IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002559

First-tier Tribunal No:
HU/01823/2023
HU/56072/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 3 January 2025

Before

UPPER TRIBUNAL JUDGE MANDALIA
and
UPPER TRIBUNAL JUDGE RASTOGI

Between

Secretary of State for the Home Department

Appellant

and

Hanjarina Pireth Oliveira
(NO ANONYMITY DIRECTION MADE)

Respondent

REPRESENTATION

For the Appellant: Ms S Lecointe, Senior Home Office Presenting Officer
For the Respondent: Ms Hanjarina Oliveira, in person

Heard at Field House on 31 October 2024

DECISION AND REASONS

INTRODUCTION

1. Although the appellant in the appeal before the Upper Tribunal is the Secretary of State for the Home Department, for ease of reference we continue to refer to the parties as they were before the First-tier Tribunal

("FtT"). Hereafter we refer to Ms Oliveira as the appellant and the Secretary of State as the respondent.

2. The appellant is a dual national of Brazil and Italy. On 1 August 2021 she was served with a decision to make a deportation order under section 5(1) of the Immigration Act 1971. She subsequently made a human rights claim on 23 August 2021. Her claim was refused by the respondent on 19 April 2023. The appellant's appeal against the decision to refuse the human rights claim was allowed by First-tier Tribunal Judge Scott-Baker ("the judge") for reasons set out in a brief decision promulgated on 7 May 2024. The judge said:

> "3. The following facts were accepted by the representatives. The appellant had dual nationality and she had 16 convictions for 8 offences between 2013 to 2021. The respondent had relied in the stage 1 decision dated 1 August 2021 on the last offence on 10 February 2021 and the conviction on 10 May 2021 at Guilford Crown Court where she was convicted of 1 count of failing to provide specimen for analysis (driving or attempting to drive), 1 count of dangerous driving and 2 counts of common assault of an emergency worker, for which she was sentenced on 14 June 2021 to 10 months imprisonment and 2 months consecutive imprisonment.
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> 4. The appellant had been granted Indefinite Leave to remain under the EU Settlement Scheme on 27 August 2020. The respondent had accepted that the appellant had applied for a registration certificate in March 2010 and has therefore been in the UK for 14 years. The appellant claims that she entered in 2007.
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> 5. In considering the framework of this appeal it was accepted by Mr Paramjorthy that the Stage 1 decision was correct in format but by virtue of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 which came into force on exit day, 31 January 2020 at 11.00 p.m., the appellant should have been granted a right of appeal against the Stage 1 decision dated 1 August 2021. This appears to have been overlooked by the respondent.
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> 6. As a result of the appellant not being granted a right of appeal the later decision of 19 April 2023, the subject of this appeal, is flawed and it follows that this appeal falls to be allowed on this technical basis.
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> 7. The substantive issues in the appeal remain outstanding."

THE GROUNDS OF APPEAL

3. The respondent claims the decision to allow the appeal for the reasons given is erroneous in law on two grounds. First, the appellant met the threshold for Deportation and in the decision to make a deportation order (the stage 1 decision) the respondent had set out why the appellant's deportation is conducive to the public good. The stage 1 decision does not restrict the appellant's right of residence and the only question that arises in an appeal against a stage one decision is whether the decision breaches the procedural protections set out in Article 21 of the Withdrawal Agreement.

4. Second, and in any event, the offending relied upon by the respondent occurred in February 2021. On 10 May 2021 the appellant was convicted

at Guilford Crown Court of one count of failing to provide specimen for analysis (driving or attempting to drive), one count of dangerous driving and two counts of common assault of an emergency worker. She was sentenced on 14 June 2021 to 10 months' imprisonment and 2 months' consecutive imprisonment. The respondent's decision was therefore not a decision taken on grounds of public policy, but under domestic legislation. The judge should therefore have considered whether the respondent's decision to refuse the human rights claim is unlawful under section 6 of the Human Rights Act 1998.

5. Permission to appeal was granted by Upper Tribunal Judge Gill on 19 June 2024

THE HEARING OF THE APPEAL BEFORE US

6. At the outset of the hearing, as the appellant is unrepresented, we summarised the background to the appeal and informed the appellant that in the first instance, our role is to consider whether the decision of the judge of the First-tier Tribunal is tainted by a material error of law. If we are satisfied that there is a material error of law in the decision, our provisional view was that given the brevity of the decision of the judge below, the appropriate course is likely to be that the appeal be remitted to the First-tier Tribunal for hearing afresh.

7. We informed the appellant that there has been a recent reported decision of the Upper Tribunal that appears to be relevant; *Vargova (EU national: post 31 December 2020 offending: deportation)* [2024] UKUT 00336 (IAC). We informed the appellant that our provisional view is that the decision of the First-tier Tribunal is infected by a material error of law, and that subject to anything she would wish to say, it seems to us that the appropriate course is for the decision of the FtT to be set aside and for the appeal to be remitted for hearing afresh.

8. The appellant was distressed and simply submitted that she would like this whole process to be completed. She was assisted by her daughter and we were anxious to ensure, so far as we could, that the appellant understood what was being said. After hearing from the appellant, we informed the appellant that we are satisfied that there is a material error of law in the decision of the FtT such that it must be set aside. We informed the appellant that in fairness to her, there has been no proper consideration by the Tribunal of her human rights' claim and that the appropriate course is for the appeal to be remitted to the FtT for rehearing. We said that we would provide a short decision setting out our reasons and this we now do.

DECISION

9. In *Vargova (EU national: post 31 December 2020 offending: deportation)*, the Upper Tribunal said:

> "1. There is a 'bright line' distinction to be drawn between the regimes that apply to (i) Union citizens, their family members, and other persons,

who exercise rights under the Withdrawal Agreement ('WA') who commit offences prior to the end of the transition period and (ii) such persons who commit offences after this date.

2. A decision to restrict the rights of entry and residence of a Union citizen, their family members, or other persons who exercise rights under the WA ('relevant persons') who commit a criminal act before 11pm 31 December 2020 ('the specified date'), or any appeal against such a decision, must be considered in accordance with Chapter VI of Directive 2004/38/EU – see Article 20(1) WA.

3. The question of whether a 'relevant person' who commits a criminal offence after the specified date is liable to deportation must be considered by reference to the United Kingdom's domestic law, at both the initial decision-making stage and in any subsequent appeal – see Article 20(2) WA. In such cases, Article 21 WA does not import into domestic law the substantive safeguards which are found in the Directive, such as a requirement to apply the EU law concept of proportionality. The 'safeguards' which are available to such individuals as a result of Article 21 WA are restricted to procedural safeguards only.

4. Where the Secretary of State considers the deportation of a Union citizen who was exercising a right to reside in United Kingdom in accordance with Union law before the end of the transition period and has continued to reside here thereafter, she proceeds in two distinct stages.

5. At the first stage, the Secretary of State issues a deportation decision, in response to which the subject is able to raise objections to the decision to make a deportation order. A Stage 1 decision does not restrict the subject's right of residence and the safeguards in the Directive have no application or any appeal against the Stage 1 decision. The question to be considered at an appeal against a Stage 1 decision is whether the appeal should be allowed by the tribunal on the basis that there was a breach of domestic law in the process of making the decision to make the order, where the nature of the breach will have been such as to render the decision unlawful i.e. the legal validity of the decision to deport.

6. A person with leave to remain under the European Union Settlement Scheme (EUSS) may have a right of appeal under regulation 6 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 against a Stage 1 decision. The grounds of appeal against such a decision are found in regulation 8 of those Regulations. If no submissions are made in response to the Stage 1 notice, the only basis of challenge is the lawfulness of the decision on the basis of the information known to the decision maker on the basis of the application of established domestic law principles.

7. At the second stage, when a deportation order is made and notified, a decision is made that does restrict the right of the person referred to in Article 10 and bring into play the provision of Article 21 and the procedural safeguards set out in the Directive.

8. If human rights issues are raised in response to a Stage 1 decision on family or private rights grounds by a 'relevant person' who commits a criminal act after the specified date, these must be considered by the Secretary of State. If she maintains it is lawful to deport, a Stage 2 decision will be made rejecting any human rights claim. Any right of appeal against that decision is to be found in domestic law. The proportionality of the decision by reference to all relevant facts, including the EU national's status

and Article 20(2) of the Withdrawal Agreement excluding the application of EU law, can be considered at that point."

10. The Upper Tribunal considered the two stages of the deportation process and said:

> "81. The decision under challenge before the Judge was a Stage 1 deportation decision notice. That wording is important. It was not a deportation order but a notice advising Ms Vargova that the Secretary of State had made a deportation decision against her and allowing a period within which she was able to raise objections to the making of a deportation order. We find it is therefore not a decision which restricts her rights of residence. We find on a proper interpretation of Article 21 that the safeguards in the Directive have no application at the making of a Stage 1 deportation notice stage or any appeal against the same. The question at that stage is whether the decision to make a deportation notice is lawful under the applicable domestic regime. It is not a decision to remove the recipient of the notice but a decision to consider making a deportation order.
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> 82. It is when a deportation order is made and notified in a Stage 2 deportation order notice, which will also notify a person of any pertinent right of appeal, that a decision is made in the host state that will restrict the right of the person referred to in Article 10 and bring into play the provision of Article 21 and the procedural safeguards set out in the Directive.
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> ...
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> 88. The question to be considered at an appeal against a Stage 1 decision is whether the appeal should be allowed by the tribunal on the basis that there was a breach of domestic law in the process of making the decision to make the order, where the nature of the breach will have been such as to render the decision unlawful i.e. the legal validity of the decision to deport.
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> 89. If submissions have been made on human rights grounds, the Secretary of State must have specific regard to her obligations under Article 8 of the Convention, balancing the applicant's ties to the United Kingdom and any difficulties he or she would face readjusting to life in their home country against the seriousness of their criminal offending, but that will form part of the Stage 2 consideration process."

11. Here, on 1 August 2021 (the stage 1 decision) the appellant was informed that as a result of the appellant's criminality, the Secretary of State deems her deportation to be conducive to the public good and as such she is liable to deportation under section 3(5)(a) of the Immigration Act 1971. The appellant was informed that she may provide reasons why she should not be deported, within 20 working days. The appellant made a human rights claim on 23 August 2021. The respondent considered the appellant's claim and made a decision on 19 April 2023 to refuse the human rights claim. There was therefore no breach of any procedural protections. There was no breach of the domestic law as to the process of making the decision to deport the appellant so it could not be said that the decision was unlawful.

12. The appellant had made representations to the respondent in support of her human rights claim and the respondent had considered all the material

relied upon by the appellant when making the decision to refuse the appellant's human rights claim on 19 August 2023. The judge noted, at paragraph [2] of the decision, that the appellant appeals under s82(1) of the 2002 Act on human rights grounds against the decision of the respondent made on 19 April 2023, but the judge simply failed to address whether the respondent's decision to refuse the human rights claim is unlawful under section 6 of the Human Rights Act 1998.

13. It follows that the decision of the FtT is vitiated by a material error of law and must be set aside.

14. As to disposal, we are conscious of the Court of Appeal's decision in *AEB v SSHD* [2022] EWCA Civ 1512, *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC) and §7.2 of the Senior President's Practice Statements. Having regard to the nature of the error of law, we accept the appellant was deprived of a fair opportunity to have all the evidence she relied upon considered by the FtT and the appropriate course, is for the appeal to be remitted for rehearing before the FtT.

NOTICE OF DECISION

15. The decision of First-tier Tribunal Judge Scott-Baker is set aside.

16. The appeal is remitted to the First-tier Tribunal for hearing afresh

17. The parties will be notified of a hearing date in due course.

18. The appellant will be assisted by a Portuguese interpreter at the hearing of her appeal.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 October 2024