IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002977

First-tier Tribunal No:
HU/01341/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 7th of January 2025

Before

UPPER TRIBUNAL JUDGE O'BRIEN

DEPUTY UPPER TRIBUNAL JUDGE JACQUES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NC
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr E. Terell, Senior Home Office Presenting Officer
For the Respondent: Ms. A Patyna, Counsel, instructed by Duncan Lewis & Co. Solicitors

Heard at Field House on 20 December 2024

DECISION AND REASONS

Introduction

1. The appellant appeals with the permission of First-tier Judge Turner against the decision of First-tier Tribunal Judge Bart-Stewart ("the judge"). By her decision, promulgated on 14 May 2024, the judge allowed the respondent's appeal against the appellant's deportation order made in respect of the respondent by virtue of section 23 (5) of the UK Borders Act 2007.

Background

2. The respondent was born in Subotica, Serbia and lived there with her parents. The respondent has dual Serbian and Hungarian nationality. The respondent came to the UK in or around 2017 and the respondent's parents and her brother now live in the UK.

3. The respondent applied for a registration certificate on 21 December 2020 (as an EU national), which she was issued on 8 February 2021, and which was valid until 30 June 2021. On 26 March 2021, the respondent applied for leave under the EU Settlement Scheme. That application was granted (on the same day) with limited leave for the respondent to remain in the UK until 27 March 2026.

4. On 15 November 2021, the respondent was convicted of making false representations for gain, possessing Class A drugs (namely Cocaine), using a vehicle whilst uninsured and driving whilst disqualified. The respondent was given a 12-month community order with an unpaid work requirement, disqualified from driving, and ordered to pay costs and a victim surcharge.

5. At Maidstone Crown Court on 4 April 2022, the respondent was convicted of possession with intent to supply Class A drugs (namely Cocaine), possession of Class B drugs (namely Cannabis), driving whilst disqualified and using a vehicle without insurance. The respondent was sentenced to 28 months' imprisonment, ordered to pay a victim surcharge, further disqualified from driving. A forfeiture order amounting to £2,970 was made against her for cash found in her possession at the time of her arrest.

6. The respondent therefore has two convictions for 8 offences. It is a matter of record that all 8 offences were committed after the end of the transitional arrangements for the UK leaving the EU.

7. On 16 May 2022, whilst in custody, the appellant served the respondent with a Stage 1 decision letter. The letter set out why the appellant contended that the respondent's deportation was conductive to the public good. The letter was served pursuant to the Immigration Act 1971 and the UK Borders Act 2007. The respondent did not make any response nor representations to the appellant in respect of the Stage 1 letter.

8. On 3 June 2023, the respondent was released on licence and transferred to an Immigration Detention Centre.

9. On 14 June 2023, the appellant served the respondent with a Stage 2 decision letter, containing a decision notice and deportation order giving notice that the respondent was to be removed to Hungary. The appellant also refused the respondent's claims that her Article 3 and Article 8 ECHR rights were being breached by the decision.

10. In July 2023, the respondent was released on bail to her parents address, where she has remained living since.

The Appeal to the First-tier Tribunal

11. The respondent appealed to the First-tier Tribunal and her appeal was heard by the judge at Yarl's Wood. Ms Patyna represented the respondent at that hearing as she does today and the appellant was represented by Mr Beer, a Home Office Presenting Officer.

12. A number of areas were in dispute between the parties at the hearing. Central to this appeal was the respondent's contention that she had a right of appeal under the Immigration (Citizen's Rights Appeals) (EU Exit) Regulations 2020 against the deportation order on the grounds that the decision breached her protected rights under the UK-EU Withdrawal Agreement. The appellant disputed that the European Regime applied as the respondent's criminal conduct occurred wholly after 23:00 hours on 31 December 2020 (the end of the EU exit transition period) and also after the end of the grace period provided for in the Citizens Directive. The appellant contented that the proper legislative framework to be applied was limited to domestic legislation and a consideration by the judge of any breach of the respondent's rights under Article 3 and Article 8 ECHR.

13. The judge then went on to hear the evidence and submissions in the case and promulgate her decision.

14. The judge made her determination as to the legal framework to be applied at paragraphs 15 to 27 of her decision. The judge found at paragraph 27 that:

> "I find that Article 10 of the Withdrawal Agreement is applicable with reference to Chapter VI of Directive 2004/38/EC. The Secretary of State is permitted to make a deportation order on grounds of public policy, public security or public health and in the case of persons such as the (respondent), who has a right of permanent residence, the respondent benefits from a higher level of protection. The burden is on the Secretary of State to show that there are serious grounds of public policy or public security."

15. The judge then proceeded to analyse the facts of the case and gave reasons for allowing the respondent's appeal at paragraphs 28 to 48 of her decision. Of note, the judge specifically referred to Article 27 (2) and Article 28 (1) of the Withdrawal Agreement (paragraphs 28 and 29 refer) and at

paragraph 25 allowed the respondent retrospective permission to appeal against the stage 1 deportation decision, finding that:

"I considered it reasonable to allow the (respondent) to proceed with her argument that the Withdrawal Agreement applies."

16. At paragraph 47 and 48 the judge concluded her decision by determining that:

"On the evidence before me and taking into account all relevant factors I find that the Secretary of State has failed to show that there are serious grounds of public policy or public security requiring the (respondent's) deportation. Even if I accepted that serious grounds were established, I find that it would not be proportionate to deport the (respondent) from the United Kingdon." [par 47]

"The Upper Tribunal stated in Abdullah that *"Where an appeal has been allowed under the EEA Regulations; or, in an appeal under the CRA Regulations on the basis the deportation decision is not justified by reference to reg 27 of the EEA Regulations, it follows that any linked appeal against the same decision under section 82 of the 2002 Act will be allowed on the basis that the decision under appeal was not in accordance with the law."* This must be the same where there is a finding that the decision is in breach of the Withdrawal Agreement. Accordingly, I find that the decision to make a deportation order is not in accordance with the law."
[par 48]

The Appeal to the Upper Tribunal

17. The appellant made an application for permission to appeal on 4 June 2024. There were three substantive grounds of appeal relied upon by the appellant, namely:

(i) That the judge made a material error of law when considering the case with regards to EU law, when Article 20 (2) of the Withdrawal Agreement applied. It was also argued that the judge attempted to incorporate EU legislation into the appeal by finding that due to the appellant's mental health issues, her submissions made in response to the Stage 2 decision, should be treated as a retrospective challenge to the Stage 1 decision.

(ii) That the judge failed to give reasons or any adequate reasons when assessing the respondent's mental health claims and that the judge erred in finding that medical treatment was not available to the respondent in Hungary.

(iii) That the judge failed to give any adequate reasoning as to why the respondent's deportation was not justified pursuant to the Immigration Act 1871 and the UK Borders Act 2007.

18. On 20 June 2024, First-tier Tribunal Judge Turner granted permission to appeal and did not restrict the grounds of appeal to be argued.

19. In granting permission, First-tier Tribunal Judge Turner stated that:

> "Having read the determination, it is arguable that IJ Bart-Stewart applied the incorrect test for the purpose of assessing the public interest in the (respondent's) deportation. As such, it is arguable the Judge did make a material misdirection of law."
>
> "It is also argued that IJ Bart-Stewart erred in permitting the (respondent) to argue against the stage one deportation notice. The application for permission to appeal at 1(c) sets out the basis of this argument in detail. It is arguable that the approach taken by IJ Bart-Stewart in this regard did infect the overall proportionality assessment and failed to have regard to the other available avenues of redress when the stage one decision was issued."

20. The respondent filed a Rule 24 response on 19 December 2024 opposing the appeal. Whilst this response was filed out of time, no issue was taken with this by Mr Terell on behalf of the appellant.

The Appeal Hearing and Submissions in the Upper Tribunal

21. We heard the appeal hearing in this matter on 20 December 2024. In preparation for the appeal, we considered the appeal bundle consisting of 828 pages, a bundle of documents consisting of 23 pages sent to the court on 20 December 2024 on behalf of the respondent and the respondent's bundle, consisting of 808 pages which had been before the First-tier Tribunal.

22. On behalf of the appellant, Mr Terell framed his argument in accordance with the grounds of appeal and referred extensively to the recent Upper Tribunal decision of **SSHD v Vargova [2024] UKUT 00336**. Mr Terell submitted that **Vargova** provided clear authority that there was a distinction to be drawn between EU citizens who had exercised their rights under the Withdrawal Agreement who had committed offences prior to the end of the transitions period and those who had committed offences after this date. Mr Terell submitted that it was clear that the judge had erred in applying EU law in this present case and that such an error was material, and such error undermined the whole of the First-tier Tribunal decision.

23. Mr Terell in particular drew our attention to the judge's conclusions at paragraphs 47 and 48 of their decision, which, he submitted, illustrated that the judge had erred in adopting an approach to the case based on EU law rather than domestic law. Mr Terell further submitted that the findings that had been made by the judge in respect of the respondent's mental health were infected by the judge's error in applying the law incorrectly. Mr Terell invited us to set aside the decision of the First-tier Tribunal in its entirety and to remit the case back to the First-tier Tribunal for rehearing afresh.

24. On behalf of the respondent, Ms Patyna made no concessions in relation to the applicability of **Vargova** in this case and submitted that even if the judge had erred as to how she had approached the case, such an error would not be material as the judge had made strong Article 3 findings in favour of the respondent.

25. Ms. Patyna drew our attention to paragraphs 40, 43 and 44 of the judge's decision:

> "Professor Sen says that she suffers from emotionally unstable personality disorder of the borderline type. Treatment would involve psychological therapy, preferably dialectal behavioural therapy, medications such as mood stabilisers, low dose antipsychotics and antidepressants. He continues that the (respondent) would consider removal from the UK a severe psychological stressor which would increase the risk of suicide based on her previous history. There is a low likelihood that she should be able to reestablish herself in Hungary or Serbia from a psychiatric perspective as her treatment needs are complex." [par 40]
>
> "The (respondent) was 23 when she came to the UK with her parents. She first tried to take her own life as a teenager. Professor Sen states that her psychiatric disorder indicates a vulnerability in personality from her adolescence that affects several areas of her life leading to her liability to become involved in unstable interpersonal relationships, mood instability, attachment difficulties with attempts at self-harm which indicated her skills to cope with psychological stresses of any kind are significantly impaired. He did not think she was feigning any symptoms. The condition makes her extremely vulnerable to psychosocial stresses. Removal from the UK would be a severe stressor as all her family are here, including her mother and father, and her sibling, to whom she is extremely close and this very likely would interfere with response to treatment." [par 43]
>
> "There is no evidence that she would be able to obtain the type of treatment and therapy recommended by Professor Sen or have the ability to access it if it was available. I consider that the reality is the appellant would likely face a complete absence of support in either Hungary or Serbia." [par 44]

26. Ms. Patyna therefore argued that this case was one that was capable of being decided in the respondent's favour on the basis of Article 3 and that the test in **AM Zimbabwe [2020] UKSC 17** had clearly been met. Ms Patyna further submitted that the judge's findings in respect of the respondent's health were separate and not dependent upon the legal framework that had been applied by the judge in other areas of her assessment. In the alternative, Ms. Patyna submitted that if the appellant's appeal was allowed pursuant to the decision of **Vargova**, that the case should be remitted to the First-tier Tribunal, but that the findings of the judge in relation to the respondent's health should be maintained.

27. In response Mr Terell accepted that there was evidence before the judge that could have led her to consider Article 3 findings but submitted that the judge had not ultimately decided the case under Article 3 and had allowed the respondent's appeal because of a fundamental misdirection as to the law to be applied. Mr Terell also referred us to the appellant's grounds of appeal, which argued that the judge had failed to undertake a proper assessment per **AM Zimbabwe** (as above) and found that treatment would not be available to the respondent in Hungary when there was no such evidence of this. This, Mr Terell submitted, meant that the findings should not be preserved, per paragraphs 39 to 45 of **AB (Iraq) v SSHD [2020] UKUT 00268**.

Analysis

28. We are in no doubt that the judge erred as argued by Mr Terell in wrongly applying EU law to their assessment of this case. We have some sympathy for the judge who was faced with an appeal before guidance was given by the Upper Tribunal as to how the court should deal with offences committed after the date upon which the EU law regime was no longer to be applied. However, the decision in **Vargova** now makes crystal clear that in circumstances, such as in this appeal, where offences were committed by an EU Citizen who had been granted leave under the EU Settlement Scheme, after the date on which the transitional arrangements came to an end, then the correct approach legal framework to apply is domestic law.

29. As set out at paragraphs 38 to 46 of **Vargova**, the correct approach would have been to decide this case in accordance with domestic law and specifically to consider the provisions of the Immigration Act 1971 and the UK Borders Act 2007. Within that, as set out at paragraph 39 of **Vargova**:

> "Section 5 of the 1971 Act permits the Secretary of State to make a deportation order against a person whose deportation is conducive to the public good, by operation of section 3(5)(a), or a person who is a member of the family of such a person. Section 32(4) of the 2007 Act deems deportation of foreign criminals, as defined, to be conducive to the public good for the purposes of section 3(5) of the 1971 Act and requires the Secretary of State to deport such a person unless an exception set out in section 33 of the 2007 Act applies."

30. The judge therefore should have considered the respondent's appeal in accordance with these provisions and undertaken an assessment as to whether any of the exceptions as set out in section 33 of the Act apply. The judge failed to do this.

31. The judge therefore fell into error when applying EU law, and in particular when allowing the respondent's appeal on the basis of paragraphs 47 and 48 of their decision.

32. It is unnecessary in the circumstances to decide whether the judge also fell into error when extending time to allow the respondent to appeal the

Stage 1 decision. To the extent that the judge allowed that appeal (and it is unclear if she did in fact make a decision) on either of the available grounds, it was erroneous for the same reasons.

33. We have considered whether this error of law was material given the findings as set out at paragraphs 40, 43 and 44 of the decision and the Article 3 arguments advanced by Ms. Patyna. We have taken into account in particular the test at paragraph 43 of **ASO (Iraq) v SSHD [2023] EWCA Civ 1282** and we do consider that the errors made by the judge were material.

34. This case was not determined by the judge on the basis of Article 3, and we cannot be certain that she would have allowed the appeal on that ground had she directed herself to the correct test. In short, the material error of law undermines the entirety of the judge's decision.

35. Furthermore, we consider that the judge also fell into error when finding, as she did at paragraph 44 that (our emphasis) "**there is no evidence** that she would be able to obtain the type of treatment and therapy recommended by Professor Sen or have the ability to access it if it was available. I consider that the reality is the appellant would likely face a complete absence of support in either Hungary or Serbia." At paragraphs 61 to 69 of the appellant's Stage 2 decision, links were provided to evidence that such medical treatment would prima facie be available to the respondent in Hungary. The judge either overlooked relevant evidence or failed to give adequate reasons why such a finding was made, especially in light of section 5.6 of Professor Sen's report which makes clear that they have no expert knowledge of the health services in Hungary. The findings must therefore be set aside in their entirety.

36. We have considered whether to re-make the decision or remit the case to the First-tier Tribunal. As the error of law undermines the entirety of the decision, we believe that any assessment of the respondent's appeal must be carried out afresh, and it is appropriate to remit the appeal to the First-tier Tribunal to be reheard afresh by a different judge.

Anonymity

37. An Anonymity Order with respect of the respondent has previously been granted by the First-tier Tribunal and we maintain that order.

Notice of Decision

38. The decision of the First-tier Tribunal involved the making of a material error of law and is set aside in its entirety with no findings preserved.

39. The appeal is remitted to the First-tier Tribunal to be considered afresh with no findings preserved, by a different judge.

G. E. Jacques

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
23 December 2024