



**IN THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM  
CHAMBER**

Case No: UI-2022-006676  
HU/04439/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 6<sup>th</sup> June 2024**

**Before**

**UPPER TRIBUNAL JUDGE H NORTON-TAYLOR  
DEPUTY UPPER TRIBUNAL JUDGE KELLY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**FABIO PAULO  
(ANONYMITY NOT ORDERED)**

Respondent

**Representation:**

For the Appellant: Unrepresented and no appearance

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

**Heard at Field House on 15 May 2024**

**The appellant is not granted anonymity pursuant to rule 14 of the  
Tribunal Procedure (Upper Tribunal) Rules 2008**

**DECISION AND REASONS**

*Introduction*

1. This is an appeal by the Secretary of State for the Home Department against the decision of First-tier Tribunal Judge Burnett to allow an appeal by Fabio Paulo against a decision, dated the 21<sup>st</sup> August 2021, to refuse his human rights claim. For ease of exposition, we shall refer to the parties in accordance with their status before the First-tier Tribunal; that is to say, Fabio Paulo as 'the appellant', and the Secretary of State as 'the respondent'.
2. We do not make an anonymity order. The appellant's name is already in the public domain consequent upon the various criminal proceedings that have been brought against him, together with the fact that no such order was made by the First-tier Tribunal. It would thus serve no useful purpose to make an anonymity order at this stage, and we are in not in any event satisfied that there is an applicable exception to the general rule of 'open justice'.

### *Background*

3. To disentangle the issues that arise for determination in this appeal, it is first necessary to set out its background in some detail.
4. The appellant is a citizen of Portugal who was born on the 14<sup>th</sup> January 1995. He claims - albeit that the respondent does not accept - that he arrived in the United Kingdom as a child in 2010. He was cautioned in 2012 for an offence of theft, was made the subject of referral order in 2012 for an offence of attempted robbery, and was sentenced on the 24<sup>th</sup> August 2020 to a total of 42 months' imprisonment for two offences of possession of class A drugs (heroin and cocaine) with intent to supply.
5. On the **12<sup>th</sup> November 2020**, the respondent served the appellant with written notice that he was considering deporting the appellant under the Immigration (European Economic Area) Regulations 2016, giving him 20 days to explain why such an order should not be made. At the same time, the respondent served the appellant with notice under section 120 of the Nationality, Immigration and Asylum Act 2002 requiring him to state any grounds that he may have for remaining in the United Kingdom.
6. It is unclear whether the appellant responded to the notice of the 12<sup>th</sup> November 2020. It is however clear that, for whatever reason, the respondent decided to serve him with further written notice, dated the **2<sup>nd</sup> June 2021**, informing him that the respondent had now concluded that he was not a person to whom the 2016 regulations applied. The reason given for this conclusion was that the appellant had not provided any evidence to show that he was lawfully resident in the United Kingdom prior 23:00 GMT on the 31<sup>st</sup> December 2020 or was otherwise 'a relevant person' as defined by Regulation 3 of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020. The appellant was nevertheless given a further opportunity to make representations, within 10 days, as to why he should not be deported. This

included (but was not limited to) him providing evidence that he was lawfully resident in the United Kingdom prior to the deadline for the applicability of the 2016 Regulations (above) or was otherwise 'a relevant person' under the 2020 Regulations. This appears to have prompted the appellant to make an application, on the 3<sup>rd</sup> July 2021, for settlement under the European Union Settlement Scheme (EUSS) on that very basis.

7. On the **20<sup>th</sup> November 2021**, the respondent issued the notice containing the decision that is the subject of the present appeal, in which it was noted that the appellant had sent a letter, as long ago as the 23<sup>rd</sup> October 2020, wherein he claimed to have arrived in the United Kingdom in 2010, "for a better life and opportunities". However, absent any evidence from the appellant that he had been lawfully resident in the United Kingdom prior to its exit from the European Union on the 31<sup>st</sup> December 2020, or that he was otherwise 'a relevant person' as defined in the 2020 Regulations, the respondent concluded that the 2016 Regulations did not apply to him. The notice therefore informed the appellant that the respondent intended to pursue his deportation, "by way of the UK Borders Act 2007", against which there was no right of appeal. The notice also informed him that his earlier 'human rights' claim was refused, and that he *did* have a right of appeal against this decision. It was thus the exercise of the right of appeal against refusal of the human rights claim that brought the matter before Judge Burnett on the 14<sup>th</sup> March 2022. The discussion between the judge and the parties' representatives at that hearing is summarised at paragraph 5 of the judge's decision. It is clear from this that the discussion centred around whether the appellant would be able to prove that he was exercising European Treaty rights prior to the 31<sup>st</sup> December 2020, thereby rendering him eligible to be considered for deportation under the 2016 Regulations rather than the Immigration Act 1971. The judge then adjourned the appeal until the 30<sup>th</sup> May 2022, with directions.

8. By the time of the hearing of the **30<sup>th</sup> May 2022**, the respondent had written two further letters that are of relevance to the issues in the present appeal, copies of which the judge noted had been provided to the Tribunal on the day of the hearing [para 8]. It will be necessary to consider these letters in further detail at a later stage. However, it will suffice for present purposes to note that (i) they are both dated the 18<sup>th</sup> May 2022, (ii) one of them sets out the respondent's detailed reasons for refusing the appellants application of the 3<sup>rd</sup> July 2021 under the EUSS (see paragraph 6, above) and (iii) the other responds to the judge's direction requiring the respondent to, "explain in detail why [the appellant does] not benefit from the transitional arrangements and the withdrawal agreement" [para 6 of that letter]. The judge notes in his decision that he had at this point indicated that it was his provisional view that, "the appellant benefited for (*sic*) the transitional provisions in the withdrawal agreement and so the respondent's consideration of the appellant's case, simply under the FNO (Foreign National Offender) provisions of national legislation, was unlawful". The judge then stood the matter down in order to give the representatives time, "to take instructions and prepare their

arguments". At the end of the hearing, the judge indicated that he would allow the appeal, whilst making it clear to the appellant, "that this did not prevent the respondent considering his case again, but under what [he] (the judge) considered to be the correct legal provisions" [para 9].

### *The decision of the First-tier Tribunal*

9. The judge recorded the submissions made by the Presenting Officer (Ms Lasoye) at paragraph 12 of his decision. She had submitted that the appellant failed to demonstrate that he had exercised EU treaty rights in the United Kingdom because (a) his employment records did not demonstrate that he was a "worker" for the purposes of the 2016 regulations, and (b) he did not have comprehensive sickness insurance. She also stated that if the judge found against this submission, he "need not go any further in [the] decision". The judge repeated this apparent 'concession' by the respondent at paragraph 31, where he said this -

"When this appeal came before me in March, I invited detailed submissions from the parties. Unfortunately I have not been greatly assisted in this respect. However Ms Lasoye did state that if I found against the respondent regarding the issue of whether the appellant had exercised treaty rights, then I need not go any further in my decision. I have hence not done so."

10. The judge then proceeded to find against the respondent concerning the appellant's claimed status as a "qualified person" for the purposes of regulation 6 of the 2016 Regulations, on the basis that the appellant had been both a "worker" and a "student" during the relevant period [para 37, 38]. The judge stated that he was not making any finding in relation to the issue of whether appellant needed "comprehensive sickness insurance" to be a qualified person. He did however note that recent caselaw, "may have implications for the further decision of the respondent" [para 38]. The judge then gave brief reasons for allowing the appellant's appeal against the respondent's refusal of his claim under Article 8 of the European Convention of Human Rights and Fundamental Freedoms at paragraphs 40 to 43 -

"40. I have found the respondent's decision does not properly accord and take into account the appellant's rights under the withdrawal agreement. I thus find that the decision at the moment is contrary to the appellant's human rights and is not proportionate. The decision fails to engage with whether the appellant demonstrates the necessary threat. If the appellant poses the necessary threat, the respondent is required to consider the matter under the 2016 regulations as to proportionality. Those factors are different in their consideration to the regime under the Nationality Immigration and Asylum Act 2002 section 117 (as amended).

41. A decision which is manifestly unlawful and contrary to the withdrawal agreement, cannot in my judgement be appropriately regarded as proportionate.

42. I make clear though that my decision does not in any way prevent the respondent from now considering the appropriate legal regime.

### **Decision**

43. The appeal is allowed to the limited basis of which I have set out above.”

### *The grounds*

11. The application for permission to appeal was essentially made and granted upon the basis that the judge had been wrong to conclude that the evidence sufficed to establish that the appellant was a “qualified person” for the purposes of the 2016 Regulations. The question of whether the Tribunal had jurisdiction to allow the appeal upon the limited basis set out above limited basis is hinted at in paragraph 12 -

“No statutory basis has been identified under which this appeal could have been allowed by reference to an available ground of appeal.”

That said, the meaning behind the remainder of this paragraph seems to us to be wholly obscure.

### *The hearing*

12. There was no attendance by or on behalf of the appellant at the hearing. This was notwithstanding the fact that the Tribunal had issued an order for the appellant’s production from the prison at which he is currently serving a sentence imposed by a criminal court. We were nevertheless satisfied that the reason for the appellant’s non-attendance was his refusal to board the prison bus that would otherwise have brought him to the hearing. Having considered rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we were accordingly also satisfied that the appellant’s absence at the hearing was by his own choice, and that no unfairness would therefore be occasioned by us proceeding to hear the appeal.

13. Mr Melvin relied upon his helpful Skeleton Argument, wherein he refers to the recently-reported decision of Abdullah & Othrs (EEA, deportation appeals, procedure) [2024] UKUT 66 (IAC). We indicated to him that, given we were minded to set aside the First-tier Tribunal’s decision for want of jurisdiction to make it, it was unnecessary for him to address us upon the remaining grounds of appeal.

### *Legal analysis*

14. The correct approach to determining an appeal against a decision to refuse a human rights claim in which the appellant potentially enjoys the protection of the preserved provisions of the Immigration (European Economic Area) Regulations 2016 is set out at paragraphs 103 to 105 of the reported decision in Abdullah & Othrs (EEA, deportation appeals, procedure) [2024] UKUT 66 (IAC). We should note, in fairness to the First-tier Tribunal judge, that this post-dates his decision. For convenience, we set out the relevant paragraphs in full -

“103. Taking all of these factors into account and applying the principles set out in Bridges, we consider that because of the particular nature of the two deportation regimes, that it flows from a finding that a deportation decision is contrary to the EUSS rules because it is not justified by reference to reg. 27 will

result in a finding that it is “not in accordance with the law” and thus any article 8 appeal would succeed on that basis. This should not, however, be understood as applying to those situations where other provisions of the Immigration Rules are met; that still requires an assessment of proportionality in line with TZ (Tanzania).

104. In the light of this, there is all the more reason why any appeal under section 82 should be stayed pending a decision on any EUSS claim then under consideration.

105. Pausing there to take stock, we consider that the following principles apply:

A. In an appeal where conduct prior to 11pm on 31 December 2020 give rise to a decision to deport an EEA citizen is in issue, it is necessary to determine whether, as at 31 December 2020 (and at the point a decision is taken):

- (1) Was the EEA citizen resident in the United Kingdom?
- (2) If so, for what continuous period (as defined in reg 3 of the EEA Regulations) before that?
- (3) Was the EEA citizen’s residence lawful, that is, in accordance with the EEA Regulations?
- (4) Had the EEA citizen acquired permanent residence under the EEA Regulations?
- (5) Had the EEA citizen made an application under the EUSS before the end of the Grace Period, that is 30 June 2021, and
- (6) If so, is it pending?

B. The answers to these questions will determine whether the EEA citizen came within the scope of the Withdrawal Agreement, the Grace Period Regulations or the EUSS. They will also determine whether that individual is a “relevant person” for the purposes of section 3 (5A) and (10) of the Immigration Act 1971 and section 33(6B) and (6C) of the UK Borders Act 2007, as expanded by regs 3(4) and 12(1)(b) of the Grace Period Regulations.

C. In respect of conduct carried out prior to 31 December 2020, the EEA Regulations only apply directly to an individual (and thus gave rise to an appeal under those regulations) if:

- (1) The decision was taken under the EEA Regulations prior to 31 December 2020 or in connection with an application pending under the regulations; or,
- (2) The individual was an EEA citizen (or a family member of such a person) lawfully resident under the EEA Regs (including those who had acquired permanent residence under reg 3 the EEA Regulations) and either:
  - (1) The decision was taken by 30 June 2021; or

(2) Was taken after that date but when a valid application under the EUSS had been made before 30 June 2021 and was still pending (but not if they had been granted leave under the EUSS); or

(3) Is a person who falls within the scope of the CRRE Regulations

D. With the passage of time, the class of individuals falling under the EEA Regulations and entitled to a right of appeal under those provisions will diminish to very small numbers. If a decision to deport was not made under the EEA Regulations, then there is no right of appeal under those regulations.

E. In an appeal under the CRA Regulations, it will be necessary to consider the application of reg. 27 of the EEA Regulations. This can arise under either ground of appeal as:

(1) if the EEA citizen is within the scope of the WA, then articles 20 and 21 of the WA apply;

(2) if not in scope of the WA, the definition of deportation order is such that only one which is justified by reference to reg. 27 of the EEA Regulations makes the EEA citizen ineligible for a grant of status under the EUSS.

F. There is a distinction between (1) and (2) because under the definition of deportation order under the EUSS, only 5 years continuous residence (as opposed to lawful residence under the EEA Regulations) is needed to acquire enhanced protection.

G. The effect of a finding that the deportation is not justified by reference to reg 27 of the EEA Regulations is that Exception 7 under section 33 of the United Kingdom Borders Act 2007 is met, and the Secretary of State's policy is then to revoke any deportation order, at which point leave to remain under the EUSS can be granted.

H. If the deportation decision against an EEA citizen arises in a human rights appeal under section 82 of the 2002 Act, then that appeal should be stayed pending resolution of any outstanding application under the EUSS to allow an appeal against a negative decision to be determined as the same time as a human rights appeal.

I. Where an appeal has been allowed under the EEA Regulations; or, in an appeal under the CRA Regulations on the basis the deportation decision is not justified by reference to reg 27 of the EEA Regulations, it follows that any linked appeal against the same decision under section 82 of the 2002 Act will be allowed on the basis that the decision under appeal was not in accordance with the law."

15. The decision of the judge to allow the appeal in this case appears primarily to have been based upon the exercise of a supposed power to supervise the decision-making process of the Secretary of State, thereby effectively enabling the Tribunal to quash the decision to deport the appellant under section 5 of the 1971 Act, whilst leaving it open for the Secretary of State to make a fresh decision to deport him (if appropriate) under regulation 23(6)(b) of the 2016 Regulations. The rationale for the exercise of this supposed jurisdiction appears to have been that the

appellant having established to the Tribunal's satisfaction that he had a right of residence in the UK under EU treaties, the Secretary of State was obliged to consider his case under the 2016 Regulations. It was the Secretary of State's supposed 'failure' to engage with the provisions of the 2016 Regulations that appears to have led the judge to conclude that the decision to deport him under the 1971 Act was unlawful. This 'public law approach' to the appeal, which it must be said was actively encouraged by the Home Office Presenting Officer, is however fundamentally flawed. This is for two related reasons. Firstly, the former right of appeal against a decision to make a so-called 'conducive deportation decision' under the Immigration Act 1971 was abolished by an amendment to section 82 of the Nationality, Immigration, and Asylum Act 2002 under section 15(2) of the Immigration Act 2014. Secondly, and in any event, the right of appeal against what was formerly known as an 'immigration decision' on the ground that it is, 'not in accordance with law', was abolished by amendment to section 84 of the 2002 Act under section 15(4) of the 2014 Act.

16. It was moreover not open to the judge to allow the appeal upon the alternative basis that the respondent's failure to consider the appellant's case under the 2016 Regulations and/or the Withdrawal Agreement rendered the decision to refuse his human rights' claim under Article 8 of the Human Rights Convention "disproportionate", absent an appeal by the appellant against the Secretary of State's decision of the 18<sup>th</sup> May 2021 to refuse his EUSS application. Furthermore, even if the appellant had chosen to appeal that decision and the Tribunal had thereafter consolidated it with his appeal against the refusal of his human rights claim, a mere finding that the appellant had acquired a right of residence prior to the relevant deadline would have been an insufficient basis for allowing either appeal. To allow the appeals in such circumstances, it would first have been necessary for the Tribunal to have gone on to reach a conclusion that was favourable to the appellant under regulation 27 and schedule 1 of the 2016 Regulations, rather than, as did the judge in the instant appeal, to "go no further" than making a finding in relation to the threshold criterion for engagement of regulation 27 - characterised by the judge as a finding that the appellant posed, "the necessary threat" - and thus to allow the appeal upon a "limited basis". The judge was moreover wrong to criticise the Secretary of State for having failed "to engage" with regulation 27, given that this had been specifically considered as part of their decision to refuse the appellant's EUSS application. What the judge ought to have done in the circumstances, was to have enquired of the appellant's representative as to whether he intended to appeal against the Secretary of State's refusal of the appellant's EUSS application - an appeal that would have been 'in time' as at the date of the hearing on the 30<sup>th</sup> May 2022 - and, if so, to have consolidated that appeal with the appeal against the decision to refuse the appellant's human rights claim that was already before him. As it was, the judge proceeded upon a basis that resulted in a decision that we find to have been a nullity for want of jurisdiction to make it, and that it must accordingly now be set aside.



17. Given the basis upon which we have allowed this appeal, it follows that it must now be remitted to the First-tier Tribunal for a complete rehearing. It may of course be that having been made aware of the basis of our decision, the appellant will now seek to pursue his appeal against the decision to refuse his EUSS application. He would of course now need to be granted a considerable extension of time to do so. Given the history of this appeal, we would respectfully suggest that any such application should be considered by a judge rather than by a legal officer exercising delegated judicial functions, although that must be a matter for the First-tier Tribunal to determine should it arise. If permission to pursue the out-of-time appeal against the decision to refuse the appellant's EUSS appeal is granted, then such an appeal will need to be consolidated with the present appeal and determined in accordance with the step-by-step approach set out in Abdullah & Others (above). If the appellant does not pursue his appeal against refusal of his EUSS application, or is not permitted to do so, then the appeal against refusal of his human rights claim should be determined in accordance with the ordinary principles applicable to such a claim (including consideration of Part 5A of the 2002 Act), and without reference to those applicable to an EEA decision made under the 2016 Regulations.

### **Notice of Decision**

**The appeal is allowed. The decision of the First-tier Tribunal to allow the appeal is set aside and the matter is remitted for re-determination by the First-tier Tribunal with none of its original findings being preserved. The remitted hearing shall not be conducted by First-tier Tribunal Judge Burnett.**

**David Kelly**

Deputy Judge of the Upper Tribunal  
(Immigration and Asylum Chamber)  
May 2024

24<sup>th</sup>