IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004566
First-tier Tribunal No: EA/12363/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 26 September 2024

Before

THE HONOURABLE MR JUSTICE DOVE, PRESIDENT
UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KATARINA VARGOVA
(NO ANONYMITY ORDER MADE)

Respondent

and

THE AIRE CENTRE

Intervenor

Representation:

For the Appellant: Julia Smyth and Harriet Wakeman, instructed by the Government Legal Department.

For the Respondent: Thomas de la Mare KC and Ms Bojana Asanovic, instructed by Turpin & Miller (Oxford) Solicitors.

For the Intervenor: Tim Buley KC and Alex Shattock, instructed by the AIRE Centre.

Heard at Field House on 19 and 20 July 2024

DECISION AND REASONS

The background

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Anthony ('the Judge'), promulgated on 14 September 2023, in which she allowed Ms Vargova's appeal.
2. Both members of the Panel have contributed to this decision.
3. Ms Vargova is a citizen of Slovakia born on 24 April 1986 who, at the time of the appeal before the Judge, was the subject of a decision to deport her from the

United Kingdom as a result of her conviction on 27 September 2022 for possession of a controlled drug in Class A with intent to supply, committed on 20 July 2022, for which she was sentenced to 2 years and 1 month imprisonment.

4. Ms Vargova was served with a Decision to deport while serving her sentence on 12 November 2022, a Stage 1 decision. She had a right of appeal against the deportation decision pursuant to regulation 6 of the Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020 which meant she could only appeal on the ground the decision (a) breaches any right under the Withdrawal Agreement or (b) the decision is not in accordance with section 3(5) or (6) of the Immigration Act 1971, which she exercised.
5. At [15] of her determination the Judge writes:

> 15. Having weighed up all of the competing arguments and having applied Article 15 of the Withdrawal Agreement; Article 27.2 and Article 28 of the Citizens Directive, I reached the conclusion that the appellant's previous criminal conviction cannot in and of itself constitute grounds for the respondent's expulsion decision. I place weight on the fact the appellant represents a low risk of reoffending and a low risk of harm to the public. I find this is an important consideration that tips the expulsion measure into disproportionate emphasis on the appellant's past offending. I have also balanced all of these considerations against the long term free movement right exercised by the appellant over the last 13 years. Therefore, having applied the safeguards as set out in the Withdrawal Agreement and having applied the EU law principles of proportionality, I reached the conclusion that the expulsion decision by the respondent is a disproportionate measure for the reasons I have set out above.

6. The Secretary of State asserts that the Judge materially erred in law in relation to the application of the Withdrawal Agreement and the applicable deportation regime, bearing in mind that the conduct leading to the decision to deport occurred after the end of the transition period.
7. Following notification of the Stage 1 decision on 12 November 2022 Ms Vargova was able, within the specified period, to make representations to the Secretary of State as to why a deportation order ought not to be made. Ms Vargova provided a response with human rights submissions dated 25 January 2023. The Secretary of State subsequently made a Stage 2 decision, refusing her human rights claim, and made a deportation order dated 16 February 2024.
8. On 22 February 2024 Ms Vargova lodged an appeal against the refusal of her human rights claim, which is pending before the First-tier Tribunal with reference HU/51990/2024. She asserts in that appeal, inter alia, that the Secretary of State's decision is contrary to Article 8 ECHR as it is not in accordance with the law. She submits that it is contrary to the Withdrawal Agreement and also disproportionate in view of her facts and circumstances, including her strong private life established whilst lawfully in the UK exercising treaty rights, and the fact her deportation is not in the interests of her rehabilitation.
9. It was ascertained at the adjourned error of law hearing on the 15 January 2024 that the appeal against the Stage 1 deportation decision considered by the Judge was lodged before the further submissions on human rights grounds were made.
10. Had the appeal involved a decision to deport an EEA national or their family member taken before 11 pm on 31 December 2020, or after, but in respect of a crime committed prior to this date and time, the EU law regime set out in Directive 2004/38/EC (the 'Directive'), incorporated into the UK domestic law by the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations') would have applied. This would have made it necessary to

consider regulations 23 and 27 of the 2016 Regulations as they were prior to 31 December 2020.

11. There was also a "grace period", for although the 2016 Regulations were revoked on 31 December 2020 the deportation provisions in regulations 23 and 27 continued to have effect for a further six months "grace period" until 30 June 2021 in respect of a person who did not have (or not had) leave under EUSS, and who immediately before 31 December 2020 received lawful residence in the UK by virtue of the Regulations, or had a right of permanent residence under the Regulations.

The Issues

12. The agreed schedule of issues requiring determination by the Upper Tribunal in this matter is:

    1. Should the FTT's decision be set aside for material error of law on the grounds identified?

    2. Can the UT decide that question without addressing the issues below (leaving them to be addressed on re-making, if the decision is set aside), or does it need to decide the issues before deciding whether there has been a material error of law?

    3. Does the WA require that post-transition period conduct be considered in a manner that applies the EU law proportionality principle on a case-by-case basis?

    4. If so, is the scheme of automatic deportation contained in ss32-33 UKBA 2007, including, in particular, Exception 7 which is expressly confined to cases of Pre Implementation Period Completion Day conduct, consistent with this requirement?

    5. Should a request for a preliminary ruling from the Court of Justice of the European Union be made by the Upper Tribunal pursuant to Article 158 of the Withdrawal Agreement?

    Issue included by Secretary of State but not agreed:

    6. Even if the answer to one or more of questions 1-4 above is 'yes', would that allow a tribunal to conclude that any right which Ms Vargova had by virtue of Part 2 of the WA was breached?[2]

    2 See Regulation 8(2)(a) of the Immigration (Citizens' Rights Appeal) (EU Exit) Regulations 2020. In addition, reference is made by SSHD to paragraphs 7, 16ii and 66 of SSHD's skeleton argument dated 26 February 2024, and to paragraphs 2v and 12 of SSHD's response to the Respondent and AIRE Centre submissions dated 2 April 2024, to demonstrate that this issue is pertinent, has been identified throughout the appeal by the Appellant SSHD, and falls to be decided by the Upper Tribunal.

The Secretary of State's case (in summary)

13. The Secretary of State's case is that the First-tier Judge's self-direction at [7] of her decision, that "*Article 21 imports the whole of Chapter vi of Directive 2004/38/EC"* is wrong. As a result, the Judge has made a clear material error of law which warrants, for that reason alone, the decision being set aside.
14. The Secretary of State submits Article 20 of the Withdrawal Agreement draws a clear distinction between the way in which conduct pre and post the end of the transition period will be dealt with, and makes it clear from Article 20(2) that where conduct post-dates the transition period, domestic law applies and this

does not require any EU law proportionality analysis. The Secretary of State argues that Article 21 of the Withdrawal Agreement must be read and interpreted in light of, and consistently with, Article 20, and when this is done it becomes clear that the safeguards preserved by Article 21 are procedural only, rather than substantive. It is argued that otherwise, Article 20(2) would be deprived of meaningful effect.

15. In the alternative, even if a proportionality analysis was required by virtue of Article 21 (which is denied by the Secretary of State), it is argued that it could not be the case that Article 21 imports a specific proportionality test where the relevant conduct post-dates the end of the transition period and Article 20(2) applies. It is argued that the proportionality principle is context specific, applies specifically to citizens' rights and is given effect by the provisions of the Directive. Thus it is argued that applying those provisions, and effectively applying the test in Article 20(1) to post-transition conduct contrary to the clear terms of Article 20(2), makes the clear distinction in Article 20(1) and 20(2) between the applicable regime for conduct pre-and post-dating the date of the transition period, devoid of meaning.
16. The Secretary of State argues that to give effect to the clear intention of the contracting parties in Article 20(2), any application of the EU proportionality principle would in any event need to take into account, and be applied consistently with, the relevant provisions of national legislation. Thus, it would need to take into account the wider context, namely, that the contracting parties to the Withdrawal Agreement specifically agreed that post-transition conduct should be treated differently from pre-transition period conduct, and that a Member State should be permitted to apply its national legislation.
17. The Secretary of State also refers to the fact that at the time of the Judge's decision she had not yet made a deportation order against Ms Vargova and had not made a decision on her human rights claim. It is submitted that in light of that Ms Vargova could not explain how, in the face of the clear terms of Article 20(2), making a Stage 1 decision breaches her rights under the Withdrawal Agreement. The Secretary of State's position is that making a Stage 1 decision would not breach any rights enjoyed by Ms Vargova under the Withdrawal Agreement even if EU proportionality principle applied. Ms Smyth submitted that Ms Vargova's submissions are entirely focused on why she should not actually be deported, but at the time of her Stage 1 decision, no deportation order had been made.

Ms Vargova's case (in summary)

18. In his skeleton argument dated 10 July 2024 Mr de la Mare KC accepts the core issue for the Upper Tribunal is whether EU proportionality considerations apply to decisions restricting the right to reside based on conduct after the specified date to persons within the personal scope of the Withdrawal Agreement. It is not disputed Ms Vargova is one such person as she has lived and worked in the UK before the specified date, had a right to reside, and held indefinite leave to remain issued under Appendix EU of the Immigration Rules.
19. Ms Vargova's case is that there is no material error of law on the face of the First-tier Tribunal decision which found the decision to deport contrary to the Withdrawal Agreement because it was disproportionate in EU law terms.
20. Ms Vargova also argues that the applicable safeguards provided by the individual application of the proportionality principle, that she submits is guaranteed for post-departure conduct by Article 21 of the Withdrawal Agreement, render the mechanism of automatic deportation for offences crossing a particular gravity threshold incompatible with the Withdrawal Agreement.

21. The correct construction of Article 20 and 21 of the Withdrawal Agreement and Article 31.3 of the Directive, interpreted in line with Article 4.3 of the Withdrawal Agreement, is said to require UK courts, as an essential procedural safeguard, to review the facts of an individual case to test the proportionality of any proposed deportation when deciding whether it is lawful to restrict the right of a person within the scope of the Withdrawal Agreement on account of post-departure conduct. It is argued that the continued operation of this safeguard process, in which there will be a fact specific application of the proportionality principle, is the explicit requirement of Article 31 of the Directive, and that this is preserved by Article 21 of the Withdrawal Agreement. It is also contended that the Secretary of State is required to consider these matters before taking an expulsion measure in national law.
22. Ms Vargova submits that the scheme of automatic deportation provided for by the UK Borders Act 2007, specifically in section 32(5), must be dis-applied pursuant to section 7A European Union Withdrawal Act 2018. What is left is a requirement to decide the case on its facts, as required with any other deportation outside the scheme of automatic deportation, and in doing so to take account of the material features of the applicant's position as identified in Articles 28.1 and 31.3 of the Directive, as the First-tier Tribunal Judge did.
23. Ms Vargova refers to a recent decision of Upper Tribunal Judge O'Callaghan in relation to the operation of proportionality in R (Krzysztofik) v Secretary of State the Home Department JR-2021-LON-001727 at [84], which we discuss further below.
24. Mr de la Mare KC also submits the Secretary of State's argument on Ground 1 that the continued application of the proportionality test for deportation decisions for those with a retained right to reside in relation to their post-departure conduct renders the text of Article 20(2) devoid of meaning, as a result of which Article 21 of the Withdrawal Agreement should be given a restricted meaning, is said to be flawed, as it ignores those aspects of the previous substantive test under the Directive which ceased to be applicable. Ms Vargova also argues that the Secretary of State's claim that as such features of the Chapter VI scheme have been authorised for amendment or removal, it follows that the assertion that the proportionality principle and its guaranteed application to the identified material features of the individual case has no role, is wrong either as a matter of text or a matter of logic. We discuss this point further below.
25. Ms Vargova argues that a decision to restrict the rights to reside must be proportionate once account is taken of the key, and specifically, factual features of the individual's case, as spelt out by Article 28.1 and 31.3 of the Directive, such that the measure in itself is rationally connected to the attainment of such objectives, that no lesser alternative is adequate, and the measure is proportionate in the round. Ms Vargova argues that significant weight is to be attributed to residence in this exercise in accordance with the Directive as required by the Withdrawal Agreement, and that the Secretary of State's approach is impossible to reconcile with the system of automatic deportation and inflexible or axiomatic rules, as contained in section 32 of the UK Borders Act 2007, in particular the rule in section 32(5).
26. Ms Vargova argues that the Secretary of State's argument that merely procedural safeguards are preserved, with proportionality being a substantive safeguard, does not survive first contact with the text of the provisions of the Directive specifically saved by Article 21 Withdrawal Agreement. This argument is submitted to proceed on a misconception as to what is meant by "safeguards" in Article 21 and "procedural safeguards" in Article 15 and 31.3 of the Directive. It is submitted "procedural safeguards" are plainly any and all safeguards as to the content, approach and nature of the decision-making and

appeal procedure, and that Articles 28.1 and 31.3 make no sense if any other reading is given.

27. Ms Vargova argues that the Secretary of State's alternative proposition that any proportionality analysis would take place at Stage 2 is said to be at odds with (i) the text of section 33 of the UK Borders Act 2007 as it is submitted that there is no exception provided pursuant to which such an exercise is permitted, and (ii) the very nature of the Tribunal appeal system which is devised to afford a right of appeal against a Decision to Deport, but not against a deportation order. If the Secretary of State through practice chooses not to make a proportionality decision, in circumstances where directly effective EU law requires it, and to which the Withdrawal Agreement continues to give effect, the Tribunal has no choice but conduct the exercise itself, as First-tier Tribunal did in this appeal.
28. Ms Vargova also submits that the broader position is that the scheme of s.32 to s.33 of the UK Borders Act 2007 is incompatible with the Withdrawal Agreement as a result of its failure to contain a further exception to deal with the distinct issues presented by post-departure conduct. It is submitted this is why the incompatibility arises at Stage 1. This cannot be avoided by the existence of other statutory exceptions to the requirement to deport, tailored to other distinct considerations such as the Human Rights Act or ECHR protections which if refused, as claimed by the Secretary of State, attract their own rights of appeal, and which may lead to the disapplication of the Stage 1 decision.

The AIRE Centre's case (in summary)

29. The case put forward by Mr Buley KC on behalf of the AIRE Centre opposes the Secretary of State's appeal and submits that this case raises an important question concerning the interpretation and implementation of the Withdrawal Agreement. The AIRE Centre's core submission is that it is clear from the Withdrawal Agreement that a proportionality analysis is required in the case of conduct that post-dates the transition period, and that this does not infringe on the distinction drawn in the Withdrawal Agreement between post-transition period conduct and conduct taking place before the end of the transition period. Mr Buley's submissions broadly reflected those which were made on behalf of Ms Vargova.
30. The AIRE Centre asserts the First-tier Tribunal did not misdirect itself or, alternatively, that any misdirection was not material to the outcome.

Ms Vargova's reply

31. Ms Vargova was given leave to reply to the Secretary of State's and AIRE Centre's submissions which she did in a document dated 16 April 2024 which maintained her position set out in Mr de la Mare's original skeleton argument.

Discussion and analysis

32. The core issue before us is what a decision maker is required to do if an EU national is convicted of a crime committed after the end of the specified date, sufficient to warrant his or her deportation from the UK. At the heart of this case is the question of the proper construction of the Withdrawal Agreement, and in particular the provisions which address this issue, which are set out below. We start by examining the domestic law context, and then consider the relevant provisions of EU law and in particular the Directive which applied prior to the departure of the UK from the EU. We then consider the provisions of the Withdrawal Agreement and seek to resolve the questions raised by the parties in the agreed issues which are to be addressed.

33. At the outset, and in relation to Ms Smyth's submission that the points raised in this appeal are not applicable at this stage, as only a Stage 1 decision had been made, we say as follows.
    If a foreign national meets the threshold for deportation under domestic law, consideration is given to the making of a Stage 1 deportation decision, not the making of a deportation order itself. Subsequently there can be the issuing of a Stage 1 decision letter setting out why deportation is conducive to the public good. That is the process that was completed in relation to Ms Vargova and the matter that should have been considered by the First-tier Tribunal.
34. The Stage 1 decision letter, also known as a notice of liability to remove, will contain all disclosable information held by the Home Office about the person's circumstances at the time of the decision including length of residence in the UK, immigration history and any dependants. Home Office guidance states that consideration of any outstanding human rights claim should be deferred until after the person has had the opportunity to make further representations so all matters can be considered together. In the current appeal Ms Vargova did not respond or make such submissions in the time period provided and so matters could not be considered together.
35. The Secretary of State has published guidance for conducive deportation decisions, updated 20 March 2024, intended to apply to deportation decisions made in respect of:

    - any non-British citizen who does not have the rights protected under the Agreements regardless of when the conduct occurred;
    - any person who has rights protected by the Agreements (or the U.K.'s domestic implementation of the Agreements) in relation to conduct that occurred after 11 PM GMT on 31 December 2020.

36. For the purposes of the guidance a person who has a right protected by the Agreements, or the UK's domestic implementation of the Agreements, is referred to as a 'relevant person'. The 'Agreements' refer to the EU Withdrawal Agreement, the EAA EFTA Separation Agreement and the Swiss Citizens Rights Agreement. It is stated that deportation on conducive grounds applies in respect of any person (EEA citizen or non-EEA citizen) who does not have rights protected by the Agreements regardless of when that conduct was committed or, in respect of a relevant person in relation to conduct committed after 11 PM GMT on 31 December 2020.
37. In relation to a 'relevant person' whose conduct, including any criminal convictions relating to it, are committed prior to 11 PM GMT on 31 December 2020, consideration must be given to making a deportation decision on public policy, public security or public health grounds.
    Section 3(5A) Immigration Act 1971 provides that the Secretary of State cannot deem a relevant person's deportation to be conducive to the public good where it will breach the Agreements to do so.
38. In relation to a person whose conduct is committed after 11 PM GMT on 31st December 2020 and who holds EUSS leave, it is said the relevant deportation decisions are a conducive decision under the Immigration Act 1971 or automatic deportation under the UK Borders Act 2007.
39. 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.

40. Section 32 UK Borders Act 2007 provides that the Secretary of State must make a deportation order in respect of a foreign criminal where all of the following apply:

- the person is not a British citizen or an Irish citizen
- the person was convicted in the UK of an offence
- the person was sentenced to a period of imprisonment of at least 12 months (single sentence)
- the person was serving that sentence on or after 1 August 2008, whether in custody or in the community
- the person has not been served with notice of the decision to deport the relevant person on conducive grounds.

Unless one of the exceptions set out in section 33 of the Act apply.

41. It is not disputed that the automatic deportation provisions contained within the 2007 Act do not apply to a person who is exempt from deportation under section 7 or section 8 of the 1971 Act. Section 7 contains exemptions from deportation for certain existing residents, none of which apply to Ms Vargova. Section 8 provides exemptions for seamen, aircrews and other special cases, none of which are applicable to Ms Vargova.
42. The exceptions to be found in section 33 of the 2007 Act are:

33 Exceptions

(1) Section 32(4) and (5)—

(a) do not apply where an exception in this section applies (subject to subsection (7) below), and

(b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention.

(3) Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction.

(4) (omitted on 31 December 2020 by virtue of the Immigration and Social Security Coordination (EU Withdrawal) Act 2020 (consequential, Savings, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (S.I 2020/1309, reg 1(2)), 17(2))

(5) Exception 4 is where the foreign criminal—

(a) is the subject of a certificate under section 2 or 70 of the Extradition Act 2003 (c. 41),

(b) is in custody pursuant to arrest under section 5 of that Act,

(c) is the subject of a provisional warrant under section 73 of that Act,

(ca) is the subject of a certificate under section 74B of that Act,

(d) is the subject of an authority to proceed under section 7 of the Extradition Act 1989 (c. 33) or an order under paragraph 4(2) of Schedule 1 to that Act, or

(e) is the subject of a provisional warrant under section 8 of that Act or of a warrant under paragraph 5(1)(b) of Schedule 1 to that Act.

(6) Exception 5 is where any of the following has effect in respect of the foreign criminal—

(a) a hospital order or guardianship order under section 37 of the Mental Health Act 1983 (c. 20),

(b) a hospital direction under section 45A of that Act,

(c) a transfer direction under section 47 of that Act,

(d) a compulsion order under section 57A of the Criminal Procedure (Scotland) Act 1995 (c. 46),

(e) a guardianship order under section 58 of that Act,

(f) a hospital direction under section 59A of that Act,

(g) a transfer for treatment direction under section 136 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13), or

(h) an order or direction under a provision which corresponds to a provision specified in paragraphs (a) to (g) and which has effect in relation to Northern Ireland.

(6A) Exception 6 is where the Secretary of State thinks that the application of section 32(4) and (5) would contravene the United Kingdom's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings (done at Warsaw on 16th May 2005).

(6B) Exception 7 is where—

(a) the foreign criminal is a relevant person, and

(b) the offence for which the foreign criminal was convicted as mentioned in section 32(1)(b) consisted of or included conduct that took place before IP completion day.

(6C) For the purposes of subsection (6B), a foreign criminal is a “relevant person”—

(a) if the foreign criminal is in the United Kingdom (whether or not they have entered within the meaning of section 11(1) of the Immigration Act 1971) having arrived with entry clearance granted by virtue of relevant entry clearance immigration rules,

(b) if the foreign criminal has leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules,

(ba) if the person is in the United Kingdom (whether or not they have entered within the meaning of section 11(1) of the Immigration Act 1971) having arrived with entry clearance granted by virtue of Article 23 of the Swiss citizens' rights agreement,**]**

(c) if the foreign criminal may be granted leave to enter or remain in the United Kingdom as a person who has a right to enter the United Kingdom by virtue of—

(i) Article 32(1)(b) of the EU withdrawal agreement,

(ii) Article 31(1)(b) of the EEA EFTA separation agreement, or

(iii) Article 26a(1)(b) of the Swiss citizens' rights agreement,

whether or not the foreign criminal has been granted such leave, or

(d) if the foreign criminal may enter the United Kingdom by virtue of regulations made under section 8 of the European Union (Withdrawal Agreement) Act 2020 (frontier workers), whether or not the foreign criminal has entered by virtue of those regulations.

(6D) In this section—

- "EEA EFTA separation agreement" and "Swiss citizens' rights agreement" have the same meanings as in the European Union (Withdrawal Agreement) Act 2020 (see section 39(1) of that Act);
- "relevant entry clearance immigration rules" and "residence scheme immigration rules" have the meanings given by section 17 of the European Union (Withdrawal Agreement) Act 2020.**]**

(7) The application of an exception—

(a) does not prevent the making of a deportation order;

(b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;

but section 32(4) applies despite the application of Exception 1 or 4.

43. The Immigration and Social Security Coordination (EU Withdrawal) Act 2020 (Consequential, Savings, Transitional and Transitory Provisions) (EU Exit) Regulations 2020, section 17(2) deals with amendments to the UK Borders Act 2007 and the omission of section 33(4) which provided an exception to deportation for EU nationals. Whilst Ms Vargova submits that the UK Borders Act should have no application in a case such as hers there is no authority for this proposition or any indication that Parliament intended that effect. If none of the statutory exemptions apply there is no need to assess whether deportation is conducive to the public good.
44. There is no indication in any text to which we have been referred that supports a claim that the fact the 2007 Act fails to provide any exception for an EU national who commits an offence and is sentenced after the relevant date, is as a result of Parliament not understanding the terms of the Withdrawal Agreement in relation to this issue, or is other than the will of Parliament.
45. The revocation of section 33(4) of the 2007 Act causes problems for Ms Vargova with her argument, constructed on the basis the provisions to be found in the Directive she relies upon continue to apply, that the 2007 Act is required to be disapplied.
46. We also note the submissions in relation to the UK Borders Act 2007 mirror a similar argument run by Mr Buley KC before a differently constituted tribunal in Abdullah & Ors (EEA, deportation appeals, procedure) [2024] UKUT 00066 which was rejected.
47. We turn to the provisions of EU law which featured in the parties' arguments. The submissions made and previous decisions in relation to the Withdrawal Agreement highlight the importance of considering the correct context of the issues at large.
48. Directive 2004/EC/38, the Directive, relates to the right of free movement in EU law. All EU citizens and their family members have the right to move and reside freely within the EU, a fundamental right established by Articles 21 of the Treaty on the Functioning of the European Union and Article 45 of the EU Charter of Fundamental Rights. The first provision on the concept of free movement of persons was introduced in the 1957 Treaty establishing the European Economic Community. The Treaty of Maastricht introduced the notion of EU citizenship to be enjoyed automatically by every national of a Member State which is the basis of the right to move and reside freely within the territory of a Member State. The gradual phasing out of internal borders under the Schengen agreements was followed by the adoption of the Directive and rights of EU citizens and their family members to move and reside freely within the EU.
49. The provisions relating to a restriction on the right of entry and the right of residence on grounds of public policy, public security or public health are to be found in Chapter VI of the Directive, with specific reference to Article 27 which sets out general principles and Article 28 which set out provisions to protect an EU citizen from expulsion.
50. The Immigration (European Economic Area) Regulations 2006, which transposed the Directive into UK law, set out the rights of EEA nationals and their family members to be admitted to and reside in the UK in certain capacities and refers to the power to deny or revoke a person's right to free movement on the grounds of public policy, public security or public health. The 2006 Regulations went through various amendments with the version in force at the date the UK left European Union being the Immigration (EEA) Regulations 2016, which have been revoked.
51. The direct effect of a Directive in EU law is not disputed nor were the UK's obligations under EU law whilst the UK was a member of the EU. Section 2 (1) of the European Communities Act 1972 as originally enacted stated:

> 2(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties and without further enactment to be given legal effect or used in United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expression shall be read is referring to one to which this subsection applies.

52. That provision was, however, repealed by section 1 of the European Union (Withdrawal) Act 2018 which received Royal Assent on 26 June 2018. There was thereafter a need to regulate the future relationships between the UK and the EU.
53. The Withdrawal Agreement was implemented in the UK by the European Union (Withdrawal Agreement) Act 2020 which received Royal Assent on 23 January 2020. The impact of these legislative provisions means that from 11 PM on 31 January 2020, the date and time of the UK becoming a non-Member State, UK citizens are no longer citizens of the European Union.
54. Some EU laws were expressly excluded from the scope of what was carried forward by the Withdrawal Agreement, including in paragraph 2 of Schedule 1 which effectively prohibited any further recognition of general principles of EU law in cases decided after the UK had left the EU. Paragraph 3 of that Schedule also limited the application of such principles which had been recognised before 31 December 2020 by providing that there is no right of action in domestic law after that date based on a failure to comply with those general principles of EU law and precluding any reliance on general principles of EU law to disapply or quash any enactment or rule of law or to decide that any conduct was unlawful.
55. By comparison, as a result of the UK leaving the EU, freedom of movement related protections against expulsion no longer apply to EU citizens, who are now subject to existing provisions contained under a range of UK legislation. Grounds for removal or deportation of an EU national (concerning the conduct after the end of the transition period) now expand beyond the previous grounds to include a range of other reasons. The reasons are such as (i) when deportation is conducive to the public good - Immigration Act, 1971, s. 3 (5); (ii) where a person has been convicted and sentenced to a period of imprisonment of at least 12 months - UK Borders Act, 2007, s. 32; (iii) or when deportation of a serious foreign criminal is in the public interest - Nationality, Immigration and Asylum Act, 2002, s. 117C. Although s. 3(5) of the Immigration Act 1971 excludes current holders of pre-settled and settled status (new residence permits for EU citizens), the 2007 and 2002 Acts apply to those individuals. This permits the UK government to deport even those with permanent residence for criminal conduct after the UK's departure from the EU pursuant to these powers. Crucially, EU citizens serving a term of imprisonment can now be removed from prison and deported from the United Kingdom even if they have not completed their prison term – see section 47 Nationality and Borders Act 2022.
56. Having considered the elements of domestic and EU law which feature in the parties' arguments we turn to the provisions of the Withdrawal Agreement which, as we have said, are central to the determination of the issues which have been set out above. It is important to consider the specific wording of the Withdrawal Agreement, as was recognised by the Upper Tribunal in Celik v SSHD [2022] UKUT 00220, a decision upheld by the Court of Appeal - see Celik [2023] EWCA Civ 921.
57. The Withdrawal Agreement is an international treaty negotiated between the United Kingdom and the remaining members of the European Union. Treaty

interpretation is guided by Articles 31 through to 33 of the Vienna Convention on the Law of Treaties. The fundamental rule is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in context and in the light of its object and purpose. The purpose of the Withdrawal Agreement was, amongst many other matters, not only to regulate the rights of EU citizens who have chosen to live in the UK but also to regulate the rights of the UK citizens who live in the remaining states of the European Union, an estimated 1.3 million people.

58. The difference in the position adopted by the Secretary of State and of the other parties is dependent upon their starting point. We have formed the view that given the UK has now departed the UK, and the vehicle for regulating its current relationship with the EU is the Withdrawal Agreement, it is more helpful to use as the starting point the terms of the Withdrawal Agreement to address how the correct approach to a decision to deport in relation to conduct occurring after the end of the transition period is to be assessed.

59. It is a settled principle that it is not possible to invoke principles of EU law in interpreting the Withdrawal Agreement, save insofar as that Agreement specifically provides. Article 4(3) states "The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law". The Secretary of State's view is that the Withdrawal Agreement makes no such provision for consideration of Union law, including the EU law concept of proportionality, when considering deportation of an EU national who has committed a criminal offence after the specified date.

60. Article 20 of the Withdrawal Agreement is central to the resolution of the arguments raised in this case. It reads:

Article 20

Restrictions of the rights of residence and entry

> 1. The conduct of Union citizens or United Kingdom nationals, their family members, and other persons, who exercise rights under this Title, where that conduct occurred before the end of the transition period, shall be considered in accordance with Chapter VI of Directive 2004/38/EC.
> 2. The conduct of Union citizens or United Kingdom nationals, their family members, and other persons, who exercise rights under this Title, where that conduct occurred after the end of the transition period, may constitute grounds for restricting the right of residence by the host State or the right of entry in the State of work in accordance with national legislation.
> 3. The host State or the State of work may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Title in the case of the abuse of those rights or fraud, as set out in Article 35 of Directive 2004/38/EC. Such measures shall be subject to the procedural safeguards provided for in Article 21 of this Agreement.
> 4. The host State or the State of work may remove applicants who submitted fraudulent or abusive applications from its territory under the conditions set out in Directive 2004/38/EC, in particular Articles 31 and 35 thereof, even before a final judgment has been handed down in the case of judicial redress sought against any rejection of such an application.

61. In our view Article 20(1) clearly creates a defined class of individuals who are entitled to retain the protection set out in the Directive in relation to any attempt to restrict their rights of residence and entry. Applying the ordinary meaning of the words there is nothing to suggest that the protection provided by the Directive applies to any other class of individuals to the same extent. If that had been the intention of the contracting parties, they would have said so, but they do not. We find there is merit in Ms Smyth's submission in relation to

the creation of a specific class of individuals to whom the Directive continues to apply when one considers the wording of Article 20(1) of the Withdrawal Agreement. The class is effectively defined by Article 20(1) as those who have committed conduct prior to the end of the transition period which falls to be considered in relation to any impact it might have on that person's rights of residence and entry.

62. This interpretation is reinforced by the wording of Article 20(2) which specifically provides, by contrast, that where a period of conduct occurs after the end of the specified date then that conduct may constitute grounds for restricting the rights of residence in the host state or the right of entry in accordance with national legislation. Article 20(1) therefore creates an exception to the general proposition that following the end of the transition period and in accordance with the Withdrawal Agreement EU law has no application.
63. We therefore find that there is a 'bright line' distinction to be drawn between the regimes that apply to those who commit offences prior to the end of the transition period and those who commit offences after this date. In relation to the latter the intention of the Withdrawal Agreement is clear in that the substantive protection provisions found in EU law, including the application of the EU law proportionality principle, ceased to be applicable.
64. We have also considered the publication by the European Commission: 'A guidance note relating to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic Energy Commission' which supports our finding. In relation to Article 20, restriction on the rights of residence, it is written:

> 2.8. Article 20 – Restrictions on the right of residence
>
> Article 20 covers all persons exercising their rights under Title II of Part Two – this means it also covers, for example, frontier workers, family members or 'extended' family members.
>
> 2.8.1. What is conduct?
>
> Paragraphs 1 and 2 of Article 20 are triggered by the conduct of persons concerned. The notion of conduct under the Agreement is based on Chapter VI of Directive 2004/38/EC (for more details, see the Commission's guidelines for better transposition and application of Directive 2004/38/EC – COM(2009)313 final, Section 3.2).
>
> 2.8.2. Conduct before and conduct after the end of the transition period
>
> Paragraphs 1 and 2 of Article 20 set out two different regimes that regulate the way in which conduct representing a genuine, present and sufficiently serious threat to public policy or public security is to be treated, depending on whether the conduct occurred before or after the end of the transition period.
>
> Paragraph 1 of Article 20 establishes a clear obligation ('shall be considered') to apply Chapter VI of Directive 2004/38/EC to certain facts, while paragraph 2 of Article 20 authorises the application of national immigration rules to facts occurring after the end of the transition period.
>
> Therefore, paragraphs 1 and 2 of Article 20 intend to separate the actions that occurred before and after the end of the transition period. National immigration rules should not be applied, even in part, to actions that are governed by paragraph 1 of Article 20 of the Agreement. However, any decision on restricting the right of residence due to conduct occurring after the end of the transition period has to be taken in accordance with the national legislation.

65. Having found Article 20 to be clear and unambiguous, we move on to consider the correct approach to Article 21 of the Withdrawal Agreement which reads as follows:

> "The safeguards set out in Article 15 Chapter VI of Directive 2004/38/EC shall apply in respect of any decision in the host State that restricts rights of the persons referred to in Article 10 of this agreement".

66. Article 15 of the Directive provides that Articles 30 and 31 of the Directive are to apply "by analogy to all decisions restricting free movement of Union citizens and family members on grounds other than public policy, public security or public health". Article 30 provides that a person subject to a decision restricting their exercise of free movement rights should be provide with written notice specifying the public policy, public security or public health grounds which were the reason for the decision, along with information in relation to how the decision could be appealed. Article 31 is set out and considered below. Applying the approach to construction which has been set out above, we accept the submissions that Article 21 must be read together with and alongside Article 20(1) and Article 20(2) as not importing substantive EU law rights in respect of those committing conduct rendering them liable to be considered for deportation after the end of the transition period, but rather provides solely for procedural protections. These are commonly understood to be the rights to be notified of a decision and how to appeal it, the right to an effective remedy, and the right to a fair hearing in respect of any challenge to the decision in question.
67. We do not accept the submission that Article 21 imports into domestic law substantive safeguards to be found in the Directive such as a requirement to apply the EU law concept of proportionality, in relation to cases under Article 20(2) in respect of individuals who have committed conduct after the end of the transition period giving rise to the need to consider whether they should be deported. This submission has the effect of importing the need to consider European law as provided for in Article 20(1) into cases specifically covered by Article 20(2). To do so would render the clear intended bright line in relation to the approach for those who commit offences prior to the specified date and those who commit offences after, irrelevant. That was clearly not the intention of the parties to the Withdrawal Agreement. The context of this finding is that offences committed prior to the specified date by an EU national would have been committed during the period the UK was part of the EU in which the protection given to the right of free movement, referred to above, was applicable. Following the specified date the UK was not a party to any EU treaty conferring such a right upon an EU national or obligation upon a member state to apply EU law. The only right such an individual has, as reflected in Article 20(2), is for any action being taken as a result of their offending after the specified date to be considered in accordance with domestic law.
68. It also goes without saying that the clear wording of Article 20(2) shows that any decision to restrict a relevant person's rights under the EUSS following criminal conduct which took place after the end of the transition period is not based on any concept of EU law and therefore does not require construction in light of the general principle of EU law pursuant to Article 4(3) of the Withdrawal Agreement. This distinction is reinforced by the actual wording of Article 20(1) which specifically refers to the application of EU law whereas Article 20(2) contains no reference to Union law or to concepts or provisions of Union law and makes reference only to domestic law.
69. As set out above, Article 21 refers to "safeguards" set out in Article 15 and Chapter VI of the Free Movement Directive. For the reasons we have given, in relation to individuals facing the potential for deportation as a result of conduct

after the transition period this wording clearly does not import the whole of these provisions, restricting them to procedural safeguards only. Procedural safeguards are also, as referred to above, referred to in Article 31 of the Directive which reads:

Article 31

Procedural safeguards

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.
2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:
— where the expulsion decision is based on a previous judicial decision; or
— where the persons concerned have had previous access to judicial review; or
— where the expulsion decision is based on imperative grounds of public security under Article 28(3).
3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.
4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

70. The proportionality issue under Article 31 arises from Article 31(3) which refers to Article 28, but it is important to note that we have not been referred to any requirement in domestic law which places a legal obligation upon a decision-maker to apply Chapter VI of the Directive, which includes Articles 27 and 28. Nor have we been referred to any authority to substantiate a claim that Article 31(3) requires a Tribunal to apply a proportionality analysis based upon EU law in relation to an EU national who commits an offence after the specified date. In fact, we find that the intention of the contracting parties was for there to be a clear line between those referred to in Article 20(1) and Article 20(2), with the effect that the proportionality analysis to be found in Articles 27 and 28 of the Directive no longer applies to the latter. Thus a person who commits an offence after the relevant date is no longer entitled to the substantive safeguards in Articles 27 and 28, and, therefore neither the Secretary of State nor a judge on appeal is required to conduct a proportionality analysis as a result of the terms of the Withdrawal Agreement in respect of such an individual. The position in relation to other regimes and the application of a proportionality assessment, such as the ECHR, is not affected by this finding.
71. We accept Ms Smyth's submission that if we were to find as Mr de la Mare and Mr Buley submit, that would undermine the purpose and intention of the parties to the Withdrawal Agreement, especially if it permitted Article 31 to bring a substantive proportionality analysis in through the "backdoor" under the guise of a procedural safeguard. Such an event would introduce elements that are not specifically provided for in domestic law. We reject any suggestion that there is, in reality, no difference to a procedural or substantive safeguard or that substantive safeguards, such as applying the full text of the Directive in relation to protection against removal of EU citizens, can be construed as procedural.

They are different concepts and are treated as such in the Directive and the Withdrawal Agreement.

72. We find no merit in an argument that Article 31(3) of the Directive introduces a new free-standing substantive right on appeal, especially where no corresponding substantive right would exist in relation to the initial decision which we find would be contrary to the clear wording of Article 20(2).
73. We also note and accept a further submission by Ms Smyth at [52] of her skeleton argument when she writes:

> 52. Finally, even under EU law, it was illegitimate to use the proportionality principle to undermine the clear provisions of EU legislation. See, for example, *Mirga v Secretary of State for Work and Pensions* [2016] UKSC 1, [2016] 1 W.L.R. 481 at [69] where the Court noted, albeit in the social security context, that *"it would severely undermine the whole thrust and purpose of the [Free Movement Directive] if proportionality could be invoked to entitle that person to have the right of residence and social assistance in another member state, save perhaps in extreme circumstances"* (and in that case, notably, the Court found that neither claimant could possibly be said to fall into the category of "*exceptional cases where proportionality could come into play*": [70]). By analogy, here, for reasons set out above, if the proportionality requirements contained within Chapter VI of the Free Movement Directive were to be imported by Article 21, this would severely undermine the entire thrust and purpose of Article 20(2), and there is no suggestion that this case represents an "*extreme*" or "*exceptional*" case where proportionality should apply.

74. Mr de la Mare submitted another judge of the Upper Tribunal had accepted there was a role for proportionality. That is a reference the decision of Upper Tribunal Judge O'Callaghan the unreported case of Lukasz Krzysztofik, the citation of which we have set out above.
75. That case involved a separate issue, namely the lawfulness of the Secretary of State's decision to pause the applicant's EUSS application dated 21 September 2020 as a result of a pending prosecution. Judge O'Callaghan declared the Secretary of State's policy unlawful as being contrary to the Withdrawal Agreement. In relation to proportionality Judge Callaghan writes:

> 84. The answer is that the Union principle of proportionality clearly applies by virtue of Article 4(3) read with Article 18, the latter referencing the operation of Article 20(1) which imports substantive provisions of the Citizens' Directive in relation to the applicable thresholds against which restrictions are to be assessed, and the proportionality requirement in Article 27 of the Directive. Additionally, Article 18 references the application of Article 21 of the Withdrawal Agreement, concerned with safeguards, and applies to the imposition of a stay, which in turn imports Article 15 of the Directive and through it Articles 28(1) and 31 of the Directive which provide an explicit guarantee of individual consideration on the facts and of the application of the principle of proportionality.
>
> 85. I am fortified in my conclusion that Article 18 is a provision caught by Article 4(3) by the judgment of the Court of Appeal in Celik v. Secretary of State for the Home Department [2023] EWCA Civ 921, [2024] 1 WLR 1946, at [56], where Lewis LJ said, at [56]:
>
> "56. Further, the principle of proportionality, whether as a matter of general principle, or as given express recognition in article 18(1)(r) of the Withdrawal Agreement, does not assist the appellant. Article 18(1)(r) is intended to ensure that decisions refusing the "new residence status" envisaged by article 18(1) are not disproportionate ... The principle of proportionality, in this context, is addressed to ensuring that the arrangements adopted by the United Kingdom (or a member state) do not prevent a person who has residence rights under the Withdrawal Agreement being able to enjoy those rights after the end of the transition period ..."

76. We do not find this assists Ms Vargova, as the circumstances being considered by Judge O'Callaghan were materially different from those in this appeal. To start with, the conduct which was the subject of the pending prosecution had occurred prior to the end of the transition period and this was therefore a case which fell within Article 20(1) of the Withdrawal Agreement and not Article 20(2). Judge O'Callaghan was not considering a specific provision of the Withdrawal Agreement which excludes the application of Union principles as is the case with Article 20(2) of the Withdrawal Agreement, which the Judge noted contrasted with the provisions and therefore requirements of Article 20(1) of the Withdrawal Agreement (see [33] of the decision). Instead, he was considering an action by the Secretary for the Home Department which delayed the recognition of a right said to be preserved by the Withdrawal Agreement. We do not dispute that there are some situations in which Union law and the proportionality principle will continue to apply, as specifically provided by the Withdrawal Agreement, an example of which is to be found in Article 20(1).
77. It must also be remembered that the Withdrawal Agreement sets out minimum standards as agreed between the parties. The Secretary of State can grant more generous rights to an EU citizen, and has done on other occasions, to which if there is a later interference with such rights the protection provided by Article 21 may be relevant.
78. In relation Article 21 the guidance published by the European Union reads:

> 2.9. Article 21 – Safeguards and right of appeal
>
> This provision covers all situations in which residence rights under the Agreement can be restricted or denied.
>
> It ensures that the procedural safeguards of Chapter VI of Directive 2004/38/EC fully apply in all situations, i.e.:
>
> (a) abuse and fraud (Article 35 of Directive 2004/38/EC);
>
> (b) measures taken on grounds of public policy, public security or public health (Chapter VI of Directive 2004/38/EC) or in accordance with national legislation; and
>
> (c) measures taken on all other grounds (Article 15 of Directive 2004/38/EC) which include situations such as when an application for a residence document is not accepted as made, when an application is refused because the applicant does not meet the conditions attached to the right of residence or decisions taken on the ground that the person concerned does no longer meet the conditions attached to the right of residence (such as when an economically non-active EU citizen becomes an unreasonable burden to the social assistance scheme of the host State).
>
> It also ensures that the material safeguards of Chapter VI of Directive 2004/38/EC fully apply with regard to restriction decisions taken on the basis of conduct that occurred before the end of the transition period.
>
> In line with the CJEU's established case law on the general principles of EU law, restriction decisions taken in accordance with national legislation must comply also with the principle of proportionality and fundamental rights, such as the right to family life.

79. There is nothing within this guidance to support an argument that what is being referred to is a substantive right. There is only reference to procedural safeguards which reinforces the submission of Ms Smyth that Article 21 relates to procedural safeguards rather than substantive rights.

80. There is a further analysis which is to be brought to bear upon these issues. We note that pursuant to Article 21 the starting point in any case will be the need to consider whether a decision has been made that restricts the residence rights of a person referred to in Article 10. It is not disputed before us that Ms Vargova is a person to whom the personal scope of the Withdrawal Agreement applies, as she is a Union citizen who was exercising a right to reside in United Kingdom in accordance with Union law before the end of the transition period and has continued to reside here thereafter.
81. The decision under challenge before the Judge was a Stage 1 deportation decision notice. That wording is important. It was not a deportation order but a notice advising Ms Vargova that the Secretary of State had made a deportation decision against her and allowing a period within which she was able to raise objections to the making of a deportation order. We find it is therefore not a decision which restricts her rights of residence. We find on a proper interpretation of Article 21 that the safeguards in the Directive have no application at the making of a Stage 1 deportation notice stage or any appeal against the same. The question at that stage is whether the decision to make a deportation notice is lawful under the applicable domestic regime. It is not a decision to remove the recipient of the notice but a decision to consider making a deportation order.
82. It is when a deportation order is made and notified in a Stage 2 deportation order notice, which will also notify a person of any pertinent right of appeal, that a decision is made in the host state that will restrict the right of the person referred to in Article 10 and bring into play the provision of Article 21 and the procedural safeguards set out in the Directive.
83. We do not accept Mr de la Mare's submissions that the 2007 Act needs amending or should be declared incompatible as exception 7 in section 33 does not specifically include a reference to those who committed offences after the specified date. The reason for that is that those persons are not protected by European law and the amendments made to the 2007 Act were entirely consistent with the provisions of the Withdrawal Agreement in respect of cases concerning conduct after the end of the transition period.
84. Before turning to our conclusions on the Judge's decision which is the subject matter of this appeal we think it would be helpful to set out the basis of the appeals of this sort and the likely scope of appeals under Stage 1.
85. A person with leave to remain under the European Union Settlement Scheme (EUSS) may have a right of appeal under regulation 6 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 which reads:

> **Right of appeal against decisions to make a deportation order in respect of a person other than a person claiming to be a frontier worker or a person with a healthcare right of entry**
>
> **6.**—(1) A person to whom paragraph (2) applies may appeal against a decision, made on or after exit day, to make a deportation order under section 5(1) of the 1971 Act in respect of them.
>
> (2) This paragraph applies to a person who—
>
> (a) has leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules, or
>
> (b) is in the United Kingdom (whether or not the person has entered within the meaning of section 11(1) of the 1971 Act having arrived with scheme entry clearance.

3) But paragraph (2) does not apply to a person if the decision to remove that person was taken—

(a) under regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"), where the decision to remove was taken before the revocation of the 2016 Regulations, or

(b) otherwise, under regulation 23(6)(b) of the 2016 Regulations as it continues to have effect by virtue of the Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020 or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020.**]**

(4) The references in paragraph (2) to a person who has leave to enter or remain include references to a person who would have had leave to enter or remain but for the making of a deportation order under section 5(1) of the 1971 Act.

86. The available Grounds of appeal are to be found in regulation 8:

Grounds of appeal

8.— (1) An appeal under these Regulations must be brought on one or both of the following two grounds.

(2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of—

(a) Chapter 1, or Article 24(2), 24(3), 25(2) or 25(3) of Chapter 2, of Title II, or Article 32(1)(b) of Title III, of Part 2 of the withdrawal agreement,

(b) Chapter 1, or Article 23(2), 23(3), 24(2) or 24(3) of Chapter 2, of Title II, or Article 31(1)(b) of Title III, of Part 2 of the EEA EFTA separation agreement, or

(c) Part 2, or Article 26a(1)(b), of the Swiss citizens' rights agreement.

(3) The second ground of appeal is that—

(a) where the decision is mentioned in regulation 3(1)(a) or (b) or 5, it is not in accordance with the provision of the immigration rules by virtue of which it was made;

(b) where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules;

(c) where the decision is mentioned in regulation 4, it is not in accordance with section 76(1) or (2) of the 2002 Act (as the case may be);

(d) where the decision is mentioned in regulation 6, it is not in accordance with section 3(5) or (6) of the 1971 Act (as the case may be).

(e) where the decision is mentioned in regulation 6A, 6B, 6C or 6D, it is not in accordance with regulation 9, 11, 12, 14, 15(1)(a) or 15(1)(c) of the 2020 Regulations (as the case may be);

(f) where the decision is mentioned in regulation 6E, it is not in accordance with section 3(5) or 3(6) of the 1971 Act, or regulation 15(1)(b) of the 2020 Regulations (as the case may be).

(g) where the decision is mentioned in regulation 6G(1)(a) or (1)(b) or 6H, it is not in accordance with the provision of the immigration rules by virtue of which it was made;

(h) where the decision is mentioned in regulation 6G(1)(c) or (1)(d), it is not made in accordance with Appendix S2;

(i) where the decision is mentioned in regulation 6I, it is not made in accordance with the provision of, or made under, the 1971 Act (including the immigration rules) by virtue of which it was made;

(j) where the decision is mentioned in regulation 6J, it is not in accordance with section 3(5) or (6) of the 1971 Act, or Appendix S2 (as the case may be).

(4) But this is subject to regulation 9.

87. If no submissions are made, i.e. on human right grounds, the only basis of challenge is the lawfulness of the decision on the basis of the information known to the decision maker on the basis of the application of established domestic law principles. If an appeal against a Stage 1 decision raises human rights issues not previously raised, the Secretary of State for the Home Department can consider the same with view to issuing a Stage 2 decision which will have the effect of superseding the Stage 1 decision. The Stage 2 letter is called a 'Decision to Refuse a Human Rights claim' which is usually given to the recipient with a Deportation Order. The problem in this case was the failure of Ms Vargova to respond to the Stage 1 decision with her human rights submissions until much later in the process.
88. The question to be considered at an appeal against a Stage 1 decision is whether the appeal should be allowed by the tribunal on the basis that there was a breach of domestic law in the process of making the decision to make the order, where the nature of the breach will have been such as to render the decision unlawful i.e. the legal validity of the decision to deport.
89. If submissions have been made on human rights grounds, the Secretary of State must have specific regard to her obligations under Article 8 of the Convention, balancing the applicant's ties to the United Kingdom and any difficulties he or she would face readjusting to life in their home country against the seriousness of their criminal offending, but that will form part of the Stage 2 consideration process.
90. During the course of the hearing submissions were also made in relation to the Home Detention Curfew with additional time being given to the advocates to file an agreed note in relation to this issue. That document was received on 21 August 2024 which we set out at Annex A to this decision. We have considered the content of the document but do not consider it impacts upon our decision and the reasoning set out in this judgment as a result of the fact it has no impact upon the EU nationals right of residence.

91. In the light of the conclusions which we have set out above we return to the determination under challenge. We note that it is argued that if the Judge erred in law in applying the Directive this was not a material error of law as the Judge considered all the facts. For the following reasons we do not accept this argument.
92. The Judge's findings of fact are set out from [6] of the decision under challenge. The Judge specifically refers to Article 21 of the Withdrawal Agreement at [6] – [9] in the following terms:

> 6. I find the Appellant enjoys the procedural protection set out in Article 21 of the Withdrawal Agreement: "The safeguards set out in Article 15 and Chapter VI of Directive 2004/38/EC shall apply in respect of any decision by the host State that restricts residence rights of the persons referred to in Article 10 of this Agreement."
> 7. Article 21 imports the whole of chapter VI of Directive 2004/38/EC (Citizens' Directive). This includes Article 27 and 28.1 of Citizens' Directive which are preserved for the purposes of procedural protection by way of Article 21 as well as their justification / proportionality requirements.
> 8. Article 21 therefore requires the application of Article 27.2 of the Citizens' Directive which reads as follows: "Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted."
> 9. The safeguards set out in Article 21 of the Withdrawal Agreement also requires me to take into consideration Article 28.1 of the Citizens Directive which reads as follows: "Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration Page 9 of 260 Page 7 of 258 Page 9 of 252 Appeal Number: EA/12363/2022 3 into the host Member State and the extent of his/her links with the country of origin."

93. We find merit in Ms Smyth's submission that the Judge erred in law at [7] in making a finding that Article 21 imports the whole of Chapter VI of Directive 2004/38/EC as for the reasons set out above we cannot accept that it does. The decision under challenge is a Stage 1 decision which does not restrict Ms Vargova's right of residence in any event.
94. In this regard we do not agree with the submission of Mr de la Mare referred to at [24] above as he is claiming the Judge did not err in stating the Directive has to be applied as part of it ceased to be applicable following the UK departure from the EU. He is saying there is no error as the Judge was only saying that those parts which remain in force have to be applied, but that is not the wording used by the Judge. The further problem with this submission is that it is a clear reference to the substantive provisions, not the procedural requirements which survive, as before. That submission is only right if Mr de la Mare is correct in his interpretation of the Withdrawal Agreement, but we find he is not.
95. At [15], as we noted above, the Judge writes:

> 15. Having weighed up all the competing arguments and having applied Article 15 of the Withdrawal Agreement, Article 27.2 Article 8 of the Citizens Directive, I reached the conclusion that the appellant's previous criminal conviction cannot in and of itself constitute grounds for the respondents expulsion decision. I place weight on the fact the appellant represents a low risk of reoffending and a low risk of harm to the public. I find this is an important consideration that tips the expulsion measure into disproportionate emphasis on the appellant's past offending. I have

also balanced all of these considerations against a long-term free movement right exercised by the appellant over the last 13 years. Therefore, having applied the safeguards are set out in the Withdrawal Agreement and having applied to EU law principle of proportionality, I reached the conclusion that the expulsion decision by the respondent is a disproportionate measure for the reasons I have set out above.

96. We find the Judge's error to be material as it is not clear that she would have come to the same decision if the correct legal matrix had been applied. The Judge specifically refers to the Directive which we have found has no application in relation to a Stage 1 decision on the facts of this case.
97. In answer to the specific questions we have been asked to consider, we find as follows:

    1. Should the FTT's decision be set aside for material error of law on the grounds identified by the Secretary of State?

       Our finding: Yes.

    2. Can the UT decide that question without addressing the issues below (leaving them to be addressed on re-making, if the decision is set aside), or does it need to decide the issues before deciding whether there has been a material error of law?

       Our finding: We have needed to decide some of the issues before deciding whether there has been a material error of law, but not in relation to the proportionality of the decision on the facts.

    3. Does the WA require that post-transition period conduct be considered in a manner that applies the EU law proportionality principle on a case-by-case basis?

       Our finding: No. There is a clear bright line between the rights of EU nationals committing offences prior to the specified date, reflected in Article 20(1) and those who commit offences after the specified date as reflected in Article 20(2) of the Withdrawal Agreement.

    4. If so, is the scheme of automatic deportation contained in ss32-33 UKBA 2007, including, in particular, Exception 7 which is expressly confined to cases of pre IP Completion Day conduct, consistent with this requirement?

       Our finding: not applicable, as we find the answer to question 2 is "No".

       In any event, we find the provisions contained in sections 32 – 33 UKBA 2007, including particular exception 7 lawful as it reflects the position set out in the Withdrawal Agreement.

       It is settled law that the existence of an exception does not prevent the making of a deportation order in any event – see section 33(7) UK Borders Act 2007. If an appellant succeeds on an appeal the deportation order made under the 2007 Act will be revoked.

    5. Should a request for a preliminary ruling from the Court of Justice of the European Union be made by the Upper Tribunal pursuant to Article 158 of the Withdrawal Agreement?

Our finding: No. There is no need as the applicable law is clear and unambiguous.

Issue included by SSHD but that has not been agreed

6. Even if the answer to one or more of questions 1-4 above is 'yes', would that allow a tribunal to conclude that any right which Ms Vargova had by virtue of Part 2 of the WA was breached?

   Our reply– Not at this stage. That will form part of the task undertaken by the First-tier Tribunal hearing Ms Vargova's appeal against the Stage 2 decision and the assessment of the proportionality of the refusal of her human rights claim.

Conclusion

98. We say at this stage we have considerable sympathy for Judge Anthony who was faced with an appeal in relation to which the guidance given to judges of the First-tier Tribunal has changed; from being that for offences committed before the specified date the EU law regime was still to be applied and for offences wholly committed after the specified date by reference to domestic law, with no reference to any provision of EU law, to a more nuanced approach. Judge Anthony was faced with a difficult task in light of such confusion and lack of guidance from the Upper Tribunal on the correct approach to be followed. We hope we have now provided that clarity.
99. We find Judge Anthony has erred in law in a manner material to the decision to allow the appeal, for the reasons set out in the Secretary of State's grounds seeking permission to appeal, the grant of permission to appeal, and in light of our primary finding in relation to the approach to be taken in relation to the deportation of an EU national who has committed offences after the specified date.
100. We set the decision of the First-tier Tribunal aside.
101. We considered it appropriate and in the interests of justice to remit the appeal to the First-tier Tribunal to be linked to the existing Stage 2 appeal for all matters to be considered together.

C J Hanson
Judge of the Upper Tribunal
Immigration and Asylum Chamber
19 September 2024

ANNEX A

IN THE UPPER TRIBUNAL Case No: UI-2023-004566
(IMMIGRATION AND ASYLUM CHAMBER)

B E T W E E N:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

- and –

KATARINA VARGOVA

Respondent

- and –

THE AIRE CENTRE

Intervenor

NOTE ON HOME DETENTION CURFEW

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1. This is an agreed note on the legal provisions filed following the direction at the hearing on 19 July 2024 by the President, Mr. Justice Dove, and Upper Tribunal Judge Hanson. In order to save a separate note on the material dates in relation to HDC, they are provided within this note.

2. The statutory provision for the discretionary early release scheme on home detention curfew is under Section 246 of the Criminal Justice Act 2003 ("Criminal Justice Act" or "CJA"). Subsection (4) of that provision sets out the exclusions from the scheme. The implementation of that power is set out in published policy described below, in a scheme known as Home Detention Curfew ("HDC").

3. Chapter 6 of Part 12 of the CJA (ss237-268) governs the release of prisoners.

4. Section 246(1) provided that, subject to subsections (2) and (4) the Secretary of State "*may release on licence under this section a fixed-term prisoner" "at any time during the period of 135 days ending with the day on which the prisoner will have served the requisite custodial period."* (The section has since been amended so as to include exceptions from this provision for certain offences and to extend the relevant period to 180 days).

5. Section 246(4) states that:

   "(4) Subsection (1) does not apply where—

   …

   (f) the prisoner is liable to removal from the United Kingdom."

6. Section 259(a) provides as follows:

"For the purposes of this Chapter a person is liable to removal from the United Kingdom if—

(a) he is liable to deportation under section 3(5) of the Immigration Act 1971 (c. 77) and has been notified of a decision to make a deportation order against him."

…

7. This discretionary power is then addressed in a published policy Home Detention Curfew (HDC) Policy Framework ("Policy Framework"). Whether a person can be released on HDC is determined in the following steps which show that persons considered to be excluded by statute are not considered for HDC even under exceptional circumstances.

   (1) Is the prisoner "eligible" for HDC? A person is eligible if not excluded by statute. This is addressed in Section 4.3 (pp.10-15 Policy Framework). Section 4.3.1, p.10 lists those as "statutorily excluded" from HDC as including (9th bullet point) "those who are liable to deportation and a decision to deport has been served (i.e. not just those with a Deportation Order)".

   (2) If the prisoner is eligible, then it is assessed whether the prisoner is "suitable" for HDC. Prisoners are "presumed unsuitable" in a variety of circumstances based on the nature of conviction and also on the basis of being "liable to deportation, but no deportation decision has been made" (Section 4.3.6, p.12, and Annex D p.32). (3) If the prisoner is eligible but not suitable, are there exceptional circumstances to warrant HDC release? (Annex D p.33)

8. There are ongoing judicial review proceedings in the Administrative Court 1 in which the issue is what constitutes a decision to make a deportation order for the purposes of s. 259(a) CJA and where it is contended that this is not applicable to "Stage 1" decisions.

9. The following are dates material to Ms Vargova's application for HDC:

   - Ms Vargova was served with a 'Decision to deport pursuant to the Immigration Act 1971 and the UK Borders Act 2007'/'ICD/4936A'on 12 November 2022;

   - Ms Vargova became eligible for HDC (subject to applicability of the legislation in her case) on 25 March 2023;

   - Ms Vargova's "Conditional Release Date" ("CRD") was 6 August 2023. This is the date of automatic release from prison, but subject to compliance with licence conditions and thus considered conditional;

   - Ms Vargova was detained under immigration powers from 6 August 2023, (notwithstanding the existence of this appeal) until she was granted immigration bail on 10 August 2023.

   Enclosures:

1) Section 246 CJA, Section 259 CJA (versions applicable at the time of Ms Vargova's eligibility for HDC until present).

2) Home Detention Curfew (HDC) Policy Framework ("Policy Framework") of June 2024. The text of the identified provisions material to persons subject to decisions to deport is identical in the versions in force since 28 March 2019 to date.

3) Ms Vargova's Release Slip (contains HDC and CRD dates).

4) Ms Vargova's grant of immigration bail by the First-tier Tribunal (10 August 2023).

1 (R (AA) v Sodexo Ltd [2023] EWHC 3215 (Admin), addressing whether the claim was academic; current Court references are CO/1825/2023 / AC-2023-LON-001544 / 'A' v SSHD.

(Enclosures have not been attached)