IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002926

First-tier Tribunal No:
EA/08923/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 January 2025

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EDVARDAS KEKSTAS

Respondent

Representation:
For the Appellant: Mr T Tabori, Counsel instructed by GLD
For the Respondent: Mr Kekstas appeared in person via CVP

Heard at Field House on Monday 16 December 2024 by a hybrid hearing

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Swaney promulgated on 29 April 2024 ("the Decision") allowing the Appellant's appeal against the Respondent's decisions dated 16 August 2023 and 10 January 2024 to deport him to Lithuania and refusing his human rights claim respectively.

2. The Appellant is a national of Lithuania. He came to the UK in 2011. His exact date of entry is not recorded due to his EEA nationality. He was granted settled status under the EU Settlement Scheme ("EUSS") on 1 September 2020. On 20 October 2021, the Appellant was convicted of burglary, attempted robbery and wounding/inflicting grievous bodily harm. He was sentenced on 17 March 2022 to eleven years' imprisonment.

3. Judge Swaney erroneously recorded at [5] of the Decision that "it [was] not disputed that the offences of which the appellant was convicted were committed on 17 January 2020". That date should read "17 January 2021". The relevance of that is that the offences were committed after the UK's departure from the EU and the end of the transition period on 31 December 2020. As Mr Tabori accepted, however, the error as to date at [5] of the Decision was not material since, at [11] of the Decision, Judge Swaney made clear that she understood that the "conduct that gave rise to the decision to deport [the Appellant] was after 31 December 2020". As the Judge there correctly recorded, despite the offences being after that date "[the Appellant] was nevertheless entitled to the protection of the terms of the Withdrawal Agreement". That is a reference to the agreement reached between the UK and the EU on the UK's departure from the EU.

4. The Judge went on to refer to various provisions of the Withdrawal Agreement. As a result of her interpretation of those provisions, she reached the conclusion at [46] of the Decision that "the respondent ought to have applied the procedural safeguards and turned [her] mind to the question of whether in the circumstances of this case, it was proportionate to make a decision to deport the appellant and to give reasons for [her] decision". She went on to find that due to what she saw as the Respondent's failure to consider proportionality of the decision to deport, which could not be "rectified by the subsequent consideration of proportionality in the refusal of the appellant's human rights claim" ([50]), the decision dated 16 August 2023 to deport the Appellant to Lithuania breached his rights under the Withdrawal Agreement.

5. The Judge then went on to consider the Respondent's decision dated 10 January 2024 refusing the Appellant's human rights claim. At [52] of the Decision, she concluded that this was "not in accordance with the law" because the decision to deport breached the Appellant's rights under the Withdrawal Agreement. For that reason, she did not move on to consider the proportionality of the decision to refuse the human rights claim.

6. The Respondent appeals the Decision on three grounds summarised as follows:

   Ground 1: the Judge erred in her interpretation of Article 20(2) of the Withdrawal Agreement by finding that this required a proportionality

decision within Directive 2004/38/EC ("the Directive") to be made when restricting a right of residence. Reference was there made to the case of Vargova v Secretary of State for the Home Department which was at that time pending before this Tribunal and which it was said would decide the issue raised in this appeal.
Ground 2: allied to the first ground, the Judge also erred in her finding that the Appellant's deportation would amount to an unlawful interference with his human rights under Article 8 ECHR.
Ground 3: the Judge had made various errors as to dates.

7. Permission to appeal was granted by First-tier Tribunal Judge R Frantzis on 19 June 2024 in the following terms:

> "..3. In a careful and thorough decision, the FtTJ identifies that they are not aware of any other cases which are on all fours with the appellant's circumstances [37]. The Grounds of Appeal contend that the legal issue ion Ground 1 is the subject of ongoing litigation and argument in the Upper Tribunal.
> 4. It is for those reasons that I grant permission to appeal. "

8. In light of the first ground and the terms of the permission grant, the appeal was thereafter stayed pending the outcome of the Vargova case. The decision in that case is now reported as Vargova (EU national: post 31 December 2020 offending: deportation) [2024] UKUT 336 (IAC) ("Vargova"). Although the decision in Vargova is the subject of an application for permission to appeal to the Court of Appeal, Mr Tabori confirmed that permission has not been granted. The Tribunal's decision therefore remains good law.

9. Following the promulgation of the decision in Vargova, the appeal came before me to decide whether there is an error of law. If I determine that the Decision does contain an error of law, I then need to decide whether to set aside the Decision in consequence. If I set the Decision aside, I must then either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

10. I had before me a composite bundle running to 333 pages (pdf). As an issue of pure law, there is no need for me to refer to documents in that bundle. I also had two bundles of relevant statutory provisions, legislation and case-law. There was no need to have regard to that material as the issue is relatively narrowly confined. I also had a skeleton argument from Mr Tabori.

11. The Appellant appeared in person. He remains in prison because of his criminal sentence. He attended remotely via CVP. Prior to the hearing, he asked for another prisoner to attend with him as a McKenzie friend. That prisoner had assisted him in the past. However, the Appellant is now serving his sentence at a different prison, and it was not possible to arrange with the authorities at both prisons for both prisoners to attend. Further, as I explained to the Appellant, the attendance of the other prisoner would not have assisted him as a

McKenzie friend is not entitled to make submissions but only to provide advice. Since the Appellant and the other prisoner would be joining the hearing from different locations, the presence of the other prisoner would be unlikely to assist the Appellant. The Appellant confirmed that he understood the position and was content to proceed.

12. The Appellant does not speak sufficient English to follow the proceedings unaided. He therefore requested a Lithuanian interpreter. He and the interpreter confirmed that they understood each other. I am extremely grateful to the interpreter for her assistance in enabling the Appellant to follow what are quite technical legal arguments.

13. Having heard submissions from Mr Tabori for the Respondent and following discussion with the Appellant, I indicated that I would allow the Respondent's appeal. I heard from both Mr Tabori and the Appellant as to their preference for the onward resolution of the appeal. Mr Tabori indicated that this Tribunal could retain the appeal. However, having considered the position carefully and taken into account the Appellant's preference, I indicated that I would remit the appeal for redetermination. I give my reasons below.

14. The Appellant explained in the course of the hearing that he had received Mr Tabori's skeleton argument but had no-one to translate it for him and was therefore unable to understand it. I was therefore conscious that due to his lack of English, the Appellant may also find it difficult to follow this written decision. I therefore provided orally at the hearing a summary of the reasons for finding an error of law as set out in more detail below. I also explained to the Appellant that I would be remitting the appeal to the First-tier Tribunal for re-hearing, and he should expect a notice of further hearing from that Tribunal.

DISCUSSION

15. I begin with the third of the Respondent's grounds. I do not need to deal with this in any detail. There are at least four errors in dates but the only one which could be material is that at [5] of the Decision which I have referred to at [3] above. As I there explain, this would not have been a material error due to what is said at [11] of the Decision.

16. I turn then to the first ground which is the crux of this appeal.

17. The guidance given in Vargova reads as follows so far as relevant:

> "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.

...

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."

18. Applying that guidance to the Decision, as Mr Tabori accepted, the Judge had rightly found as follows:

(1) The Appellant has a right of appeal against the 16 August 2023 pursuant to regulation 6 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ([20] of the Decision).
(2) That right of appeal includes the ground whether the decision under appeal breaches the Appellant's rights under the Withdrawal Agreement ([21]).
(3) Article 20(2) of the Withdrawal Agreement applies where the conduct complained of occurs after the end of the transition period ([24] and [43]). In particular at [43] of the Decision, the Judge correctly found that "the appellant's right of residence falls to be considered pursuant to national legislation".
(4) The Appellant is entitled to rely on the procedural safeguards afforded by Article 21 of the Withdrawal Agreement ([45]).

19. The Judge however fell into error from [46] onward of the Decision. The Judge there said this:

"46. I find that this means that the respondent ought to have applied the procedural safeguards and turned his mind to the question of whether in the circumstances of this case, it was proportionate to make a decision to deport the appellant and to give reasons for his decision.

47. In his letter dated 16 August 2022, the respondent relies solely on the fact of the appellant's conviction and length of sentence. The respondent

says that the appellant has not shown that any of the exceptions to deportation apply to him, but has failed to identify which exceptions are relevant and does not give any reasons as to why they do not apply. In the appellant's case it is not evident that he asked the relevant questions, or, if in fact he did, then he failed to identify what factors he had considered and failed to give reasons for his decision that it was proportionate to deport the appellant."

20. As Mr Tabori submitted, and I accept, the Judge there indicates that she thought that an assessment of proportionality under EU law and the Directive formed part of the procedural safeguards in Article 21 of the Withdrawal Agreement. As [3] of the headnote in Vargova makes clear, that is not the position. That is therefore a clear error.

21. Having reached her conclusion in relation to the deportation decision at [47] of the Decision, she went on to consider whether the assessment of proportionality in relation to human rights was sufficient to meet the procedural safeguard as she understood it to be under the Withdrawal Agreement. She considered that issue at [48] to [51] of the Decision as follows:

"48. The Court of Appeal considered the relationship between EU law and domestic human rights law in SSHD v AA (Poland) [2024] EWCA Civ 18. In that case the Court of Appeal found that the First-tier Tribunal judge fell into error in finding that only one proportionality assessment was required and that if the appellant's appeal was dismissed under the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations) (the 2016 Regulations), then he would already have had his article 8 proportionality claim considered at its highest.

49. The Court of Appeal held that the proportionality assessment required by the 2016 Regulations is a matter of EU law that is separate and distinct from the public interest question which arises when considering a human rights claim under domestic law. I consider that the same reasoning must apply to the proportionality assessment required by the Withdrawal Agreement.

50. For these reasons, I find that the failure to consider the proportionality of the decision to deport pursuant to the procedural safeguards protected by the Withdrawal Agreement cannot be rectified by the subsequent consideration of proportionality in the refusal of the appellant's human rights claim.

51. I find that the respondent has failed to consider proportionality in making the decision to deport the appellant. Accordingly, I find that the respondent's decision made on 16 August 2023 to deport the appellant pursuant to section [sic] and 3(5)(a) of the 1971 Act and section 32(5) of the 2007 Act breaches the appellant's rights pursuant to the Withdrawal Agreement and I allow the appellant's appeal against that decision."

22. As above, that passage repeats the error that the procedural safeguards incorporate a requirement to consider proportionality under the EU law.

23. The Judge then went on at [52] to consider the Respondent's decision refusing the Appellant's human rights claim. Her assessment in that regard is the subject of the Respondent's second ground. The Judge found that the refusal of the human rights claim was an unlawful interference with the Appellant's human rights for the following reasons:

> "I find that because the respondent's decision to deport the appellant breaches his rights under the Withdrawal Agreement, the decision to refuse the human rights decision is not in accordance with the law. The appellant's appeal against the refusal of his human rights claim made on 10 January 2024 falls to be allowed."

24. The Judge therefore wrongly concluded that the failure to consider proportionality under EU law which had led to the first of her errors also led to an allowing of the appeal on human rights grounds because the refusal of the human rights claim was not in accordance with the law. The Respondent has therefore also made out her second ground.

25. In his brief submissions to me, the Appellant made clear that his main ground of appeal was that deportation would breach his human rights. The Appellant has not had any judicial assessment of the Respondent's decision as to proportionality in that regard. Although, as Mr Tabori submitted and I accept, there are limited issues to be decided in this appeal, it is appropriate to remit the appeal in fairness to the Appellant. It was for that reason that I agreed to the Appellant's request to remit the appeal.

26. As I have made clear above, however, there can now be little if any challenge to the Respondent's decision to deport based on the Withdrawal Agreement. The main and possibly only issue is whether the decision to deport the Appellant to Lithuania breaches his Article 8 rights. Although the Appellant referred also to deportation breaching his Article 3 rights, as I explained to him, his protection claim in relation to Lithuania as an EU Member State has been certified inadmissible. As Judge Swaney pointed out at [22] of the Decision, "[p]ursuant to section 80A(3) [of the Nationality, Immigration and Asylum Act 2002] there is no right of appeal against a declaration of inadmissibility."

CONCLUSION

27. For the reasons set out above, the Decision contains errors of law. I therefore set that aside in its entirety and remit the appeal to the First-tier Tribunal for a full de novo hearing.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Swaney promulgated on 29 April 2024 involves the making of an error of law. I set aside the Decision in its entirety. I remit the appeal to the First-tier Tribunal (Taylor House) for rehearing before any Judge other than Judge Swaney. A Lithuanian interpreter will be required for the hearing and a CVP link needs to be provided for the Appellant.

L K Smith
Upper Tribunal Judge Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 December 2024