respondent had not contested the existence of the Appellant's section 120 notice and had not raised any objection to this ground identified in the Appellant's Skeleton Argument. Fourthly, that the First-tier Tribunal erred in law as a matter of procedurel fairness for failing to require the Respondent to investigate the existence of the section 120 notice and produce a copy of it. Finally, that the First-tier Tribunal erred in law in the alternative in finding that the exceptions to deportation were not met, specifically by failing to consider risk on return in the context of significant obstacles to reintegration in Poland; by taking into account sentencing remarks about family separation; and in the assessment of whether there were very compelling circumstances, failing to make a cumulative assessment including risk on return, previous mitigation, remorse and a low OASys risk assessment alongside double counting the criminal offence as serious and gruesome.

8. At the outset of the hearing, Mr Basra indicated on behalf of the Respondent that it was accepted that there was a material error of law on the first ground of appeal as to the jurisdiction of the First-tier Tribunal and that in accordance with Regulation 9 of the EUSS regulations, human rights grounds could be considered

subject to whether they were a new matter. It was suggested that the appeal should be set aside and remitted to the First-tier Tribunal and that it may be appropriate for any further hearing to await a stage 2 deportation decision from the Respondent. Mr Basra indicated that the Respondent had no record of any section 120 notice from the Appellant, despite various checks being made for this.

9. I questioned with the representatives whether the error in relation to the first ground of appeal was material given that the Appellant had not identified any specific grounds of appeal actually open to him under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 which could have possibly succeeded before the First-tier Tribunal. Mr Bandegani accepted that the First-tier Tribunal were not assisted by the way in which the appeal was pursued before it, but that the jurisdictional error was nonetheless fatal to the appeal as the First-tier Tribunal simply did not have jurisdiction to consider it on the basis upon which it did and there has been no valid decision on the correct grounds. Mr Bandegani supported the Respondent's practical suggestion that proper submissions in the form of a section 120 response were now made by the Appellant for a stage 2 deportation letter and a right of appeal against any refusal under section 82 of the Nationality, Immigration and Asylum Act 2022.

10. At the end of the hearing Mr Bandegani indicated that he wished to make further written submisssions within seven days on the issue of materiality and jurisdiction. There was unfortunately an administrative delay in directions being issued by the Upper Tribunal to confirm agreement to this and the opportunity for any response required on behalf of the Respondent. In the event nothing further was received from either party, however the opportunity to do so, has delayed the preparation and promulgation of this decision.

Findings and reasons

11. The Respondent's decision which is the subject of this appeal was one to make a deportation order against the Appellant, a person who had indefinite leave to remain under the EUSS. It is known as a stage 1 deportation letter which, different to a stage 2 deportation letter following a protection and/or human rights claim; does not of itself include any detailed consideration of an individual's human rights nor refusal of any such claim. The rights of appeal against this specific type of decision are set out in the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. Regulation 6 identifies the right of appeal for these circumstances and Regulation 8 sets out the grounds of appeal as follows:

8.- (1) An appeal under these Regulations must be brought on one or both of the following grounds.

(2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of –

(a) Chapter 1, or Article 24(2) or 25(2) of Chapter 2, of Title II of Part 2 of the withdrawal agreement,

(b) Chapter 1, or Article 23(2) or 24(2) of Chapter 2, of Title II of Part 2 of the EEA EFTA separation agreement,

(c) Part 2 of the Swiss citizens' rights agreement.

(3) The second ground of appeal is that –

(a) …;

(b) …;

(c) …;

(d) where the decision is mentioned in regulation 6, it is not in accordance with section 3(5) or (6) of the 1971 Act (as the case may be).

(4) But this is subject to regulation 9.

12. Regulation 9 of the same deals with the situation in which an appellant makes a section 120 statement, by which matters contained therein must be considered if they constitute a specified ground of appeal against the decision, subject to provisions for a new matter which would, if so, require the Respondent's consent.

13. The Appellant's grounds of appeal to the First-tier Tribunal focused on the Appellant's assertion that he had spent a period of more than 10 years in the United Kingdom in accordance with the Immigration (European Economic Area) Regulations 2016; that the Respondent failed to consider his deportation in line with Regulation 27 of the same and that the Appellant met both the private life and family life exceptions to deportation.

14. The Appellant's Skeleton Argument refers to the correct right of appeal and grounds of appeal in Regulations 6 and 8 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, but then refers to the Immigration Act 1971, section 32 and following of the UK Borders Act 2007 and focuses on sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002. In substance the submissions focus on the exceptions to deportation with only a fleeting reference to Article 3 of the European Convention on Human Rights in the context of whether there are very significant obstacles to reintegration. There is no reference at all to the Immigration (European Economic Area) Regulations 2016 nor any issues of length of residence in that context. At no point in any of the Appellant's documents or submissions has there been any reference to or reliance on the EU Withdrawal Agreement.

15. The first ground of appeal concerns the jurisdiction of the First-tier Tribunal and available grounds of appeal to it against the Respondent's decision under challenge. Although the right and grounds of appeal were clearly set out in the reasons for refusal letter and referred to briefly in the Appellant's skeleton argment; there is no reference at all to the correct legal framework in the First-tier Tribunal's decision nor does it appear there were any legal submissions at all on the scope of the actual ground of appeals available to the Appellant. Instead, the decision focuses on the Article 8 claim and the framework in sections 117A to 117D of the Nationality, Immgiration and Asylum Act 2002 in the way in which a refusal of a human rights claim in the context of deportation is normally approached. It would appear that the First-tier Tribunal received little, if any assistance on the correct legal framework from either party with a decision being made in response to the matters focused on by the parties.

16. I have my doubts as to whether the failure to refer to the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 or grounds of appeal therein by the First-tier Tribunal are material in this case as it difficult to see how the ground of

appeal in Regulation 8(3)(d) set out above could in substance, in the circumstances of this appeal, be anything other than an assessment under section 32 and following of the UK Borders Act 2007 and the exceptions to deportation therein and in section 117C of the Nationality, Immigration and Asylum Act 2002 in the context of this case. However, given this is a matter of jurisdiction of the First-tier Tribunal upon which neither party made any submissions on it at all and therefore no legal argument was considered, I find it is a material error of law to have considered this appeal as if brought under section 82 of the Nationality, Immigration and Asylum Act 2002 when there was no such right of appeal against the Respondent's decision. For this reason, the decision of the First-tier Tribunal must be set aside and it is appropriate to remit the appeal to the First-tier Tribunal for re-hearing. It will be a matter for the First-tier Tribunal to issue any appropriate case management directions for this, such as whether written submissions from the parties are required on the correct grounds of appeal applicable to this case and as to any new matters raised.

17. The other grounds of appeal have no discernable merit at all. It is clear from the documents submitted on behalf of the Appellant and submissions made at the hearing that there was no standalone Article 3 claim made and even if there was, it would, at its highest, be a new matter to which the Respondent had not consented and therefore could not in any event have been considered by the First-tier Tribunal. As to the claimed risk on return to Poland, it was found that it had not been made out and therefore could not amount to a material factor relevant to consider as a very significant obstacle to reintegration.

18. In relation to the section 120 notice, it is claimed that this was a handwritten statement sent to the Respondent by the Appellant. It seems the Appellant has no copy of this and his written evidence did not refer to it, for example where it was sent or its contents. The Respondent has not been able to find any record or copy of it either. The First-tier Tribunal simply found in paragraph 16 of the decision that there was no evidence of any such written submissions being made; which in all of the circumstances was a fair and rational conclusion. Given that the First-tier Tribunal's decision is set aside in any event, the practical way forward would be as Mr Basra suggested, for the Appellant to make such submissions as he wishes and for the Respondent to consider them in the normal way, which would likely result in a further decision and separate right of appeal. It will be a matter for the First-tier Tribunal, on any application by the Appellant, to determine if it is appropriate to stay the remaking of this appeal awaiting any further decision and appeal, and/or whether to join such appeals if made.

19. The remaining points in ground 5 are more akin to disagreement with the First-tier Tribunal's decision but in any event, the decision has already been set aside for a de novo hearing and this ground therefore adds nothing of substance to the outcome in the Upper Tribunal.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

The appeal is remitted to the First-tier Tribunal for a de novo hearing before any Judge except Judge Chohan. The First-tier Tribunal may issue appropriate case management directions as outlined above or otherwise.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9th November 2023