IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005518
First-tier Tribunal No:
EA/05619/2022
HU/56515/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 September 2024

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE HOFFMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LUKASZ BALZEJCZYK
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr A. McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr J. Holt, instructed by TMC Solicitors Ltd.

Heard at Field House on 21 August 2024

DECISION AND REASONS

1. For the sake of continuity, we will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

BACKGROUND

2. The original appellant, Mr Blazejczyk, entered the UK in September 2005 and has lived and worked here for nearly 20 years. The appellant began a relationship with his ex-partner, also a Polish national, in 2008. They had a child together, 'O', who was born in 2009. The couple married in Poland in 2011. The marriage broke down on or around 2019-2020. The child continued to have contact with his father after the couple separated.

The pre-EU Exit offence (2020)

3. The appellant's convictions arose out of aggression towards his wife and child. On 29 April 2020 he was convicted of battery, criminal damage, and harassment against his wife. These offences were committed on various dates between October 2018 and April 2020. On 27 May 2020, the appellant was sentenced to 12 months' imprisonment, which was suspended for 18 months ('the pre-EU exit offence').

4. The appellant, his wife and child were all granted Indefinite Leave to Remain (ILR) under the EU Settlement Scheme in June 2020.

The post-EU Exit offence (2021)

5. In June 2021 the appellant subjected his child to serious and sustained verbal abuse, which the child recorded on his phone. The mother made a complaint to the police. Although the complaint was subsequently withdrawn, a prosecution was pursued. The appellant pleaded guilty to an offence of child cruelty on 31 January 2022 and was sentenced to 6 months' imprisonment for the post-EU exit offence. The suspended sentence imposed in May 2020 was activated. The appellant was sentenced to 6 months' imprisonment to be served consecutively for the pre-EU exit offence. A total of 12 months' imprisonment.

Decision to deport (27 March 2022)

6. On 27 March 2022, the respondent made a decision to deport the appellant pursuant to section 3(5)(a) of the Immigration Act 1971 ('IA 1971') on the ground that his deportation was deemed to be conducive to the public good.

7. Under the heading 'Part 1 – Deportation decision' the respondent outlined the details of both the pre-EU exit conviction and the post-EU exit conviction. This section of the decision went on to state: 'As a result of your criminality, the Secretary of State deems your deportation to be conducive to the public good and as such you are liable to deportation under section 3(5)(a) of the Immigration Act 1971.'

8. The decision confirmed that the appellant had a right of appeal against the decision to deport under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the CRA Regulations 2020'). The available grounds of appeal were that:

   (i) the decision breaches any rights under the Withdrawal Agreement, the EEA EFTA Separation Agreement, or the Swiss Citizens Rights Agreement; and

   (ii) the decision is not in accordance with section 3(5) or (6) of the IA 1971.

9. Under the next heading 'Part 2 – Considerations in your deportation decision' the respondent stated: 'You have been convicted of criminal <u>offences</u> as set out in Part 1 of this letter' [our emphasis].

10. Under the heading 'Part 3 – Next steps' the letter repeated that the appellant had a right of appeal against the decision under the CRA Regulations 2020. The appellant subsequently lodged an appeal (EA/05619/2022).

11. Later in the decision, the respondent issue a one-stop notice under section 120 of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002') inviting the appellant to make any further submissions relating to any other reasons why he should not be deported from the UK. The appellant made further representations to the respondent on 12 July 2022.

Decision to refuse a human rights claim (12 May 2023)

12. On 21 May 2023, the respondent made a decision to refuse a human rights claim.

13. Under the heading, 'Part 1 – Deportation decision', the respondent referred to the deportation decision dated 27 March 2022 stating that 'because of your criminal conviction' [our emphasis] the respondent had decided to make a deportation order pursuant to section 3(5)(a) IA 1971. This section acknowledged that the appellant had lodged an appeal against the decision under the CRA Regulations 2020.

14. Under the heading, 'Part 2 – Reasons for this decision', the respondent went on to consider whether removal pursuant to the order would amount to a breach of the appellant's right to private and family life under Article 8 of the European Convention on Human Rights. This section of the decision set out some of the history of offending, but not the details of the pre-EU Exit conviction. However, at the end of this summary the decision letter stated:

> '12. You have been convicted of a criminal offence, as set out in our notice of decision dated 27 March 2022. The Secretary of State deems your deportation to be conducive to the public good under section 5(1) of the Immigration Act 1971.' [our emphasis]

15. The respondent found that the post-EU Exit conviction in 2022 was one that had caused 'serious harm'. The respondent considered the terms of the OASys assessment dated 16 May 2022. The report went on to find that there was a risk of harm to children if the appellant had unsupervised contact.

16. The respondent went on to consider whether the appellant came within any of the exceptions to deportation. Despite noting that social services had recommended that the appellant did not have unsupervised contact with the child, the respondent concluded that it would not be unduly harsh for the appellant's child to live in Poland (the 'go' scenario) or to remain in the care of his mother in the UK (the 'stay' scenario). The appellant did not meet the exception relating to family life with his former wife in light of the evidence showing that they divorced on 02 November 2021. The respondent went on to find that the appellant did not meet the private life exception and there were no 'very compelling circumstances' that might outweigh the public interest in deportation.

17. Under the heading, 'Part 3 – Next Steps', the letter went on to outline the appellant's right of appeal against the decision. Among other things, this section of the decision stated:

> '65. You may appeal against this decision under regulation 36 of the EEA Regulations 2016, as saved, on the grounds that your removal from the United Kingdom breaches your rights under the EEA Regulations 2016, the EU Withdrawal Agreement, the EEA EFTA Separation Agreement or the Swiss

> Citizens' Rights Agreement, in respect of your entry to or residence in the United Kingdom. [our emphasis]
>
> 66. You may also appeal against the decision to refuse your protection and/or human rights claim under section 82 of the Nationality, Immigration and Asylum Act 2002.'

18. The appellant lodged an appeal against the decision (HU/56515/2023). Both appeals were linked to be heard together by the First-tier Tribunal.

First-tier Tribunal decision (01 December 2023)

19. First-tier Tribunal Judge Rhys-Davies ('the judge') allowed both appeals in a decision sent on 01 December 2023. The judge identified the fact that there were two decisions with separate rights of appeal. He summarised the relevant issues for determination that had been agreed between the parties [6].

20. The first issue was whether the decision to deport dated 27 March 2022 relied on conduct occurring before 31 December 2020 (pre-EU Exit) such that the appeal would be determined with reference to the relevant provisions of EU law. Article 20(1) of the Withdrawal Agreement made clear any restriction on the right of residence relating to conduct that occurred before the end of the transition period must be considered in accordance with Chapter VI of Directive 2004/38/EC ('the Citizens' Directive'). This aspect of the Withdrawal Agreement was provided for in saved provisions of The Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016'), which governed the removal of those exercising rights of free movement on public policy grounds prior to EU Exit.

21. The second issue was whether the decision to refuse a human rights claim dated 12 May 2023 should be considered with reference to the domestic legal framework relating to human rights considerations in deportation cases under Part 5A NIAA 2002, and in any event, whether deportation would amount to a disproportionate interference with the appellant's right to private and family life under Article 8 of the European Convention.

22. In relation to the first issue, the judge rejected the respondent's submission that the decision to deport was simply setting out the background of the appellant's offending. He found that the unqualified wording of the letter clearly indicated that the respondent was relying on both the pre-EU Exit offence as well as the post-EU Exit offence [19]-[20]. It followed that the appellant could appeal with reference to the saved provisions of the EEA Regulations 2016 [21]. The respondent's representative at the hearing accepted that the appellant was entitled to the highest level of protection outlined in regulation 27 EEA Regulations 2016 and did not argue that his strong integrative links were broken by the relatively short period of imprisonment [23]. In light of this concession, the judge allowed the appeal against the decision to deport brought under the CRA Regulations 2020 [25].

23. In relation to the second issue, the judge found that the appellant would only qualify as a 'foreign criminal' for the purpose of section 117D NIAA 2002 if the post-EU Exit offence had caused 'serious harm'. He went on to make various findings with reference to relevant case law [32], the sentencing judge's remarks [36], and an OASys assessment [37]. It is not necessary to set out the judge's full reasoning for the purpose of this decision [38]-[44]. The judge acknowledged that the offence related to particularly nasty behaviour towards his son, but on the

evidence before him, the judge concluded that it was not likely to have caused serious harm within the meaning of the statutory framework [45].

24. Having found that the appellant fell outside the statutory framework contained in Part 5A NIAA 2002 the judge went on to conduct an overall proportionality assessment with reference to Article 8 of the European Convention. He took into account the fact that he had already found that the decision to deport was contrary to the appellant's protected rights under the Withdrawal Agreement for the purpose of the appeal under the CRA Regulations 2020. In the circumstances, he found that it was difficult to see how the decision to remove would not also be disproportionate for the purpose of Article 8 [49]. Nevertheless, the judge took into account the appellant's long residence in the UK, the fact that he was a settled migrant, and that he had enjoyed family life with his son until the incident leading to the post-EU Exit offence [50]-[53]. Although the appellant did not currently have contact with his son, removal would severely impinge on his ability to re-establish a relationship with him [54]. Having considered all the circumstances in the round, the judge concluded that removal would be unlawful under section 6 of the Human Rights Act 1998 ('the HRA 1998').

Proceedings in the Upper Tribunal

25. The respondent applied for permission to appeal to the Upper Tribunal on the following grounds:

    (i) The 'Stage 1' notice of intention to deport could not be read in isolation from the 'Stage 2' notice. The first ground repeated the assertion made at the hearing before the First-tier Tribunal that the decision to deport was only setting out the background. The 'Stage 2' human rights decision only relied on the post-EU Exit offence. For this reason, the judge was wrong to apply the 'European test'.

    (ii) It was submitted that the judge was 'wrong' to find that the post-EU Exit offence did not cause 'serious harm'.

    (iii) The argument relating to 'serious harm' was repeated in the third point, which made general submissions asserting that the Article 8 assessment was 'flawed'.

26. First-tier Tribunal Judge Saffer granted permission to appeal in an order dated 30 December 2023.

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

DECISION AND REASONS

28. Given the discussion at the hearing, it is not necessary to analyse the complex and somewhat unclear set of provisions relating to deportation of certain categories of people who were exercising rights of free movement prior to EU Exit, which were put in place following the United Kingdom's exit from the EU.

29. Mr McVeety did not have instructions to concede or withdraw the appeal brought by the Secretary of State, but accepted that the wording of the decision to deport did make clear that both the pre-EU Exit offence and the post-EU Exit offence were relied on. If the first ground could not properly be pursued, he also accepted that the grounds relating to the human rights appeal could not succeed.

30. We agree with Mr McVeety and would have made the same finding even if there had been no concession. Perhaps because of the complex provisions that have been put in place, the respondent's decision makers and those who drafted the grounds had not understood the scheme properly in the context of cases involving the deportation of EU citizens who were exercising rights of free movement prior to 31 December 2020.

31. Under the domestic legal framework, there is no right of appeal against an initial decision to deport a foreign national from the UK on grounds that it is conducive to the public good (sometimes referred to as a Part 1 decision). If the respondent receives submissions in response to the initial decision, a protection or human rights decision might be made, and it is the second decision that attracts a right of appeal under section 82 NIAA 2002.

32. The decision letters seem to have muddled the provisions. The first decision was not a 'Part 1' deportation decision but was a decision in its own right that attracted a right of appeal under the CRA Regulations 2020. Contrary to what is said in the grounds, it could not be remedied by a human rights decision considering a different issue, which attracted a right of appeal under the NIAA 2002. In any event, we note that the human rights decision still relied on the convictions 'as set out in our notice of decision dated 27 March 2022' i.e. the first decision which relied on both convictions. The human rights decision also, rather confusingly, asserted that there was a right of appeal with reference to the saved provisions of the EEA Regulations 2016, thereby seeming implicitly to recognise that both pre-EU Exit and post-EU exit offences had been relied on. If that was the case, it seems to us, without detailed analysis, that the EU law framework that was required by Article 20(1) of the Withdrawal Agreement could and should have been dealt with in the initial decision to deport, which attracted the right of appeal under the CRA Regulations 2020. It suffices to make those brief observations given the concession made by Mr McVeety.

33. It follows that it was open to the judge to find that the decision to deport under section 3(5)(a) IA 1971 engaged Article 20(1) of the Withdrawal Agreement and that due to the appellant's long residence he was entitled to the highest level of protection from removal outlined in regulation 27 EEA Regulations 2016. Although the offences for which the appellant was convicted were sufficiently serious eventually to warrant a custodial sentence, they were at the lower end of the scale. It was within a range of reasonable responses to the evidence for the judge to conclude that they were not sufficient to justify removal on imperative grounds of public security.

34. Given that the key decision exercising the powers to deport under section 3(5)(a) IA 1971 was the decision to deport dated 27 March 2022, allowing the appeal under the CRA Regulations 2020 was likely to be determinative of the human rights appeal and is in any event in accordance with what was recently said in *Abdullah & Ors (EEA, deportation appeals, procedure)* [2024] UKUT 00066.

35. For the reasons given above, we conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law.

NOTICE OF DECISION

The First-tier Tribunal decision does not involve the making of an error of law

The decision shall stand

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

22 August 2024