IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002354

First-tier Tribunal No: EA/03656/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23 October 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANA CLEMENTE DE DIEGO DIAZ

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Presenting Officer
For the Respondent: Mr D Magne, Solicitor, of Magne & Co Solicitors

Heard at Royal Courts of Justice on 21 October 2024

DECISION AND REASONS

1. The Secretary of State appeals with the permission of Upper Tribunal Judge Loughran against the decision of First-tier Tribunal Judge Gibbs. By her decision of 16 April 2024, Judge Gibbs allowed Ms Diaz's appeal against the Secretary of State's decision to make a deportation order by virtue of section 32(5) of the UK Borders Act 2007.

2. To avoid confusion, I shall refer to the parties as they were before the First-tier Tribunal: Ms Diaz as the appellant and the Secretary of State as the respondent.

Background

3. The relevant background can be stated quite shortly. The appellant is a Spanish national. She has been in the UK for some years. On 29 April 2021, she was granted settled status under the EU Settlement Scheme. On 5 October 2023, following a plea, the appellant was convicted of Stalking involving serious alarm

or distress. She was sentenced by Mr Recorder Boyle to three years' imprisonment and a restraining order which prohibited her from contacting the victim.

4. On 25 October 2023, the respondent made a decision to deport the appellant. She did so on the basis that the appellant was a foreign criminal as defined in the UK Borders Act 2007, and that none of the exceptions to that designation applied to the appellant. The three year sentence therefore brought the appellant within the statutory definition of a foreign criminal and the respondent concluded that she was obliged to make a deportation order.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. She was unrepresented at that stage, and has continued to be so until comparatively recently. The First-tier Tribunal held a number of case management hearings ("CMH"). The judge who presided over the first two such hearings was concerned that the respondent might have erred in treating the appellant as a person to whom exception 7 in s33 of the UK Borders Act 2007 applied. He gave the respondent time to consider the position and to review the decision accordingly.

6. The respondent took no action and the matter came before Judge Gibbs for a further CMH on 4 April. The respondent was represented by a Presenting Officer. The appellant was present but not represented. The judge stated that the respondent had had ample time to comply with directions. She indicated to the respondent that she intended to treat the CMH as the substantive hearing. The Presenting Officer was content with that course of action and made no further submissions.

7. The judge issued a reserved decision on 17 April 2024. She concluded that "the appellant's offending occurred between 1 April 2020 and 31 May 2023", as that was made clear in "both the indictments against the appellant and the judge's sentencing remarks": [7]. Having directed herself to the relevant provisions of the Withdrawal Agreement ("WA"), the judge concluded that the respondent had erred by breaching a right which the appellant had under the WA. She reached that conclusion because the "respondent appears to have failed to understand that whilst the appellant was sentenced in 2023 her criminal conduct took place over 3 years as set out above": [8]. The judge therefore allowed the appeal on that basis, albeit that she noted that there was "nothing to prevent the respondent from issuing a new decision considering the appellant's position by reference only to conduct which has occurred since the United Kingdom left the EU.": [10]

The Appeal to the Upper Tribunal

8. There is a single ground of appeal to the Upper Tribunal, which is that the judge misdirected herself on the facts because the criminal conduct upon which the decision was based had all occurred after IP Completion Day: 31 December 2020.

9. The respondent filed a bundle in compliance with the Upper Tribunal's directions.

10. The appellant instructed Mr Magne in connection with the appeal before the Upper Tribunal. He has produced a skeleton argument and a supplementary

bundle. He stated at the start of the hearing that he had not received the respondent's bundle. I gave him time to consider the parts of the bundle to which Ms Cunha intended to refer during her submissions. He confirmed after a few minutes that he was ready to proceed.

Submissions

11. Ms Cunha submitted that the judge had erred in concluding that the offending behaviour had started in April 2020. The appellant and her ex-partner had started their short relationship at that time, and there was no reason to think that there had been any cause for concern at that point. The first reference to any difficulty in the papers was in November 2020 and it seemed that the offending had started in earnest in 2021. The judge had misread the papers in concluding otherwise.

12. Ms Cunha sought to take me to material which had not been before the First-tier Tribunal, including a PNC extract and an OASys report. I observed that there was no application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Ms Cunha did not attempt to make any such application orally, and was content to rely on the material which had been before the FtT.

13. For the appellant, Mr Magne submitted that the judge had been entitled to find that the offending conduct had spanned IP Completion Day. He submitted that it was clear that there had been some offending in September 2020, as there were counts on the indictment to that effect. Those counts had been taken into account as part of the sentencing exercise. Mr Magne indicated that he wished to rely on material which was not before the judge, although he had also not made an application under rule 15(2A). The judge had been correct to find that the seventh exception in the 2007 Act applied to the appellant and that she had rights under the WA because her offending had taken place, in part, before IP Completion Day.

14. In reply, Ms Cunha submitted with reference to *SSHD v HA (Iraq)* [2022] UKSC 22; [2022] 1 WLR 3784 that a proper understanding of the sentencing remarks was crucial. At best, the evidence before the judge had been equivocal as to the date on which the offending had begun. The proper course, in the circumstances, was for the appeal to be allowed and remitted to the First-tier Tribunal for consideration afresh. Mr Magne agreed that this was the appropriate relief in the event that I was with the Secretary of State on the single ground of appeal.

Legal Framework

15. Section 32(4) and (5) of the 2007 Act state that the deportation of foreign criminals is in the public interest and that the Secretary of State must make a deportation order in respect of a foreign criminal. Section 33 of that Act provides a number of exceptions to that basic rule, however. The seventh exception is "where the foreign criminal is a relevant person, and 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."

16. The appellant has ILR under Appendix EU. She is therefore a relevant person, as defined at s33(6C)(b) of the 2007 Act: Under the 2007 Act, therefore, the critical question was whether the appellant's conviction consisted of or included conduct which took place before 11pm on 31 December 2020.

17. It is not necessary to set out the salient provisions of the Withdrawal Agreement. It suffices for present purposes to note that Article 20 reflects the distinction in the domestic regime. Where offending conduct occurred before the end of the transition period, it must be considered in accordance with the Citizens Directive. Where it occurred after the end of that period, it is to be considered in accordance with national legislation.

18. The intention is clear, in that the additional protections against expulsion in Chapter VI of the Citizens Directive are to continue to apply to relevant persons who committed crimes whilst that Directive applied in the UK, whereas that protection ceased to apply to such persons who committed crimes after the UK's withdrawal from the EU.

Analysis

19. It was rightly agreed by Ms Cunha and Mr Magne that there is a single question before me, which is whether the judge was *entitled to proceed* on the basis that the appellant's criminal conduct pre-dated 31 December 2020. I have intentionally framed the question in that way; it is not whether the judge was *entitled to find* that the appellant's criminal conduct pre-dated 31 December 2020. That subtle distinction is important on the facts of this case. The judge did not make a finding of fact on the basis of the oral and documentary evidence before her at a contested hearing; she brought the appeal to an end following a hearing which was originally intended to be only preparatory because she considered the relevant facts to be clear, and to be capable of producing only one answer.

20. I consider the judge to have erred in proceeding on that basis. The evidence shone very little clear light on the start of the appellant's offending. The judge erred in treating as black and white what was, in truth, rather grey.

21. The judge proceeded on the basis that the offending had started in April 2020 but she clearly erred in that respect; the limited evidence which was before her showed that the short consensual relationship between the appellant and the victim had begun in April 2020. In sentencing the appellant, Mr Recorded Boyle confirmed that the relationship had started at that point. He said nothing to suggest that there had been any problems in the relationship between April 2020 and November 2020[1], at which point one of the victim's friends had died and he had ended the relationship between him and the appellant.

22. As Ms Cunha observed in her submissions, the critical events on which the sentence was based appear to have occurred after June 2021, when the appellant sent intimate images to the victim and her communications with him took what the Recorder described as 'a more sinister turn'. There were then various other matters to which the Recorder referred, including the arrest of the victim as a result of an unfounded allegation made by the appellant (September 2021) and her making a false allegation to his employer in February 2022. By the summer of 2022, she had started to make contact with his acquaintances via social media. The offending continued after her arrest in 2023.

[1] The learned Recorder actually stated that the death had ben in November 2021 but that cannot be correct because he went on to describe subsequent events in the summer of 2021.

23. Mr Magne highlight the fact that there is some indication in the papers that the offending had started in 2020. He highlights the fact that the appellant was charged with perverting the course of justice, which was said to have taken place 'on or before 6 September 2020'. The difficulty with that submission is that the count in question was ordered to lie on the court file, so it was not proven. Mr Magne also notes that the stalking offence was said to have taken place between 1 April 2020 and 31 May 2023. As I have noted above, however, there is nothing to suggest that the short relationship between the appellant and the victim was abusive or that it involved any stalking whatsoever before 2021.

24. At best, there was doubt in the papers as to the start date of the offending, although the judge was evidently not assisted by the Presenting Officer in this respect. The judge's error was to treat the start date as a certainty in the face of that doubt. The course she took in converting the CMH to a substantive hearing was borne out of that error. She thought that this was a clearcut case in which the respondent had applied the wrong regime to the appellant's deportation, but it was not. It was a case in which this issue was quite rightly to the fore, but the only way in which to resolve that question properly was by holding a hearing and making a finding about the date on which the offending had begun. If it had begun before IP Completion Day, the respondent had erred. If it had occurred purely after IP Completion Day (as the respondent thought), then the respondent had not erred and the appellant did not have any rights under the WA. In those circumstances, she would still have had alternative grounds of appeal available to her but she could not have succeeded on the basis identified by the judge.

25. This is a case in which both parties have taken preliminary steps to adduce further evidence before the Upper Tribunal but in which neither has made the necessary application under rule 15(2A). I have nevertheless considered that material in connection with the question of relief. The OASys report and the PNC Extract on which the respondent relies do tend to suggest that the offending all took place after IP Completion Day, whereas the additional material which Mr Magne has found arguably points in the opposite direction. That only serves to reinforce my conclusion that the correct course in this case was, and is, to have a contested hearing in the FtT. If the appellant wishes to contend that her offending had started in 2020, she is best placed to establish that with evidence.

26. In sum, I find that the judge erred in proceeding on the basis that the appellant engaged exception 7 in the 2007 Act. The evidence in that respect was not clear and the proper course was for there to be a fact-finding hearing. In ordering otherwise, the judge fell into error. Her decision will therefore be set aside and the appeal will be remitted to the FtT for there to be a hearing on the merits.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law. That decision is set aside and the appeal is remitted to be heard by a judge other then Judge Gibbs.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 October 2024