IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2024-001275
UI-2024-001276
First-tier Tribunal No:
EA/00987/2023
HU/02033/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 03 July 2024

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NIKODEM PIWOWARCYZK
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Kevin Ojo, a Senior Home Office Presenting Officer
For the Respondent: Peter Jorro of Counsel, instructed by Goscimski & Associates, solicitors

Heard at Field House on 27 June 2024

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 17 January 2023 to make a deportation order by virtue of section 32(5) of the UK Borders Act 2007. The claimant is a citizen of Poland and is a foreign criminal as therein defined.

2. The Secretary of State's deportation decision carried an in country right of appeal, which the claimant exercised.

3. **Mode of hearing.** The hearing today took place face to face.

4. For the reasons set out in this decision, I have concluded that the Secretary of State's appeal must be dismissed.

Background

5. On 5 January 2020, the claimant was granted indefinite leave to remain under the EU Settlement Scheme (EUSS). In the UK, he lives with his partner, Ewelina Lojek, who is also a Polish citizen and grew up in Poland. She has indefinite leave to remain. They have two children, both born in the UK. The elder child, a boy, was born in the UK in June 2010 and is 14 years old. The younger, a girl, was born in May 2017 and is now 7 years old.

6. The claimant has a long list of previous offences, culminating in being sentenced on 16 December 2022 (for an offence on 3 May 2021) for 'fraudulent evasion of a prohibition on the importation of a Class B drug [liquid amphetamine]' contrary to section 170(2) of the Customs and Excise Management Act 1979 and section 3(1) of the Misuse of Drugs Act 1971.

7. The main basis of the claimant's case is that his removal would be unduly harsh for his partner and their two children, on both the 'go' and 'stay' scenarios.

First-tier Tribunal decision

8. The First-tier Judge allowed the appeal on Article 8 ECHR grounds, finding that both the 'go' and 'stay' scenarios would be unduly harsh for this claimant's family members. His partner has longstanding mental health issues, in particular agoraphobia. Their elder child was already 13 years old and had lived in the UK all his life; he only went to Poland to visit his grandparents in the holidays. The younger, a daughter, would be 7 years old in November 2024. The First-tier Judge was satisfied that it was appropriate to allow the family's Article 8 ECHR rights to outweigh the public interest in removing the claimant.

9. The First-tier Tribunal refused permission to appeal.

Permission to appeal

10. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Rimington who considered that:

> "Although the Judge cited *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22, it is arguable he failed to apply the 'unduly harsh test' therein. It is arguable that the Judge failed to reason his decision adequately, particularly in the absence of current independent evidence and the reliance on dated reports. All grounds are arguable."

11. There was no Rule 24 Reply on behalf of the claimant.

12. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

13. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal. The Secretary of State's deportation decision carries an in country right of appeal, which the claimant exercised.

14. For the Secretary of State, Mr Ojo recognised that it was not necessary for the Judge to refer to every point in the evidence before him. He advanced two arguments, the first concerning the weight given to the psychological report of Dr Bronwyn Stewart D.Clin.Psych BSc (Hons), concerning the claimant's partner and children, and to the partner's oral evidence; and the second, that the First-tier Judge had conflated the best interest of the two children with the 'unduly harsh' test, at [76] and [80] of the decision.

15. In relation to Dr Stewart's report, the treatment of which begins in the First-tier Tribunal decision at [44], Mr Ojo argued that the report had been prepared for the claimant's criminal trial and should have been challenged by the Judge as out of date. He conceded that the Presenting Officer at the hearing did not raise this issue, either in cross-examination or closing submissions.

16. Mr Ojo submitted that the First-tier Judge had given inappropriate weight to Dr Stewart's report, which recorded that the claimant's partner had been able to access psychiatric treatment in Poland when she lived there before coming to the UK. Mr Ojo argued that the Judge had failed to treat the partner's evidence with caution, given her mental health difficulties.

17. In relation to the conflation point, Mr Ojo contended that in [76] and [80] of the decision the Judge had confused 'best interests' with 'unduly harsh' and therefore, that the Judge's decision was irrational and should be set aside.

18. For the claimant, Mr Jorro argued that the First-tier Judge had directed herself to the proper issues, the effect of removal of this claimant on his partner and 13-year old son, in particular. The Judge had given a proper self-direction at [68] as to the weight to be given to the best interests of the children.

19. The evidence, which the Judge accepted, was that the claimant's partner had been unable to manage without him and remained psychologically vulnerable. There was no allegation of perversity in the grounds of appeal, in particular in relation to the oral evidence of the claimant and his partner. The Judge had taken proper account of the law and the evidence and had accepted the evidence of the witnesses before her. There was no error of law in the First-tier Judge's conclusions.

20. In reply, Mr Ojo referred me to [19] and [47] in the decision which set out the partner's evidence and paragraphs 6.99-6.103 of the expert report. He argued that the Judge should have accorded different weight to the

evidence of the partner on that basis, and found that despite her evidence to the contrary, she would be able to manage in the claimant's absence.

Analysis

21. At [44] of the decision, the First-tier Judge noted the age of Dr Stewart's report:

> "Dr Stewart's detailed Expert Report … of 60 pages pertaining to the [claimant] and family members is two years old. Even so, [it] contains vital information on the individuals at the time when the [claimant] was sentenced. I find it a useful source to cross check on information provided in or around 2022 with information/evidence provided before me.
>
> 45. The Report is divided into 10 parts. It is a worthy read as it provides a useful backdrop[3.04] to the circumstances of the adults and children in this appeal. *I give equal weight to all other evidence before me. …*The interview records begin at paragraph 6.0. *They contain essential details which I condense for obvious reasons."* [*Emphasis added*]

22. At [59], the Judge noted that Secretary of State accepted in the refusal letter that the claimant's Article 8 rights were engaged. The Secretary of State did not dispute that the claimant had lived at a stable address for a considerable time, had a genuine and subsisting relationship with both his partner and his children, and that he had responsibility for their welfare, arising out of a significant and meaningful involvement with his family members. The claimant had lived most of his adult life in the UK, his wife still had indefinite leave to remain as an EU national and the children have settled status under the EUSS process, with the older child close to qualifying for British citizen status (which is now the case for both children).

23. At [63] the Judge explained the weight she gave to the oral evidence of the claimant and his partner. She said this:

> "Addressing the oral evidence from the [claimant] and his partner, I am satisfied that both the [claimant] and his partner gave consistent evidence of family life with their children. I took the opportunity to hear further evidence from [the partner]. I am satisfied her direct, thoughtful and candid replies reveals her hidden emotions. I observed her continued vulnerability on two occasions on how she/[the claimant] intended to cop if (1) the claimant returned to Poland on his own; and (2) she remains in the UK with the children or alternatively, (3) they all leave together."

The Judge treated the evidence of the claimant and his partner as credible.

24. At [66]-[71], the Judge set out the relevant legal principles and at [68] set out correctly the approach to be taken to the children's best interests: see *DS (India) v Secretary of State for the Home Department* [2009] EWCA Civ 544 and *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74. She then considered the individual facts concerning the partner and each child, before concluding at [82] that:

> "82. On careful consideration of the evidence, *including the best interests of the children,* I am satisfied that the examined facts are sufficiently compelling to outweigh the public interest in his deportation. I find that the [claimant's] deportation being a disproportionate measure would breach the UK's obligation under Article 8 ECHR. Thus, Exception 2 to deportation is established." [*Emphasis added*]

Conclusions

25. I am being asked to interfere with findings of fact and credibility in a lengthy and detailed decision by an experienced First-tier Judge, who heard and saw the parties give their evidence.

26. It is not for me to say whether on this evidence, I would have reached the same conclusions as to credibility or the weight to be given to various elements of the evidence: at the error of law stage, the issue is whether the Judge reached conclusions which were open to her on the evidence.

27. This is a careful and fully reasoned decision over 16 A4 pages. Regarding the medical report of Dr Stewart, it was the only report before the Judge and the Presenting Officer neither cross-examined on its relevance, nor made submissions on that point, according to Mr Ojo. The Judge's approach to the report is impeccable: see [44]-[45] cited above.

28. I remind myself that an appellate court may interfere with the First-tier Tribunal's findings of fact and credibility only where they are 'plainly wrong' or 'rationally insupportable': see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [2]-[5] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed.

29. The grounds of appeal in this appeal do not reach that high standard and are no more than a vigorously advanced disagreement with conclusions which were unarguably open to the Judge for the reasons given in the decision.

Notice of Decision

30. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of no error on a point of law
    I do not set aside the decision but order that it shall stand.

Judith Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 30 June 2024