IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005289

[On appeal from
First-tier Tribunal No: EA/10165/2022]

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14th June 2024

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

CHRISTOPHER IHEGBU
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Ferrin (LR)
For the Respondent: Mr Lawson (Senior Home Office Presenting Officer)

Heard at Birmingham Civil Justice Centre on 23rd May 2024

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Plowright, promulgated on 16th October 2023, following a hearing at Birmingham CJC on 6th October 2023. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before us.

The Appellant

2. The Appellant is a male, a citizen of Germany, and was born on 28th August 1965. He appeals against the decision of the Respondent dated 2nd October 2022 authorising his deportation (a Stage 1 deportation decision) on account of his having been convicted of being concerned in the supplying of a controlled drug, for which he was sentenced to one year and three months' imprisonment at Aberdeen Sheriff Court on 30th May 2022.

The Appellant's Claim

3. The Appellant's claim is that the decision to deport the Appellant was disproportionate under Article 8 ECHR because it was not in accordance with Section 3(5) and (6) of the Immigration Act 1971. The Appellant was a person with EUSS leave and the Respondent had accepted that he had a right of appeal against the decision under Regulation 6 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. The Appellant could appeal the deportation decision on the basis that the decision breached his rights under the Withdrawal Agreement, the EEA EFTA Separation Agreement, or the Swiss Citizens' Rights Agreement. In the alternative, the Respondent had also accepted that the Appellant could appeal on the basis that the decision was not in accordance with Section 3(5) or (6) of the Immigration Act 1971, and the Appellant had also been issued with a One-Stop Notice. Therefore, although there had been a Stage 1 deportation decision there had not been a Stage 2 decision with respect to the Appellant's Article 8 rights and that the failure to make that decision rendered the decision unlawful as being disproportionate.

The Judge's Findings

4. Judge Plowright, hearing the appeal on 6th October 2023, observed how on 14th October 2022 the Appellant had filed an appeal in the section "New Matters" when arguing that it would be disproportionate to deport him under Article 8 ECHR. The Appellant's representative had then sought to make good that representation on 2nd February 2023 by filing further evidence in relation to the Appellant's Article 8 rights. Thereafter, on 15th June 2023 FtTJ Shepherd had adjourned the hearing of this appeal before her owing to a lack of any reply to the Appellant's representations in relation to the initial decision to deport letter of 2nd October 2022. Judge Shepherd went on to give directions that the Respondent furnish further evidence in relation to the Appellant's offence, sentence and conviction and also furnish a response in relation to the Appellant's human rights case, as well as an indication of whether the Respondent intends to serve a Stage 2 deportation decision.

5. Although the matter was then listed for final hearing on 25th August 2023 it had to be converted to an oral Case Management hearing because of the delay by the Respondent in producing a Stage 2 decision letter so that further directions were issued again by the Tribunal requiring the Respondent to comply with FtTJ Shepherd's directions. This was done on 15th August 2023 so that when FtTJ Parkes heard the matter on 25th August 2023 at the oral Case Management hearing the Tribunal decided that the Respondent had had more than sufficient time to prepare this case and had consistently failed to comply with directions and had failed to explain how this has come about. Judge Parkes also stated that the Respondent was not permitted to serve any further evidence or other documentation in this appeal and was limited to the Home Office bundle of 21 pages which had already been served. Moreover, there would be a wasted costs order against the Respondent in respect of the Appellant's costs of attendance before Judge Shepherd on 15th June 2023 and the CMR of 25th August 2023.

6. When on 6th October 2023 the appeal was finally heard, it saw the Respondent's representative make an application for an adjournment of three months in order for the Respondent to consider the response to the Section 120 notice and to make a "Stage 2 decision". The Appellant's Counsel did not oppose this application and positively supported it. The Respondent's representative did, however, make it abundantly clear that having taken instructions, the

Respondent was not going to consent to Article 8 being dealt with as a 'new matter.' However, IJ Plowright refused the application for an adjournment on the basis that the Article 8 representations had been made on 2nd February 2023, and that in spite of directions by the Tribunal on 15th June 2023 and on 15th August 2023, the Respondent had failed to take the matter any further. Then on 25th August 2023, both parties had been left in no doubt that the appeal would be listed for a final hearing and that the Respondent could not seek to rely on any further evidence or documentation including the Stage 2 letter.

7. Judge Plowright went on to explain that the appeal before him could only be brought on one of two grounds. First, that the decision was in breach of the Withdrawal Agreement. Second, and in the alternative, that the decision was not in accordance with Section 3(5) of the Immigration Rules. Article 8 could only be considered as a 'new matter' before the Tribunal if the Respondent had consented to it being considered as a new matter. Judge Plowright pointed out that, "however the respondent does not consent to it being raised as a new matter" and that "even if the respondent were to consider the appellant's Article 8 rights in the next three months, there is therefore no guarantee that the respondent will consent to Article 8 being considered as a 'new matter' as part of this appeal" (paragraph 18).

8. Given that this was the case, Judge Plowright proceeded to hear the appeal without consideration of the Article 8 issue because "it was in the interests of justice to proceed with the appeal that was before me on the limited grounds available to the appellant", and that "the appellant will not be penalised by proceeding today because as Mr Swaby [for the Respondent] made clear, the appellant's Article 8 representations would still have to be considered at some point in time by the respondent" (paragraph 19).

9. On that basis, and in considering the appeal on these specific merits, the judge dismissed the appeal because, "it has not been argued before me that the decision is in breach of the Withdrawal Agreement" and that "therefore the only ground of appeal that I need to consider is whether the decision is in accordance with section 3(5) of the Immigration Act 1971" (paragraph 24). This being so, it was clear that the definition of a "foreign criminal" under Section 32 of the UK Borders Act 2007 and the definition of "foreign criminal" under Section 117B of the Nationality, Immigration and Asylum Act 2002, applied in this case, because here it was the case that "the appellant meets that definition because he was sentenced to more than 12 months of imprisonment" (paragraph 25).

Grounds of Application

10. The grounds of application state that the judge was wrong not to have allowed the adjournment because both parties had agreed to the adjournment. Therefore, the judge's decision to refuse the Respondent's application to adjourn in order to enable the Respondent to consider the Article 8 claim was perverse, unreasonable and unfair to the Appellant, especially given the relevance of Article 8 rights raised by the Appellant. Moreover, the Appellant was being penalised for the Respondent's failure to consider the Appellant's response to a Section 120 notice. The Appellant fell within the exceptions of Section 33 of the UK Borders Act 2007 and the Respondent was in breach of her own policy in failing to consider the Appellant's Article 8 claim. Reliance was placed upon the decision in **BH (policies/information: SoS's duties) Iraq [2020] UKUT 189 (IAC)** for the proposition that the Respondent has a duty to reach decisions that are in accordance with her policies. This being so, the Tribunal Judge ought to

have granted the adjournment to enable the Respondent to consider the Appellant's representations. It was also submitted that there was a legitimate expectation that the Stage 2 decision letter would be provided by the Respondent so that everything should have been done to facilitate that.

The Grant of Permission

11. On 8th January 2024, the Upper Tribunal granted permission to appeal to the Appellant on the basis that it was arguable that the judge's refusal to adjourn the hearing was unfair, "given that both parties consented to the adjournment and given that the appellant was effectively being arguably penalised for the respondent's failure to consider his response to section 120 notice".

Submissions

12. At the hearing before us on 23rd May 2024, Ms Ferrin, appearing on behalf of the Appellant, submitted that the Respondent Secretary of State had a duty to issue a decision, and that this was also in accordance with the Respondent's own policies, but this was not done. Following the Section 120 decision the Respondent could have written to the Appellant but did not do so. When Ms Ferrin was asked by the Tribunal whether it was the case that, given that the Appellant has twenty days to file further evidence for a Part 2 decision this had been done, Ms Ferrin conceded that no such evidence had in fact been filed. For his part, Mr Lawson submitted that the Appellant was not being disadvantaged as had been contended, because the judge had made it quite clear that this was just a Stage 1 decision, and that a Stage 2 decision would be made as and when appropriate, upon the Respondent having considered the Appellant's Article 8 claims. Mr Lawson also submitted that the Appellant was not being put in jeopardy because he was not being removed until his Article 8 rights had been considered.

Decision

13. We find that there is no material error of law in the judge's decision. The determination shall stand. This is because, contrary to what was being argued on behalf of the Appellant, the judge made it clear that, "the appellant will not be penalised by proceeding today because as Mr Swaby [for the Respondent] made clear, the appellant's Article 8 representations would still have to be considered at some point in time by the respondent" (paragraph 19). Furthermore, the judge was correct in also earlier stating that, "Article 8 could only be considered as a 'new matter' before me if the respondent consented to it being considered as a new matter", and that in the instant case, "the respondent does not consent to it being raised as a new matter" (paragraph 18). It is noteworthy that the judge also added that, "even if the respondent were to consider the appellant's Article 8 rights in the next three months, there is therefore no guarantee that the respondent will consent to Article 8 being considered as a 'new matter' as part of this appeal" (paragraph 18).

14. For all these reasons, therefore, the judge was entitled to proceed on the discrete grounds of this being a Stage 1 decision by the Respondent, where the only issue was whether the Respondent could deem the Appellant's deportation to be conducive to the public good under Section 3(5)(a) of the Immigration Act

1971. This was on the basis of the Appellant being a “foreign criminal” in accordance with Section 32(1) of the UK Borders Act 2007.

Satvinder S. Juss

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

4th June 2024