IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004443

First-tier Tribunal No: HU/01032/2022
EA/06398/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 16th of January 2025

Before

UPPER TRIBUNAL JUDGE HOFFMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KONRAD MAKOCKI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: In person

Heard at Field House on 6 January 2025

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 Makocki 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 Karbani ("the judge") promulgated on 2 September 2022. In that decision, the judge allowed the appellant's appeal against the respondent's decision dated 6 June 2022 refusing his human rights claim ("the Stage 2 deportation decision"). Having allowed the appellant's human rights appeal, the judge made no findings in relation to the appellant's appeal under the

Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations") challenging the respondent's decision dated 7 July 2022 to refuse his application for status under the EU Settlement Scheme ("EUSS").

Background

3. The appellant is a citizen of Poland. Since arriving in the UK – according to him, in 2009 – the appellant has been convicted on six occasions for nine offences:

- On 13 July 2015, the appellant was convicted at Buckinghamshire Magistrates' Court of destroying or damaging property and assault on a constable for which he was fined.
- On 31 May 2016, the appellant was convicted at Buckinghamshire Magistrates' Court of possessing a Class B drug (cannabis) for which he was fined.
- On 7 September 2016, the appellant was convicted at Buckinghamshire Magistrates' Court of racially or religiously aggravated harassment by words or writing for which he was fined.
- On 3 December 2019, the appellant was convicted at Buckinghamshire Magistrates' Court of battery. On 4 December 2019, he was given a 12-month community order and fined.
- On 4 November 2020, the appellant was convicted at Buckinghamshire Magistrates' Court of battery. He was fined and handed a 12-month community order.
- On 23 October 2021, the appellant was convicted at Oxfordshire Magistrates' Court of assault occasioning actual bodily harm, battery and the use of threatening and abuse words or behaviour likely to cause harassment. He was remanded in custody and on 21 December 2021 he was sentenced at Aylesbury Crown Court to 10 months' imprisonment; issued with a restraining order for two years against his ex-partner; and fined.

4. Meanwhile, on 22 June 2021, the appellant had applied for status under the EUSS. However, on 23 January 2022 the appellant was served with the Stage 1 deportation decision notifying him that the respondent was considering whether to deport him in accordance with the Immigration (European Economic Area) Regulations 2016. In response, on 13 February 2022, the appellant made human rights representations explaining why he thought he should be allowed to remain in the UK. In particular, he sought to rely on his relationship with his twin sister and her 12-year-old son.

5. On 6 June 2022, the appellant was served with the Stage 2 deportation decision refusing his human rights claim; and on 7 July 2022, the respondent refused the appellant's application for status under the EUSS on the basis that he was subject to a decision to make a deportation order.

The appellant's appeal to the First-tier Tribunal

6. The appellant exercised his rights of appeal against the decisions of 6 June 2022 and 7 July 2022. In her decision of 2 September 2022, the judge focussed on the appellant's human rights appeal. The judge found that the appellant did not meet either the private life or family exceptions to the public interest in deportation set out under s.117C(4) and (5) of the Nationality, Immigration and Asylum Act 2002

("the 2002 Act"): see [37] and [39]. The judge therefore went on to consider whether there were any very compelling circumstances to the appellant's case that outweighed the public interest in his deportation. At [40], the judge found that while there was "no evidence of any formal rehabilitation" and she attached "little weight" to the appellant's evidence that he was "now sober and intends to stay that way", she nonetheless found that "he expressed genuine remorse for his behaviour", he had "pleaded guilty from the outset" and had helped "other detainees with paperwork whilst in prison". Taking these into account, as well as "his work history", she found that "these factors reduce the public interest in his deportation". The judge then went on to make the following findings:

> "41. I have balanced that public interest with the likely impact of deportation on [the appellant's] nephew. I have reminded myself that the threshold for determining whether the impact on a child will be unduly harsh is an elevated threshold. I am satisfied that the appellant shares a loving bond with his nephew, and the impact on the child of the appellant's removal will be unduly harsh. I find that the appellant has made efforts to maintain a relationship with his nephew whilst in prison, and is likely to recommence regular contact with him upon release. I am satisfied that he offers practical assistance to his sister and nephew in a relationship akin to being a father figure, and that this will not be able to continue at any comparable level if the appellant is deported.
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> 42. I find that the overall impact on the appellant's nephew as a result of his removal will be disproportionate. I am therefore satisfied that there are very compelling circumstances in this case which outweigh the public interest in the appellant's deportation. The appellant's appeal therefore succeeds under Article 8 outside of the Rules."

7. At [43], the judge stated that she had "not gone on to consider separately whether the decision is in accordance with the Withdrawal Agreement in view of the conclusion above". The notice of decision confirms only that the appeal has been allowed on Article 8 grounds only.

The respondent's appeal to the Upper Tribunal

8. On 20 September 2022, First-tier Tribunal Judge Burnett granted the respondent permission to appeal to the Upper Tribunal.

9. The respondent raised four grounds of appeal of which only two were pursued by Ms Everett:

- Ground 1: The judge made a material error of law by failing to give adequate reasons for her finding that the appellant's deportation would have unduly harsh consequences for his nephew and that the facts of the case met the elevated threshold of very compelling circumstances.
- Ground 4: The judge made a perverse finding that the relationship between the appellant and his nephew met the unduly harsh threshold, let alone the elevated threshold of very compelling circumstances.

The hearing

10. At the error of law hearing, the appellant was unrepresented. He speaks English and did not require an interpreter. He confirmed that he had access to the hearing bundle prepared by the respondent on his phone.

11. I explained to the appellant the purpose of the hearing and the possible outcomes. I also summarised the respondent's grounds of appeal for him. Once

Ms Everett completed her oral submissions, I summarised the key points for the appellant. I then gave him the opportunity to explain why he believed that the decision of the First-tier Tribunal should be upheld. The appellant explained that he does not have his own children, he has known his nephew since he was born, he is his nephew's godfather and has a parental relationship with him. He believed that the judge was right to find that his deportation would have a negative impact on his nephew. The appellant apologised for the crimes he had committed and said that he was no longer abusing alcohol and was a good man.

12. At the end of the hearing, I reserved my decision.

Findings – Error of Law

13. I am satisfied that the judge made a material error of law by failing to give adequate reasons for finding that (a) the appellant's deportation would have unduly harsh consequences for his nephew; and (b) that there were very compelling circumstances to the case that outweighed the public interest in the appellant's deportation.

14. The meaning of "unduly harsh" was considered by the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53. At [23], Lord Carnworth said:

> "23. On the other hand the expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of 'reasonableness' under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in IT (Jamaica) v Secretary of State for the Home Department [2017] 1 WLR 240, paras 55 and 64) can it be equated with a requirement to show 'very compelling reasons'. That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

15. The Supreme Court returned to the unduly harsh test in HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22 where it approved the self-direction given by the Upper Tribunal at [46] of the decision in MK (Section 55: Tribunal Options: Sierra Leone) [2015] UKUT 223:

> "…By way of self-direction, we are mindful that "unduly harsh" does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher…"

16. In the present case, the appellant does not have a partner or children. He instead sought to rely on his relationship with his nephew. There was no suggestion that the appellant lived with his nephew in the past or to what extent he featured in his nephew's life prior to his imprisonment, not least in circumstances where the appellant clearly struggled with alcoholism. The appellant's witness statement only discussed his relationship with his nephew in

very broad terms. At [13] to [22], the judge summarises the appellant's evidence before the First-tier Tribunal. It is notable that little is said about his relationship with his nephew. At [18], it is recorded that the appellant's sister "had not visited him in prison with his nephew, because he was told that they are not close family" and that the appellant said he "has been in touch with his nephew and he knows the appellant is in prison as he is now 13 years old". At [24], the judge records that in his closing submissions the appellant said that he "has a very close relationship with his sister and nephew as well". At [39], the judge found that the appellant "spoke compellingly about his relationship with his nephew and his desire to be a father figure for him"; that he "genuinely intends to partake in the child's life, absent any other father figure"; that "the appellant's connection to the child is one of note"(although this is not explained in any detail); and that the appellant "spoke of the child's progress at school". It was a matter for the judge how much weight to place on the evidence of the appellant. However, I note that none of these findings engage with what the actual consequences would be for the nephew were the appellant to be deported from the UK.

17. The appellant's sister did not attend the hearing to give oral evidence because the appellant said that she was unwell, although at [39] the judge evidently attached weight to what she describes as a statement prepared for the appeal. It appears that this may in fact be a reference to a copy of a letter she had written to the Home Office dated 16 February 2022. Little is said in that letter about the appellant's relationship with his nephew although the judge states that the contents "echoed" what the appellant said. In that letter, the appellant's sister wrote that the appellant lived in the same town as her and that the appellant "can help out with looking after my son on occasion as I work full time…and I also study full-time…It would be challenging without Konrad being nearby and having him deported to Poland". Again, while it was a matter for the judge how much weight to attach to the evidence from the sister, there is no indication from the judge what this evidence said about what the unduly harsh consequences would be on the nephew were the appellant to be deported.

18. While the judge says at [41] that she has reminded herself "that the threshold for determining whether the impact on a child will be unduly harsh is an elevated threshold", from reading the decision it is difficult to discern what particular facts of the case led the judge to believe that that threshold had been met. The judge refers to the appellant having a "loving bond" with his nephew; that he "has made efforts to maintain a relationship with his nephew while in prison, and is likely to recommence regular contact with him upon release"; and that "he offers practical assistance to his sister and nephew in a relationship akin to being a father figure and that this will not be able to continue at any comparable level if the appellant is deported". However, it does not automatically follow that because of those things the impact of the appellant's deportation on his nephew would lead to "severe, or bleak" consequences for the nephew rather than something that is "uncomfortable, inconvenient, undesirable or merely difficult". Irrespective of the fact that the appellant is not even the parent of the child in question, I am satisfied that the judge failed to identify any consequences that would befall the nephew that would engage the necessary degree of harshness.

19. Furthermore, given that the judge accepted that the appellant did not meet either of the two exceptions set out under s.117C of the 2002 Act, it was incumbent on her to consider whether there were any very compelling circumstances to the case "over and above" those described in subsections (4) and (5), the latter of which is predicated on the unduly harsh test. As Lord

Carnworth explained in KO (Nigeria), the unduly harsh test does not equate to or replicate the very compelling circumstances test. Accordingly, the unduly harsh test was not determinative of the very compelling circumstances test. However, at [42], the judge errs by giving no reasons at all for finding that there are very compelling circumstances to the case. She simply states that "the overall impact on the appellant's nephew as a result of his removal will be disproportionate". This was clearly material to the judge's decision to allow the appeal on Article 8 ECHR grounds.

20. For the above reasons, I am satisfied that the judge did make material errors of law in her decision.

Failure to make a decision on the appellant's EUSS appeal

21. While not a point that was raised as part of the respondent's appeal, I would add that because the judge failed to make a decision on the appellant's EUSS appeal, that appeal has yet to be determined in accordance with rule 29 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. This is made clear by the notice of decision, which only refers to the appeal having been allowed under Article 8. In deportation cases such as this one, where the appellant has brought separate appeals under the 2020 Regulations and the 2002 Act, it is incumbent on the First-tier Tribunal to determine both. First, this would avoid situations like the present one where the appellant inadvertently has a pending appeal before the First-tier Tribunal, which may have unintended consequences further down the line. Second, whether an appeal is allowed under the 2020 Regulations and/or human rights grounds will be an important factor when the respondent subsequently decides what type of leave to grant the appellant.

Remaking

22. Had the decision of the First-tier Tribunal been made more recently, I would have preserved the findings in respect of Exceptions 1 and 2 and retained the appeal for remaking in the Upper Tribunal. However, it has been almost two and half years since the decision of the First-tier Tribunal was promulgated, during which time there may have been developments in the appellant's Article 8 ECHR life. Consequently, 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 a material error 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, to be remade afresh and heard by any judge other than Judge Karbani.

M R Hoffman

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10th January 2025