IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-002820
UI-2024-002821
First-tier Tribunal Nos: EA/06550/2022
HU/61830/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 18 December 2024

Before

UPPER TRIBUNAL JUDGE HOFFMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TOMAS MOLNAR
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms S Nwachukwu, Senior Home Office Presenting Officer
For the Respondent: Ms A Radford of Counsel, instructed by Turpin Miller

Heard at Field House on 12 November 2024

DECISION AND REASONS

Introduction

1. I will refer to the parties as they were before the First-tier Tribunal even though it is the Secretary of State who is the appellant before the Upper Tribunal. Therefore, Mr Molnar will be referred to as the appellant and the Secretary of State as the respondent.

2. The respondent appeals with permission against the decision of First-tier Tribunal Judge Swaney promulgated on 14 May 2024 allowing the appellant's appeals against two linked decisions of the respondent. In the first, dated 18 June 2022, the respondent made a decision to deport the appellant to the Czech Republic ("the Stage 1 decision"). In the second decision, dated 22 September 2023, the respondent refused the appellant's human rights claim and confirmed that she would proceed with his deportation ("the Stage 2 decision").

Background

3. The appellant, who is a Czech national, arrived in the UK in 2012 when he was around the age of 10 as a dependent of his mother who was exercising EU Treaty rights. On 21 May 2019, the appellant was granted settled status under the EU Settlement Scheme. However, on 10 March 2022 he was convicted at Canterbury Crown Court for possession with intent to supply a Class A drug (cocaine), acquiring/using/possessing criminal property and possession of an offensive weapon in a private place. He was sentenced to 27 months' detention in a young offender institution.

4. In response to the appellant's convictions, on 20 June 2022 the respondent served on him the Stage 1 decision. The appellant exercised his right of appeal against that decision to the First-tier Tribunal (EA/06550/2022). Additionally, on 4 January 2023 the appellant made a human rights claim resisting his deportation. That led to the Stage 2 decision, which also attracted a right of appeal (HU/61830/2023).

5. As the appellant is an EU national whose criminal offending took place after the end of the transition period following the UK's withdrawal from the EU, the law governing his deportation is the UK's national legislation. Accordingly, the decision to deport him was taken in accordance with s.32(5) of the UK Borders Act 2007.

The appeals before the First-tier Tribunal

6. The appellant's appeals against the two decisions were heard by First-tier Tribunal Judge Swaney ("the judge") on 11 April 2024. In a decision promulgated on 14 May 2024, the judge allowed the appellant's appeals. Her reasons are summarised below.

7. The judge noted at [36] that it was common ground between the parties that as an EU citizen who had committed offences after the end of the transitional period following the UK's exit from the EU, in accordance with Article 20(2) of the EU-UK Withdrawal Agreement the decision to deport the appellant fell to be considered under national legislation. However, she also found that when applying Article 20(2), the procedural safeguards set out in Article 21 applied, although not the substantive safeguards provided for by EU law. She accordingly rejected the appellant's argument that the respondent was required to justify his deportation on grounds of public policy, public security or public health, or that he must pose a genuine present and sufficiently serious threat to one of the fundamental interests of society: see [48]. Nevertheless, at [48] the judge considered that the EU law principle of proportionality was not a substantive safeguard but a procedural one. As a consequence, at [49], the judge found in order to adhere to EU procedural safeguards, the respondent ought to have turned her mind to the question of whether the appellant's deportation was proportionate in the circumstances of the case and to give reasons for her decision. At [51], the judge found that there was no evidence that prior to making the Stage 1 decision, the appellant had been given the opportunity to show whether any of the exceptions to deportation applied to him and the respondent had failed to consider whether deportation was the least restrictive measure to achieve her objective of protecting the public interest. At [52] to [53], the judge found that it was irrelevant that the respondent had considered the proportionality of the decision to deport the appellant as part of her assessment of his human rights claim in the

Stage 2 decision. She concluded at [56] by finding that the failure by the respondent to consider the proportionality of the decision to deport the appellant breached his rights under the Withdrawal Agreement and at [57], as a consequence, the decision to deport the appellant also breached his rights under Article 8 of the European Convention on Human Rights ("ECHR").

The respondent's appeal to the Upper Tribunal

8. The respondent was granted permission to appeal by First-tier Tribunal Judge Seelhoff on 14 June 2024 on the ground that the judge erred in law by holding that the proportionality assessment was required by Article 21 of the Withdrawal Agreement.

Findings – Error of Law

9. The key provisions of the Withdrawal Agreement relevant to the present appeal are as follows:

> Article 20
>
> **Restrictions of the rights of residence and entry**
>
> 1. The conduct of Union citizens or United Kingdom nationals, their family members, and other persons, who exercise rights under this Title, where that conduct occurred before the end of the transition period, shall be considered in accordance with Chapter VI of Directive 2004/38/EC.
>
> 2. The conduct of Union citizens or United Kingdom nationals, their family members, and other persons, who exercise rights under this Title, where that conduct occurred after the end of the transition period, may constitute grounds for restricting the right of residence by the host State or the right of entry in the State of work in accordance with national legislation.
>
> […].
>
> Article 21
>
> **Safeguards and right of appeal**
>
> The safeguards set out in Article 15 and Chapter VI of Directive 2004/38/EC shall apply in respect of any decision by the host State that restricts residence rights of the persons referred to in Article 10 of this Agreement.

10. At the error of law hearing, the respondent sought to rely on the recent decision of the Upper Tribunal in Vargova (EU national: post 31 December 2020 offending: deportation) [2024] UKUT 00336 (IAC). In that decision, the presidential panel (Dove J and Upper Tribunal Judge Hanson) ("the panel") held that under Article 20 of the Withdrawal Agreement there is a "bright line" distinction to be drawn between cases where an EU citizen or their family members who exercise rights under the Withdrawal Agreement face deportation depending on whether the criminal offending pre- or post-dates the end of the transitional period following the UK's exit from the EU, i.e. 31 December 2020. Where a person faces deportation for criminal offences committed prior to the end of the transition period, EU law applies, specifically the requirements of Chapter VI of Directive

2004/38/EC ("the Directive") (Article 20(1)). However, for cases where the offences are committed after the transitional period, the person's deportation will be considered under the domestic law (Article 20(2)).

11. To the extent that Article 21 of the Withdrawal Agreement says that the safeguards set out in Article 15 and Chapter VI of the Directive apply in respect of any decision by the host State that restricts residence rights of persons protected by the Withdrawal Agreement, at [66] and [67] the panel held that for the cases that fell within the ambit of Article 20(2), this only imported into domestic law the ~~substantive rather than procedural safeguards~~ procedural rather than substantive safeguards found in the Directive. Article 21 had to be considered in the light of paragraphs (1) and (2) of Article 20 and the panel found that any other interpretation of "safeguard" would undermine the bright line between pre- and post-transition offending.

12. Ms Radford, on behalf of the appellant, submitted that the judge did not make a material error of law and, indeed, she had not gone far enough in her decision: she should, it was argued, have found that Article 21 of the Withdrawal Agreement applies all of the safeguards in Article 15 and Chapter VI of the Directive, not just the procedural safeguards. According to Ms Radford, Vargova had been wrongly decided and I should not follow it. The panel had, she said, impermissibly sought to read down Article 21 on the basis that it was inconsistent with what they took to be the UK's intentions when exiting the EU. Ms Radford relied upon Article 4(3), which requires that the provisions of the Withdrawal Agreement "referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of EU law". Ms Radford argued that had the panel considered Article 21 in the light of what Article 4(3) said, they would have been required to interpret the reference to the "safeguards" set out in Article 15 and Chapter VI of the Directive as meaning both procedural and substantive safeguards. Furthermore, she submitted that the text of Article 21 of the Withdrawal Agreement did not say that the safeguards were procedural only; nor did it seek to restrict the application of the provisions in the Directive that it expressly referred to.

13. While Ms Radford argued her points with some force and clarity, ultimately, I am more persuaded by the reasoning of the panel in Vargova. First, the panel in Vargova did have regard to Article 4(3) of the Withdrawal Agreement at [68] but found that (a) the wording of Article 20(2) was clear and required no interpretation and (b), because post-transition period conduct was to be decided in accordance with the national law, Article 20(2) did not require construction in the light of the general principles of EU law.

14. Second, while it is correct that Article 21 refers only to "safeguards" rather than to "procedural safeguards", as the panel found at [66] and [67], if this was taken to mean substantive safeguards as well it would have the effect of importing EU law considerations into decisions taken in accordance with Article 20(2), thereby undermining the bright line drawn between the approaches to be taken in cases involving pre- and post-transition period offending. In essence, the approach advocated for by Ms Radford would mean that for offences that pre-dated the end of the transition period, the respondent would need to apply EU law considerations set out in Chapter VI of the Directive; but for offences that post-dated the end of the transition period the respondent would have to apply both the national legislation relating to deportation and all of the same EU law considerations set out in Chapter VI. That simply cannot be the intention of

Articles 20 and 21. There is no logical reason why it would be more rather than less onerous to deport convicted criminals following the UK's exit from the EU. Indeed, the panel in Vargova rejected the assertion that Article 31(3) of the Directive could import through the "back door" of Article 21 a substantive proportionality analysis into cases that fell within Article 20(2): see [70] and [71]. The panel's interpretation was supported by the European Union's guidance on the Withdrawal Agreement: see [78]. This says that Article 21

> "ensures that the procedural safeguards of Chapter VI of Directive 2004/38/EC fully apply in all situations" including "measures taken on the grounds of public policy, public security or public health (Chapter VI of Directive 2004/38/EC) or in accordance with national legislation". [Underling added]

As the panel noted at [79], there is nothing within that guidance that supported the claim that Article 21 imported substantive EU law rights into a case that falls within Article 20(2).

15. It is also argued in the appellant's Rule 24 response that it would be strange if the Withdrawal Agreement provided those within its scope with no substantive protections from expulsion having carefully set out their substantive rights, which would be rendered meaningless if the UK is free to expel its beneficiaries on whatever terms it chooses. I am not persuaded by that argument. It cannot be said that in deporting a person under its national legislation that the UK is expelling them on "whatever terms it chooses". To the contrary, it would be expelling them on terms specifically agreed with the remaining EU Member States and in accordance with a defined domestic statutory basis subject to EU law procedural safeguards. I do not accept that deporting a person in such a scenario renders their rights under the Withdrawal Agreement meaningless: their right under that Agreement is to have their removal considered in accordance with Articles 20(2) and 21.

16. Ms Radford also sought to rely on the Court of Appeal's judgment in Secretary of State for Work and Pensions v AT [2023] EWCA Civ 1307. She said that case was raised before the panel in Vargova but not mentioned in the decision. I am not, however, satisfied that it adds much to the appellant's case. In AT the Court of Appeal held that the Charter of Fundamental Rights of the European Union continued to apply to the residence rights under Article 13 of the Withdrawal Agreement and to Article 21 of the EU Treaty which applied through express cross-reference. The Court of Appeal decided that those rights were directly effective and fell to be construed in accordance with the Charter: see [113]. However, I am satisfied that the preserved residence rights EU citizens continue to enjoy under Article 13 of the Withdrawal Agreement are nevertheless subject to restriction in accordance with Article 20. As discussed above, under Article 20(1), Chapter VI of the Directive is only applicable in cases where the criminal conduct occurred before the end of the transition period. Otherwise, under Article 20(2), restrictions on the right of residence under Article 13 must be decided in accordance with the national legislation.

17. I therefore turn to consider the decision of the First-tier Tribunal in the present case.

18. Firstly, while the judge was right to find that the reference to "safeguards" in Article 21 meant procedural safeguards only, I am satisfied that she nevertheless erred in law at [48] in finding that the EU law principle of proportionality was a

procedural rather than a substantive safeguard. It is difficult to see how the application of the proportionality analysis, which involves a decisive weighing of the factors for and against deportation based on the particular facts of a case, can be said to be a procedural safeguard akin to the right to be notified of a decision or the right to appeal or review a decision. Indeed, in Vargova the panel accepted at [63] that the proportionality principle was a substantive safeguard.

19. Secondly, in finding at [51] and [56] that the respondent had failed to carry out a proportionality analysis of the decision to deport the appellant, the judge erred on two bases. First, in making that finding, the judge was looking at the Stage 1 decision. However, in Vargova the panel held at [81] and [82] that a Stage 1 decision does not restrict the rights of a person protected by the Withdrawal Agreement and, consequently, Article 21 is not engaged at all. Instead, it is the Stage 2 decision at which a deportation order is made that a person's right of residence is restricted. Second, and more importantly, as the panel also found in Vargova, the EU principle of proportionality is a substantive and not a procedural safeguard and, consequently, it does not apply in cases where Article 20(2) is engaged.

20. These errors of law were material to the outcome of both appeals. That is because the judge found that the respondent's failure to carry out a proportionality exercise not only infected the Stage 1 decision but, at [57], that it also undermined the Stage 2 decision on the basis that the perceived breach of the Withdrawal Agreement in turn amounted to a disproportionate interference with the appellant's rights under Article 8 ECHR.

Remaking

21. The judge allowed the appellant's appeal on the basis that she found the respondent had not carried out a proportionality analysis in accordance with EU law. As a consequence, she did not carry out a substantive consideration of the facts of the appellant's case, including in relation to the provisions of the UK Borders Act 2007 or Article 8 ECHR. Therefore, taking into account the nature and extent of the findings of fact required to remake the decision, applying paragraph 7.2 of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, I am satisfied that remittal for a de novo hearing is the appropriate course of action.

Notice of Decision

The decision of the First-tier Tribunal involved the making of material errors on a point of law.

The decision of the First-tier Tribunal is set aside with no findings preserved.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal at Taylor House, to be remade afresh and heard by any judge other than Judge Swaney.

M R Hoffman

Judge of the Upper Tribunal

Immigration and Asylum Chamber

15th November 2024