IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-002033
UI-2024-002034
First-tier Tribunal Nos:
EA/10810/2022 &
HU/56831/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 15 August 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JUSSEF SHAREEF
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr N Wain, Senior Home Office Presenting Officer
For the Respondent: Mr D Furner, Birnberg Peirce Solicitors

Heard at Field House on 25 July 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Swaney, promulgated on 29 January 2024 allowing the respondents appeal against decisions made on 5 October 2022 to deport him on the basis that his deportation was conducive to the public good and on 11 May 2023 to refuse his human rights claim.

2. The respondent has lived in the United Kingdom for over fifteen years. On 18 April 2022 he was granted indefinite leave to remain (settled status under the EU Settlement Scheme). On 4 August 2022 he was convicted for refusing to stop a vehicle when required and driving a vehicle whilst under the influence of a specified controlled drug. He was sentenced to

one year and two months' imprisonment for this. The conduct which gave rise to the convictions occurred in February 2021.

3. On 5 October 2022 the respondent made the first of two decisions under appeal, making a decision to deport the appellant from the United Kingdom pursuant to Sections 32(5) of the UK Borders Act 2007 and Section 3(5) of the Immigration Act 1971. The respondent lodged an appeal against that decision on 19 October 2022.

4. Subsequent to that the respondent made representations as to why he should not be deported. These were refused for the reasons set out in the Secretary of State's decision dated 11 May 2023.

5. The right of appeal against the first decision arises under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, the first decision being a decision within Regulation 5(c) of those Regulations and the grounds of appeal as set out in Regulation 8. The decision made on 11 May 2023 gives rise to a right of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002.

6. The first decision provides materially as follows:

> The deportation of a foreign criminal is conducive to the public good. The public interest in your deportation is further strengthened because of your previous 5 convictions and 13 offences.

7. Prior to the hearing on 25 January 2024, the respondent was required to serve a skeleton argument five days before the hearing. This was not, however, served until three days before the hearing, contrary to what is averred in the grounds of appeal.

8. In that skeleton argument it is argued that the respondent falls within Article 10 of the Withdrawal Agreement. It is submitted that Article 20 of the Withdrawal Agreement distinguishes between circumstances where the misconduct justifying deportation occurred before or after the implementation day, that is 31 December 2020. It is submitted that if the misconduct occurred exclusively after implementation day the Secretary of State was entitled to restrict the right of residence in accordance with national law exclusively but, if she relied on misconduct before implementation day any restriction must comply with Chapter 6 of Directive 2004/38/EC ("the Citizens' Directive"). That in turn would require the Secretary of State to demonstrate that serious grounds of public policy or public security were met to justify the appellant's deportation but that this was not done, deportation being justified purely on the basis of national law but, it is submitted, by relying on pre-implementation misconduct without reference to the public policy/public security test the decision has breached the appellant's rights under the Withdrawal Agreement, Article 20.1.

9. The remainder of the submissions in the skeleton argument are directed towards the human rights appeal.

10. When the matter came before the judge, she recorded as follows:

> 13. Mr Armstrong accepted that the respondent had not made a decision on those grounds. He indicated that if a decision was not required, he would be happy to make submissions on the point and noted that the second decision contains some reasoning relevant to the public security point. I indicated that submissions on the point would not be sufficient as a decision is required.
>
> 14. Mr Furner asked whether the first decision was maintained and confirmed that the appellant's position is that the appeal ought to be allowed on the basis that the decision breaches his rights under the Withdrawal Agreement.
>
> 15. I permitted Mr Armstrong some time to take instructions, as it was not clear that he was adequately briefed to deal with the argument. He did so and stated that he was instructed to make an adjournment application to afford the respondent an opportunity to make a supplementary decision which dealt with whether deportation is justified on serious grounds of public security. Mr Armstrong submitted that it would be appropriate to grant an adjournment so that the appellant was clear about the exact basis of the respondent's decision. He stated that he was instructed to ask me to make directions about what exactly would assist the tribunal in a further decision letter.

11. The respondent objected to the delay. The judge then wrote:

> 17. Having accepted that the first decision was flawed and that consideration of whether deportation was justified on serious grounds of public security was necessary, it is perhaps somewhat surprising that the respondent did not reflect that the better course of action would be to seek to withdraw that decision altogether.

12. The judge refused the adjournment and she then heard evidence. The judge accepted that the respondent fell within the terms of the Withdrawal Agreement and she noted [34] and [35] that the Secretary of State had given two reasons for making a decision to deport the appellant: the first, owing to a offence committed on 14 February 2021 and the second, as five previous convictions for thirteen offences strengthened the public interest in his deportation. The judge then went on to observe as follows:

> 36. The respondent could have made his decision to deport the appellant pursuant to section 3(5) of the 1971 Act solely by reference to his conviction for the index offence. Had he done so, he would have been able to justify his decision solely with reference to the domestic regime. I find however that the respondent relied expressly on the appellant's previous convictions to justify her decision. I have reached this conclusion based on several factors. The first is the fact that Mr Armstrong sought to make submissions as to public security grounds. The second is the application for an adjournment by the respondent to seek to produce a supplementary refusal letter in respect of those convictions. The third is the extensive reference to those previous convictions in the second decision, see in particular paragraphs 2, 7, 10, 41 and 42 (pages 19, 20 and 24, hearing bundle). I place limited weight on the third, as the second decision obviously post dates the first. It is however related to the first decision and in my view demonstrates the matters the respondent relied on in making the first decision.

13. She also found as follows:

> 38. The respondent apparently accepted that his decision was flawed in that respect because he sought an adjournment to correct the error. I have given my reasons above for refusing that request. Because the respondent has failed to give effect to the procedural safeguards contained in article 21 of the Withdrawal Agreement when making the first decision, I find that the decision breaches the appellant's rights under the Withdrawal Agreement. The judge then went on to allow the appeal under Section 82(1) – human rights appeal – on the basis that it was not in accordance with the law.

14. The Secretary of State then sought permission to appeal on the basis that the judge had made erred:

a. in making a mistake of fact in concluding that the decision had been based on the respondent's offending prior to 31 December 2021 and that where a holistic assessment whether deportation is appropriate has been made this did not mean that there was reliance on the prior offending;

b. in finding that the decision letters were based on the respondent's post-Brexit offending and it was averred that there had been no concession or acceptance made contrary to that, despite the findings at [33];

c. in failing to make an adequate assessment pursuant to Article 8;

d. that the judge had erred in failing to apply the principles set out in Nwaigwe (adjournment: fairness) [2014] UKUT 418 when dealing with the request for an adjournment, the late submission of the appellant's skeleton argument preventing the Secretary of State from undertaking a pre-hearing review or permitting the Presenting Officer to adequately prepare for the hearing;

15. It is also averred that:

a. that any concession made was not well made and the Secretary of State should be permitted in the interests of justice to withdraw it;

b. that the decision to deport was taken in accordance with national legislation which is always required by the Withdrawal Agreement;

c. the respondent's previous conduct did not inform the Secretary of State's decision to deport and that in any event it is demonstrated by the means by which deportation was viewed.

16. On 3 June 2024 Upper Tribunal Judge Kebede granted permission stating:-

> 4. However it is arguable, as asserted in the renewed grounds, that there was sufficient uncertainty in that regard at the hearing before FTTJ Swaney

and that fairness therefore arguably demanded that an adjournment should have been granted when requested by the respondent to clarify the situation. It is also arguable that FTTJ Swaney erred by considering that a reference in the respondent's decision to other pre-31 December 2020 conduct was sufficient to bring the appellant within scope of the Withdrawal Agreement, when the index offence was committed post 31 December 2020.

17. The Secretary of State's case is, in summary, that she had not taken into account pre-December 2020 conduct in concluding that the respondent should be deported. It is further submitted that insofar as the judge made that finding of fact that this so, based on a concession, it was either not a concession as she understood it; or, it is a concession which the Secretary of State ought to be permitted to withdraw. Further, the judge should have adjourned the appeal in all the circumstances.

18. The respondent's case is that the judge's finding of fact as to prior conduct being taken into account was justified by the evidence, pointing out that the approach taken at the hearing, after the Presenting Officer had taken instructions, was to seek an adjournment in order that a further decision letter could be issued addressing the relevant test. It is submitted the fact that that course of action was taken is an admission that the decision was defective in that pre-Brexit conduct had been taken into account and that this was justified. If it were not, then any supplementary letter would be wholly unnecessary.

19. It is further submitted that the basis for the adjournment sought was with a view to obtaining that further refusal letter. The adjournment request was not put on the basis that the Presenting Officer had been ambushed or needed more time to prepare for the case. It is submitted that the Secretary of State had made an erroneous decision by taking into account matters she should not have taken into account. It was further submitted that it was not for a judge to assess whether the Secretary of State's representative was confused such that poor advocacy on her behalf was a reason to adjourn.

Discussion

Was there a concession? If so, what?

20. The wording of the first refusal as set out at [6] is open to two interpretations: either that the conviction in February 2022 was sufficient to make the respondent's deportation conducive to the public good and the reference to other offences is simply additional; or, that earlier conduct was taken into account in assessing that deportation is conducive to the public good.

21. At this point, it is appropriate to consider what the law provides. Under section 5 of the Immigration Act 1971, the Secretary of State may make a deportation order against a person whose deportation is deemed to be conducive to the public good, by operation of section 3(5)(a). Section 3(5A) of that Act prevents the SSHD from deeming a deportation to be conducive to the public good if it would be contrary to articles 20 and 21

of the WA, that is, the EU deportation provisions. That is not the position here, given the date of the conduct giving rise to the conviction in February 2022.

22. The regime under the UK Borders Act 2007 imposes a duty on the SSHD to deport foreign criminals. Section 32(4) of that Act deems the deportation of a foreign criminal to be conducive to the public good. The effect of this scheme is that once the Secretary of State has considered whether an exception applies and concludes that it does not (as is the case here, as recorded in the decision of 5 October 2022), she does not need to consider whether deportation is conducive to the public good and is then under a duty to make a deportation order.

23. The renewed grounds aver that there had not been a concession, and submit that the presenting officer had said [33] that he could not concede. But, that relates only to the issue of unlawfulness, not as to what the Secretary of State had taken into account. It is of note that there is no statement from the presenting officer, nor any letter or statement from the Secretary of State or one of her officials as to what was or was not considered.

24. Although the Presenting Officer stated that he was unable to concede the appeal, the judge was fully entitled to take into account the position he put her. The Secretary of State's position, after instructions were taken, was that it was necessary to issue a further refusal letter addressing the public policy/public security test. That was the position adopted by the Secretary of State at the hearing. There is merit in Mr Furner's submission that the position put to the judge, taken after Mr Armstrong had taken instructions, was that in reaching her decision the Secretary of State had improperly taken into account pre-Brexit conduct. As a matter of logic, if she had not taken into account such conduct (despite it not being necessary to do so) there would have been no need to issue a second letter.

25. Whilst I note the submissions in the renewed grounds that, had the Secretary of State sought to rely on pre-Brexit conduct, then the appropriate course of action would have been to make a refusal to pursue deportation under the EEA Regulations as saved by the Citizens' Rights (Restrictions of Rights and Residence) (EU Exit) Regulations 2020 that presupposes that the Secretary of State had properly understood what ought to have been done. The submission that a further letter was necessary indicates that an error had occurred.

26. I accept, as does the respondent, that if no mention had been made of the conduct pre-Brexit, the 5 October 2022 decision would at that point have been unassailable. However, the statements from the Presenting Officer and the basis of the adjournment sought – to allow a further supplementary refusal letter to be issued – was a sufficient factual basis from which the judge was entitled to conclude that, albeit contrary to what ought to have happened, the Secretary of State had improperly taken into

account matters which she should not have done and that accordingly this led to a breach of the Withdrawal Agreement.

Should the Secretary of State be permitted to withdraw her Concession?

27. The Secretary of State's case is that it is entirely permissible to seek to withdraw a concession at this stage. The respondent submits that it is not given that there is no proper basis on which, on the facts of this case, a request to withdraw a concession is permissible given the effect of withdrawing the concession would unfairly permit the Secretary of State to make arguments that could not properly be challenged. It is further submitted that in this case what the Secretary of State is in effect seeking to do is, in effect, altering a statement of fact as the Secretary of State either had taken into account pre-Brexit conduct (wrongly, or without giving reasons for doing so) or she had not.

28. The Secretary of State, however, maintains that it would be fair in all the circumstances to permit the concession to be withdrawn. That is set out in the renewed grounds

29. Much of the case law relating to the withdrawal of concessions relates to scenarios where the Secretary of State has accepted the appellant's account either in whole or in part, or, as in NR v SSHD [2009] EWCA Civ 856. Further, this is not a concession withdrawn at the hearing, nor for that matter is it a concession as to the law. Either the Secretary of State took something into account, or she did not.

30. As Lewison LJ observed in Fage UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5 at [114]:

> ii. The trial is not a dress rehearsal. It is the first and last night of the show.

31. It is of note that in this case, the Secretary of State has not expressly denied that she took into account pre-Brexit material or submitted that was intimated to the judge was an incorrect statement of fact. It is simply averred that had the previous conduct informed the decision, a different process would have ensued. That, however, presupposes that the Secretary of State always follows correct procedure, a somewhat bold submission.

32. The effect of the withdrawal of the concession is, in effect, to alter significantly the Secretary of State's case to a situation where she now says that she did not improperly consider pre-Brexit conduct. That is a significant change to the case as put.

33. The concession made in this case is unusual. There is significant merit in Mr Furner's submission that the Secretary of State either knew what she did or she did not and the judge only proceeded after instructions had been taken. Further, this is a concession as to fact – whether matters were taken into account or not – not as to the law. It is also sufficiently clear that what the Secretary of State is seeking to do by this concession is to improve her arguments

34. The question arises whether the pre-Brexit material could have justified deportation under the law relating to pre-Brexit conduct, as was suggested to the judge by the request for a supplementary letter. The renewed grounds, however, accept that the higher test applicable by operation of the Withdrawal Agreement is not met.

35. The issue here was one of whether the decision under challenge was in accordance with the Withdrawal Agreement or not. The effect of what the Secretary of State seeks to do is to alter the basis of the finding that it was not.

36. In effect, the Secretary of State's case is that I should permit a reopening of the fact-finding prior to determination of whether the decision of the First-tier Tribunal involved the making of an error of law. I accept, following E v SSHD [2004] EWCA Civ 49, R (Iran) [2005] EWCA Civ 982 and Ladd v Marshall[1954] EWCA Civ 1 that an error of fact can be an error of law, and I do not rule out the possibility that the Upper Tribunal may permit a concession to be withdrawn at the stage of deciding whether there is a material error of law, there would need to be a good reason to do so.

37. Taking all of these factors into account, and applying the principles set out in NR (Jamaica) at [10] to [12], I am not satisfied on the particular facts of this case, bearing in mind the stage reached, that it would be in the interests of justice to permit the Secretary of State to withdraw her concession, and I bear in mind that it has at all times been open to her to withdraw her decisions.

Should the appeal have been adjourned?

38. I turn next to whether the judge should have adjourned the appeal. Whilst there may have been merit in a request that the appeal should have been adjourned owing to a need to take instructions in respect of a particularly complex point or that owing to the late service of the skeleton argument the Secretary of State was not properly prepared, that was the not the basis of which an adjournment was sought. It is sufficiently clear from the judge's decision that the reason it was sought was in order to produce a second refusal letter, setting out why the decision to deport was sustainable by reference to the relevant EU law test.

39. As noted above, that is no longer the Secretary of State's case; her case is in effect that there is no need to produce such a letter, as the pre-Brexit conduct had not been taken into account.

40. Having considered carefully the submissions made, I conclude, applying the principles set out in Nwaigwe, that the judge approach the question of whether to adjourn properly, and that she exercised her discretion properly. There was, viewing all the circumstances, no unfairness here.

41. In the circumstances, the judge was entitled to and gave adequate reasons for refusing that adjournment request.

42. Accordingly, for these reasons, I am not satisfied that the grounds identify an error of law and I therefore uphold the decision in the judge's approach to the first decision.

43. Given that the finding with respect to the first decision is sustainable it follows, from SSHD v AA (Poland) [2024] EWCA Civ 18 and Abdullah v SSHD [2024] UKUT 114 that the decision in respect of the human rights argument is sustainable.

Notice of Decision

1 The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed Date: 5 August 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal