IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006451

First-tier Tribunal No:
EA/53742/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 28th of March 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Secretary of State for the Home Department

Appellant

and

Didzis Bondars
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms R Arif, Senior Home Office Presenting officer
For the Respondent: Ms G Kiai, counsel, instructed by Turpin Miller LLP

Heard at Birmingham Civil Justice Centre on 2 November 2023

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Didzis Bondars. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the First-tier Tribunal ("FtT"). I refer to Mr Bondars as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Lativa. He claims to have arrived in the United Kingdom in 2009. On 25 April 2019 he was granted indefinite leave to remain under the EU Settlement Scheme. The appellant has 4 convictions for 7 offences committed between 18 December 2019 and 25 March 2021 and on 11 November 2021 a decision was made to make a deportation order, relying upon sections 3(5)(a) and 5(1) of the Immigration Act 1971. The appellant's appeal against that decision was allowed by First-tier Tribunal Judge Barker for reasons set out in her decision dated 11 July 2022.

3. The respondent claims Judge Barker materially erred in law in finding that the deportation of the appellant is not conducive to the public good. The respondent claims Judge Barker has substituted her own view as to whether or not the appellant's deportation is conducive to the public good without due deference to the view of the respondent. The respondent claims that on appeal, the Tribunal was restricted to a consideration of the legality of the respondent's decision on public law grounds. The respondent refers to the decision of the Upper Tribunal in *Wilson (NIAA Part 5A; deportation decisions)* [2020] UKUT 350 (IAC) in which the Upper Tribunal said the Tribunal is concerned only with whether removal in consequence of the refusal of the human rights claim is contrary to section 6 of the Human Rights Act 1998. If Article 8(1) is engaged, the answer to that question requires a finding on whether removal etc would be a disproportionate interference with Article 8 rights. The respondent claims that the judge's assessment of proportionality here, is limited to what is said at paragraphs [65] and [66] of the decision and the judge fails to give adequate reasons for the conclusion that the decision of the respondent is disproportionate.

4. The respondent submits that the concession made by the Presenting Officer that if the Tribunal found that the appellant was not a persistent offender, the appeal must be allowed as the public interest would not require his removal, was made erroneously. The respondent seeks to withdraw the concession because there is good reason in all the circumstances to take that course. The respondent claims the concession is contrary to the approach that must be taken as set out in *Wilson (NIAA Part 5A; deportation decisions)*.

5. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchinson on 17 August 2022. Judge Grant-Hutchinson said:

> "2. It is arguable that the Judge has erred in law (a) by substituting her own decision for that of the Respondent in finding that the deportation of the Appellant is not conducive to the public good and (b) by failing to give adequate reasons in concluding that the Respondent's decision is disproportionate.
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> 3. While the Respondent accepts that the Presenting Officer conceded that if the Appellant was not a persistent offender then there was no public interest in the Appellant's deportation, it is submitted that the concession was made inappropriately and should be withdrawn. Reference is made to the case of SSHD v Akram Davoodipanah [2004] EWCA Civ 106."

The hearing before me

6. Ms Arif adopts the respondent's grounds of appeal and submits that in reaching her decision, the judge substituted her opinion as to whether the deportation of the appellant is conducive to the public good for that of the respondent. She submits, relying upon the decision of the Upper Tribunal in *Wilson (NIAA Part 5A; deportation decisions),* that the real question for the Judge was whether the removal of the appellant is disproportionate. She submits the concession made by the Presenting Officer that if the judge finds the appellant is not a persistent offender, his appeal should be allowed, was erroneously made and the judge was required to consider and make a finding on whether removal of the appellant would be a disproportionate interference with his Article 8 rights.

7. In reply, Ms Kiai adopts her skeleton argument dated 2 November 2023. She submits that in reaching her decision, in accordance with the principles set out in *Wilson (NIAA Part 5A; deportation decisions),* the judge properly considered whether the appellant's removal would be a disproportionate interference with his Article 8 rights. Ms Kiai submits the judge considered the appellant's offending behaviour and found that he cannot accurately be described as a man 'who keeps breaking the law' and that he is not a persistent offender. There is therefore no other reason for the appellant to be deported, and it was open to the judge to therefore conclude that the refusal of the appellant's human rights claim is not proportionate in all the circumstances.

8. Ms Kiai submits it is not open to the respondent to simply withdraw the concession made at the hearing after the decision of the FtT has been promulgated. It would have been open to the Presenting Officer to withdraw the concession during the course of the hearing but he did not do so. There is no evidence that the concession was not properly made and it was a concession specific to the facts of this appeal. Ms Kiai submits the withdrawal of the concession is prejudicial to the appellant who incurred significant expense to secure representation before the FtT and has continued to incur the expense in defending the decision of the FtT. Furthermore, the withdrawal of the concession is prejudicial because of the ongoing delay in reaching a final decision.

Decision

9. Section 3(5)(a) of the 1971 Act provides that a person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good. Section 5(1) of the 1971 Act provides that where a person is liable to deportation under s3(5), the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the UK. Such a deportation order shall invalidate any leave to enter or remain in the UK given before the order is made or while it is in force.

10. In the decision dated 11 November 2021, the respondent said that as a result of his criminality, the Secretary of State deems the appellant's deportation to be conducive to the public good and as such he is liable to

deportation under section 3(5)(a) of the Immigration Act 1971. The respondent went on to say:

> "The Secretary of State has deemed your deportation to be conducive to the public good and accordingly it is in the public interest that you be removed from the United Kingdom without delay. Therefore, the Secretary of State has decided to make a deportation order against you under section 5(1) pursuant to section 3(5) or 3(6) of the Immigration Act 1971."

11. As Ms Kiai acknowledged from the outset of her submissions, Part 13 and in particular, paragraph 398 of the Immigration Rules remained relevant. Insofar as is material, the rules provide:

> "396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation….
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> …
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> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
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> …
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> …
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
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> …
>
> 399A This paragraph applies where paragraph 398(b) or (c) applies if –
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> (a) the person has been lawfully resident in the UK for most of his life; and
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> (b) he is socially and culturally integrated in the UK; and
>
> (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

12. In *Wilson (NIAA Part 5A; deportation decisions)* [2020] UKUT 00350(IAC), the Upper Tribunal said:

> "68. The distinction between the Secretary of State's power to deem a person's deportation to be conducive to the public good, because the Secretary of State considers that their offending has caused serious harm or that they are a persistent offender, and the task of the First-tier Tribunal in determining an appeal against the Secretary of State's decision to refuse a human rights claim by a person liable to deportation, is evident from SC (Zimbabwe). As set out in paragraph 29 above, in paragraph 26 of his

judgment in that case, McCombe LJ rejected the submission of Counsel for the Secretary of State that:

> "s.117D(2)(c) requires a court or tribunal, in applying that provision to attribute "significant weight" to **the Secretary of State's anterior view that paragraph 398(c) of the Rules has been satisfied for the purposes of her own decision to make a deportation order in the first place**" (our emphasis).

There is no suggestion there or, indeed, elsewhere in the Court of Appeal authorities mentioned above, that a finding by the First-tier Tribunal, in a human rights appeal, that an individual is not a "foreign criminal" for the purposes of Part 5A of the 2002 Act means the Secretary of State's "anterior" decision under section 3(5)(a) and section 5 of the 1971 Act must, without more, be treated as unlawful.

69. The reason for that is plain. Section 117A of the 2002 Act delineates the scope or application of Part 5A. Subsection (1) explains that Part 5A applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches Article 8 and would as a result be unlawful. In an appeal under section 82(1)(b), the decision in question is the refusal by the Secretary of State of a human rights claim; that is to say, the refusal of a claim, defined by section 113(1), that removal from the United Kingdom or a requirement to leave it would be unlawful under section 6 of the 1998 Act. The First-tier Tribunal is, therefore, not deciding an appeal against the decision to make a deportation order and/or the decision that removal of the individual is, in the Secretary of State's view, conducive to the public good. It is concerned only with whether removal etc in consequence of the refusal of the human rights claim is contrary to section 6 of the Human Rights Act 1998. If Article 8(1) is engaged, the answer to that question requires a finding on whether removal etc would be a disproportionate interference with Article 8 rights."

13. I accept, as Ms Kiai submits, the judge properly identified the issues in the appeal at paragraph [29] of her decision. She found at [46], the respondent's decision engages Article 8 and that removal would involve an interference with the appellant's private and family life in the UK. She was satisfied in all the circumstances that such interference would have consequences of such gravity as potentially to engage the operation of Article 8 of the ECHR. She said, at [50], that the decision comes down to whether the interference with the appellant's right to respect for his private life is justified under Article 8(2) and proportionate in all the circumstances.

14. The judge identified at paragraph [29] of her decision that the next question is whether the appellant is a foreign criminal within the meaning of s117D(2) of the Nationality, Immigration and Asylum Act 2002. Section 117A(1) of the 2002 Act states that Part 5A of the Act applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts (a) breaches a person's right to respect for private and family life under Article 8, and (b) as a result would be unlawful under section 6 of the Human Rights Act 1998. Section 117A(2) requires that in considering the public interest question, the court or tribunal must (in particular) have regard, in all cases to the considerations listed in s117B,

and in cases concerning the deportation of foreign criminals, to the considerations listed in s117C.

15. For reasons set out at paragraphs [51] to [61] of the decision, the judge concluded, at [62] as follows:

> "Having a considered all the relevant factors as detailed above, whilst the Appellant has been convicted of more than one offence over the relatively short course of some 17 months, given the number of convictions, and the nature and timing of the offences, I am satisfied that the Appellant cannot be accurately described as man 'who keeps on breaking the law', and is not a persistent offender for the purposes of section 117D of the 2002 Act."

16. At paragraphs [63] to [65], the judge went on to say:

> "63. In my judgment, the level of his offending does not meet the threshold for justification of deportation under the 1971 Act. In other words, I find that removal of the Appellant is not conducive to the public good.
>
> 64. In those circumstances, and as Mr Swaby himself submitted during the hearing, the Respondent puts forward no other reason for the decision to deport the Appellant and her decision cannot not be justified on my findings. The refusal of his human rights claim is not proportionate in all the circumstances. It follows that the appeal must be allowed.
>
> 65. I am satisfied that the public interest does not require the Appellant's deportation. Deportation will interfere with the Appellant's right to respect for his family and private life under Article 8 of the ECHR, and the interference is not justified by reference to Part 5A of the 2002 Act. In other words, the Respondent's decision amounts to a disproportionate interference with the Appellant's rights."

17. It is here that in my judgement the judge fell into error. As the Upper Tribunal said in *Wilson (NIAA Part 5A; deportation decisions)*:

> "72. … in the present case, the Secretary of State's decisions that the claimant's deportation would be conducive to the public good and that a deportation order should be made in respect of him, would have to be unlawful on public law grounds before that anterior aspect of the decision-making process could inform the conclusion to be reached by the First-tier Tribunal in the human rights appeal. To reiterate, such unlawfulness is not established by the judge's conclusion for the purposes of Part 5A of the 2002 Act that the individual is not a "foreign criminal" within the meaning of section 117D(2)."

18. What is clear from paragraph [63] of the decision of the FtT is that the judge erroneously substituted her own view as to whether or not the removal of the appellant is conducive to the public good to the view of the Secretary of State. She failed to consider whether the Secretary of State's decision that the appellant's deportation would be conducive to the public good and that a deportation order should be made in respect of him, was unlawful on public law grounds.

19. The judge conflated the issues because her decision that the level of the appellant's offending does not meet the threshold for justification of deportation under the 1971 Act, was informed by her decision that he is not a persistent offender for the purposes of s117D of the 2002 Act.

Section 3(5) of the 1971 Act simply provides, without more, that a person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good. The individual is neither required to be a persistent offender nor the subject of any particular sentence imposed following a conviction. Paragraphs 398(c) and 399A of the Immigration Rules are then relevant. The judge failed to have regard to any of the factors relevant to her decision as set out in paragraph 399A of the Immigration Rules.

20. It was against the backdrop of that error that the judge went on, at paragraphs [64] and [65] of her decision, to refer to the 'concession' made by the Presenting Officer and to conclude that the refusal of the appellant's human rights claim is not proportionate in all the circumstances and the appeal must be allowed. The 'concession' made by the Presenting Officer is set out at paragraph [49] of the decision:

> "Mr Swaby submitted, quite sensibly in my judgment, that if I found that the Appellant was not a persistent offender, then his deportation could not be justified, and his appeal must be allowed, as the public interest would not require his removal."

21. The respondent claims the concession was erroneous and seeks to withdraw it. That is set out in the grounds of appeal. Ms Kiai submits the respondent is not at liberty to withdraw a concession following a hearing, once the appellant's appeal has been successful, and that it is an abuse of process for the Upper Tribunal to allow the respondent to rely on the respondent's withdrawal of the concession in order to establish an 'error of law'. Ms Kiai refers to the decision of the IAT in *Carcabuk* which was cited with approval by the Court of Appeal in *NR (Jamaica) v SSHD* [2009] EWCA Civ 856 and to the decision of Anthony Thornton QC in *R (on the application of Said & Others) v SSHD* [2015] EWHC 879. She submits the respondent has failed to provide any good reason explaining why the concession was made and why the respondent now seeks to withdraw it. She submits there is significant prejudice to the appellant who has spent a considerable amount of money on these proceedings, and now wishes to move on with his life. Ms Kiai submits the real effect of the respondent's concession before the FtT, is (in substance), to withdraw the respondent's decision, and it would be wrong for the Upper Tribunal to permit the respondent to withdraw that concession; *AK (Sierra Leone) v SSHD* [2016] EWCA Civ 999

22. In *AK (Sierra Leone) v SSHD*, concessions were made on behalf of the Secretary of State before the First-tier Tribunal that AK fell within Exception 1 of s.117C(3) of the Nationality, Immigration and Asylum Act 2002, as amended. The SSHD was permitted to withdraw that concession before the Upper Tribunal. The Court of Appeal allowed AK's appeal and, in doing so, considered a number of cases where concessions were sought to be withdrawn, including *SSHD v Davoodipanah* [2004] EWCA Civ 106, which is referred to by the respondent in the Grounds of Appeal here. Having considered the particular facts of the case, Jackson LJ concluded:

> "48. It follows that the concessions made by the Home Office Presenting Officer were such as to determine the entire appeal. The First-tier Tribunal

> Judge, as he was entitled to do, accepted those concessions. That was the end of the case.
>
> 49. I do not need to go so far as to say that in such circumstances the Secretary of State could never appeal to the Upper Tribunal, but on the facts of this particular appeal, it seems to me quite unjust that the Secretary of State, having conceded on all points, should be entitled to resurrect her case and withdraw the concessions which she had made. As [Counsel for the Secretary of State] rightly concedes, the Upper Tribunal gave no good reason for allowing the Secretary of State to take that course.
>
> 50. Against that background and some two years eight months after the Secretary of State made her concessions, I think it would be unjust to remit this case to the Upper Tribunal so that the Secretary of State can now embark upon another attempt to withdraw her concessions. In the result, therefore, if my Lady agrees, this appeal will be allowed, and the decision of the First-tier Tribunal will be reinstated."

23. The authorities that are referred to by Ms Kiai demonstrate the approach taken in different cases but what is clear is that much will turn on the particular facts and circumstances and there are no all embracing principles.

24. I can see the force in the submissions made by Ms Kiai and I accept that where a Presenting Officer makes a concession during the course of the hearing before the FtT it should not normally be open to the Secretary of State at the second appeal stage to seek to withdraw it with no explanation for its having been made. I accept that finality of litigation requires the respondent to be bound by the concession in precisely the same way that a concession made on behalf of an appellant would be adopted by a judge. I acknowledge the prejudice that Ms Kiai refers to, but that must be weighed against the need to ensure that a decision reached by the Tribunal is one that is reached on a proper legal foundation. The Upper Tribunal may, depending on the circumstances, permit a concession that was made before the FtT to be withdrawn. Here, the concession made was quite simply wrong as a matter of law as established in the reported decision of the Upper Tribunal in *Wilson (NIAA Part 5A; deportation decisions)*, a decision that pre-dates the decision of the FtT. Neither party referred to the decision of the Upper Tribunal before the FtT. The judge was not assisted in her task by the Presenting Officer but a specialist judge of the Tribunal can be expected to know of relevant reported decisions. I have no doubt that had the judge had in mind the correct approach, she would not have proceeded in the way that she did.

25. The finding made by the judge that the appellant is not a persistent offender means the appellant is not a 'foreign criminal' as defined in s117D and so the additional considerations set out in s117C of the 2002 Act did not apply. That did not absolve the judge from considering whether the removal of the appellant is proportionate to the legitimate aim having regard to the public interest considerations applicable in all cases as set out in s117B of the 2002 Act.

26. Standing back, I am satisfied that the judge made two errors in reaching her decision. First, she erroneously substituted her own view as to

whether or not the removal of the appellant is conducive to the public good for the view of the Secretary of State, without giving any reasons as why the respondent's view was unlawful on public law grounds. Second, and following on from that error, the judge failed to make an adequately reasoned finding on whether the removal of the appellant would be a disproportionate interference with Article 8 rights. The concession made by the Presenting Officer flowed from judge's erroneous approach to the appeal and it is in my judgement appropriate to allow the respondent to withdraw the concession because; i) it was not the only error in the decision of the FtT; (ii) it was erroneous in law, and iii) it is in the overall interests of justice to do so since the decision of the FtT must be set aside in any event.

27. I find therefore that the decision of FtT Judge Barker is vitiated by material errors of law such that it must be set aside.

28. The findings made by the judge that the respondent's decision engages Article 8 and that removal would involve an interference with the appellant's private and family life in the UK, and would have consequences of such gravity as potentially to engage the operation of Article 8 of the ECHR are not challenged, and are preserved. The finding in favour of the appellant that the appellant is not a 'persistent offender' and therefore is not a 'foreign criminal' as defined in s117D(2) of the 2002 Act is also preserved. The issue in this appeal is whether the interference with the appellant's right to respect for his family and private life is justified under Article 8(2) and proportionate in all the circumstances.

29. As to disposal, I am 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. Sub-paragraph (a) deals with where the effect of the error has been to deprive a party before the Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the FtT, whereas sub-paragraph (b) directs me to consider whether I am satisfied that the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

30. Having regard to the nature of the errors of law, I accept the appellant was deprived of a fair opportunity to have his Article 8 appeal considered by the FtT and the appropriate course, in fairness to the appellant, is for the appeal to be remitted for rehearing before the FtT.

Notice of Decision

31. The decision of First-tier Tribunal Judge Barker is set aside.

32. The appeal is remitted to the FtT for hearing afresh.

33. The finding set out in paragraph [28] of this decision are preserved. The issue in this appeal is whether the interference with the appellant's right to

respect for his family and private life is justified under Article 8(2) and proportionate in all the circumstances.

34. The parties will be notified for a further hearing date before the FtT in due course.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 February 2024