IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004818
First-tier Tribunal No: EA/00638/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 14 June 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

TOMAS POCTA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Forest, instructed by Rea Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

Heard at Edinburgh on 1 May 2024

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Doyle, promulgated on 11 August 2023, dismissing his appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the Appeals Regulations").

Background

2. On 31 May 2019 the appellant was granted leave to remain under the EU Settlement Scheme ("EUSS").

3. On 6 October 2022 at Aberdeen Sheriff Court, he was convicted of assault to injure and danger to life, for which he was sentenced to 27 months' imprisonment and a restriction order.

4. On 18 December 2022 the Secretary of State took a decision to deport him pursuant to the Immigration Act 1971 and the UK Borders Act 2007 ("the 2007 Act") on the basis that he was a foreign national and, pursuant to Section 32(5) of the 2007 Act, the Secretary of State was required to make a deportation order against him. That decision states that he has a right of appeal under the Appeals Regulations on the grounds that:

   (1) the decision breaches any rights under the Withdrawal Agreement; or

   (2) is not in accordance with Sections 3(5) or 3(6) of the Immigration Act 1971.

5. The decision also states under the heading "One-Stop Notice" that the appellant can give reasons why he should be allowed to stay in the United Kingdom and that he should do so within twenty-eight days of the date of service of the document. It says "You may raise any human rights issues at this stage and we will consider these. If we do not accept that you should not be deported on human rights grounds you will have a separate appeal against this decision".

6. The appeal skeleton argument submitted to the First-tier Tribunal raised two issues:

   "I. Would the deportation of the Appellant breach Article 8 ECHR outside the Immigration Rules.

   II. Is the Secretary of State entitled to deport the Appellant."

7. A submission was made that:

   "The Appellant faces all but insurmountable obstacles in terms of resisting deportation under the relevant immigration rules and the statutory structure. Nonetheless it is still the case the Appellant is entitled to a determination of his case outside the rules in terms of Article 8 ECHR (Unane v. UK) (80343/17))."

8. It is of note that the appellant was married in 2018 and that he and his wife had a son born in October 2020. The index offence took place, according to the appellant, on 13 and 14 January 2022 and was a serious and violent assault against his wife. As a consequence of that there is a non-harassment order in place, and the appellant is unaware of her whereabouts or of their child.

9. The appellant has been unable to get contact again with his son. Although there was previous contact supervised by the mother-in-law, by the time of the appeal before the First-tier Tribunal this had ceased. It was unclear whether the appellant's son and former partner were living in

Scotland or, as appeared to be the case, in England. He had been unable to obtain contact with them but, being in custody in Scotland it was difficult to secure representation from solicitors in Carlisle; the child was assumed to be in Cumbria.

10. At the hearing before the First-tier Tribunal, Mr Rea applied for an adjournment so that the appellant could obtain contact with his son. This was framed on the basis that the appellant might be able to benefit from the exceptions set out in Section 117C of the Nationality, Immigration and Asylum Act 2002 and also by reference to Section 33(2) of the 2007 Act and that he would fall then within Exception 1, as set out in Section 33(2)(a) of the UK Borders Act 2007. Mr Rea explained to the judge that application was resisted by the Home Office and was refused by the judge.

11. The judge held:-

(i) the appellant does not have contact with the son, does not know the address at which he lives and "realistically acknowledges that he cannot establish a genuine and subsisting relationship with his son." [22].

(ii) there is no realistic prospect of contact action starting within the next six months, the appellant does not have a subsisting relationship with his son and cannot fall within the exceptions set out at paragraph 399 of the Immigration Rules or Section 33 of the 2007 Act;

(iii) the appellant could not establish Article 8 family life [29];

(iv) there is no reliable evidence of the effect of deportation on the appellant's son, it not being disputed that there was no contact for the last ten months. He could not show that he falls within the exceptions set out in Section 117C (5); the decision appealed against was dismissed on Article 8 grounds.

12. The appellant sought permission to appeal on the sole ground that the judge had failed to record that an adjournment had been sought and refused; and, in doing so had breached the principles set out in Nwaigwe (adjournment: fairness) [2014] UKUT 00418; and, in doing so, failed to take into account the gravity of the impact of deportation would have on a genuine and subsisting parental relationship with a qualifying child.

13. On 25 October 2023 First-tier Tribunal Judge Burnett granted permission noting [3] that it was accepted in the grounds of appeal that the judge had set out the relevant law but that it was not clear to him that the respondent had made a stage 2 deportation decision, reference being made to Regulation 6 of the Regulations.

14. He observed that:

> "This case may provide a good opportunity for the Upper Tribunal to set out the scope of a regulation 6 appeal and whether it includes a consideration of

human rights as opposed to simply ‘setting the legal regime scene for the stage 2 decision’ of the respondent.”

The Hearing

15. In addition to the bundle prepared for the hearing I had two applications made pursuant to Rule 15(2A) by the appellant and two skeleton arguments prepared by Mr Forest.

The Law

16. The Appeals Regulations provide as follows, so far as is material:

> **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.
>
> **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,
>
> …
>
> (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).

…

(4) But this is subject to regulation 9.

17. Regulation 9 provides:

9.—(1) If an appellant makes a section 120 statement, the relevant authority must consider any matter raised in that statement which constitutes a specified ground of appeal against the decision appealed against. For the purposes of this paragraph, a "specified ground of appeal" is a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act.

(2) In this regulation, "section 120 statement" means a statement made under section 120 of the 2002 Act and includes any statement made under that section, as applied by Schedule 1 or 2 to these Regulations.

(3) For the purposes of this regulation, it does not matter whether a section 120 statement is made before or after the appeal under these Regulations is commenced.

(4) The relevant authority may also consider any matter which it thinks relevant to the substance of the decision appealed against, including a matter arising after the date of the decision.

(5) But the relevant authority must not consider a new matter without the consent of the Secretary of State.

(6) A matter is a "new matter" if—

(a)it constitutes a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act, and

(b)the Secretary of State has not previously considered the matter in the context of—

(i) the decision appealed against under these Regulations, or

(ii) a section 120 statement made by the appellant.

18. It is of note that this mirrors Section 85 of the Nationality, Immigration and Asylum Act 2002.

19. The grounds of appeal to the First-tier Tribunal in this case were limited as can be seen from reg.8. They do not include a ground that the decision breached the appellant's human rights. There is no jurisdiction under the Appeals Regulations to allow an appeal on human rights grounds where that is simply not available as a ground of appeal. A decision of the type appealable under the Appeals Regulations is not a human rights decision, as can be seen from Abdullah & Ors (EEA; deportation appeals; procedure) [2024] UKUT 24.

20. Further, reg 9 does not assist. There was no section 120 statement made, and so reg 9 (1) does not apply. Mr Forest's submission that, where there is no section 120 notice, the Tribunal can nonetheless take and indeed should take into account a new matter is contrary to the clear intent of the legislation which is to restrict what grounds can be raised

21. The wording of reg 9 mirrors that of section 85 of the 2002 Act. Having had regard and in the circumstances it is sensible to consider the law relevant to that Section. In Lamichhane v SSHD [2012] EWCA Civ 260 the Court of Appeal held at [39}

> 39. I can now turn to section 85(2) . The reference to "a statement under section 120 " is a statement made in response to a notice served under that section. There can be no such statement if no section 120 notice has been served. It is implicit in section 85(2) that in the absence of such a statement the Tribunal shall not consider "any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against". :

22. Although the wording of Section 85 has, however, changed since Lamichhane, it has not done so materially.

23. It is manifestly clear that raising human rights is clearly a new matter, and that it could not be raised without the respondent's consent; nor, in any event, could a power to consider a new matter expand the grounds of appeal.

24. It therefore follows that not only was the judge wrong to consider Article 8 it could not in any event lawfully have been considered. Given Mr Forest's concession that the appeal could not succeed on either of the grounds set out in Regulation 8, the appeal would inevitably have been dismissed.

25. That is not, however, to say that the appellant's human rights will not be considered or an appealable human rights decision be made; that is what will occur as stage 2 as envisaged in the refusal letter (see [5] above) and there will be another appeal.

26. Bearing in mind that the appellant's human rights could not have been considered in this appeal, any error with respect to the refusal of the adjournment was not material for the reasons set out below.

27. As a preliminary observation, it is clear from the recording of the hearing that the judge did hear an application for an adjournment and gave reasons for rejecting that application. It is not primarily the reasons that are challenged rather it is the failure to record either the request or the reasons for rejecting the application.

28. The basis of the application for an adjournment was on the basis that the appellant wanted to get information regarding his son in order to mount an Article 8 case, in that he wished to be able to show that Exception 2, set out in the 2002 Act, applied. Given that the judge had no jurisdiction

to consider that issue, it cannot in all the circumstances be argued that it was unfair for him to refuse an adjournment, albeit that the reasons he gave for doing so were flawed.

29. Further, even if he had been able to consider Article 8, in order to show that there was undue harshness, the appellant would have had not only to get in contact with the child but then to take up the relationship with that child again and have evidence that the effect on the child of his removal would be unduly harsh. There are a significant number of contingencies to that and in all the circumstances of the case, as set out above, this decision was clearly not unfair bearing in mind the principles set out in Nwaigwe.

30. The judge should have recorded the application for an adjournment in his decision, and the reasons for rejecting it, even if only briefly. That said, on the particular facts of this case, this did not constitute unfairness or an error capable of affecting the outcome.

Notice of Decision

For the reasons set out above, I consider the decision of the First-tier Tribunal did not involve the making of an error of law capable of affecting the outcome and I uphold it.

Signed Date: 6 June 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal