



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002502

First-tier Tribunal No: HU/53108/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 2nd of May 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KLAUS BANI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Z Young, a Senior Home Office Presenting Officer.

For the Respondent: Mr Bani in person, with the assistance of an Albanian interpreter.

Heard at Phoenix House (Bradford) on 19 April 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Pickering ('the Judge') promulgated following a hearing at Bradford on 11 April 2023, in which the Judge allowed Mr Bani's appeal against the refusal of his human rights claim on 28 April 2022 and the decision to refuse his application under the EU Settlement Scheme (EUSS) under the Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020.
2. Mr Bani is a citizen in Albania born on 16 November 1990. He married a Greek national on 12 December 2014 and their first child was born in August 2015. Mr Bani was admitted to the UK on 18 August 2018 under the Immigration (EEA) Regulations 2016 ('the 2016 Regulations'), subsequently left, but re-entered on 1 January 2019.
3. On 21 August 2019 Mr Bani committed an offence of possession of Class A Drugs with intent to supply. He, his wife, and their son, made applications under the EUSS which the Judge notes the Secretary of State's chronology records as

having been made on 9 October 2019. Although there appears to be an alternative date the Judge makes a specific finding that the applications were made prior to 31 December 2020.

4. On 17 December 2020 Mr Bani was sentenced to 3 ½ years imprisonment.
5. The Judge records it was accepted Mr Bani has a genuine and subsisting relationship with his wife and their child and that for the purposes of the 2016 Regulations he would satisfy Regulation 7 as a family member. It was also found Mr Bani is only entitled to the lowest tier of protection under the 2016 Regulations.
6. Having considered the oral and documentary evidence the Judge sets out her key findings of fact from [17] of the decision under challenge.
7. The first matter considered by the Judge was which regime applied. The Judge notes that different views were canvassed about the legal framework that should apply in the appeal but came to the conclusion that the case is one to which the 2016 Regulations should have been applied not the domestic regime relied upon by the decision maker. At [18] the Judge finds there is no dispute that the criminal offence was committed prior to 30 December 2020 and, accordingly, that Article 20 of the Withdrawal Agreement meant the case felt to be considered under the Citizens Directive. The Judge also records that it was accepted that the Appellant was for the purposes of the 2016 Regulations a family member made an application under the EUSS [18].
8. The Judge notes there are two decisions before her the first being the refusal of the human rights claim.
9. At [24] the Judge considers whether she should or could read into the first decision the observations on made in relation to the second decision, the refusal of leave to remain under the EUSS, recording that neither party approached the appeal on that basis given that the Secretary of State expressly stated in the first decision that she would not consider the 2016 Regulations. As a result, the Judge looked at the challenge to this decision in isolation.
10. At [25 – 26] the Judge writes:
 25. I found further confirmation in that approach from the deportation order that was made under section 32 (4) of the Borders Act 2007 on the basis that it was conducive to the public good in line with section 3 of the Immigration Act 1971. This was not a decision that was taken in line with the 2016 Regulations.
 26. There is no public interest in the UK breaching its obligations under the Withdrawal Agreement. On that discrete point, is a human rights appeal falls to be allowed.
11. The Judge notes that the application under the EUSS was refused under the suitability requirements pursuant to Appendix EU EU15 on the basis the Appellant is subject to a deportation order.
12. The Judge notes the thrust of the Appellant's case is that it should have been considered under the 2016 Regulations, yet the wording of the refusal does not appear to accept that the 2016 Regulations apply, but nevertheless went on to consider them as an alternative proposition.
13. Thereafter the Judge deals with the nature of the offending [30], and risk of reoffending [31] – [33], before going on to consider whether the Appellant posed a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society such that there are public policy or public security grounds for deportation. In relation to this last issue the Judge writes at [34] – [37]:
 34. I do not find the appellant poses a genuine, present and sufficiently serious threat. The respondent acknowledges that the risk of re-conviction is low [CB p.457] and this is a matter that I have attached significant weight to. This is a very serious

offence but isolated offence on the appellant's record. That offence alone was not on its own sufficiently to persuade me that the appellant was a present threat. The appellant acknowledged his wrong doing and has taken steps to improve himself in prison by undertaking courses and working. I found his remorse sincere. I accept that he would not wish to go to prison again given the impact it had upon him and his family and I considered this a further factor that detracted from him being a present threat. Since being released from prison he has not offended again which is generally supportive of the assessment that he is low risk. I have heeded the respondent's submissions about the impact of illicit drugs particularly on society more broadly and in the observations I have made I have not sought to minimise this. I have considered the factors in Schedule 1 of the 2016 Regulations when coming to my conclusions.

35. However drawing the strands of the evidence together the respondent has not persuaded me that it is more likely than not that this appellant represents a genuine, present and sufficiently serious threat.

36. I noted the wording of 27A of the Temporary Protection Regulations where deportation is conducive to the public good can only apply to conduct taken on conduct that took place after IP completion day. However the position in the definitions section of Appendix EU in relation to a deportation order appears to modify this approach in stating:

(b) *an order made under section 5(1) of the Immigration Act 1971 by virtue of section 3(5) or section 3(6) of that Act in respect of:*

(i) *conduct committed after the specified date; or*

(ii) **conduct committed by the person before the specified date, where the Secretary of State has decided that the deportation order is justified on the grounds of public policy, public security or public health in accordance with regulation 27 of the EEA Regulations**, *irrespective of whether the EEA Regulations apply to the person (except that in regulation 27 for "with a right of permanent residence under regulation 15" and "has a right of permanent residence under regulation 15" read "who, but for the making of the deportation order, meets the requirements of paragraph EU11, EU11A or EU12 of Appendix EU to the Immigration Rules"; and for "an EEA decision" read "a deportation decision")*

37. The appeal is allowed on the basis that the decision is contrary to the withdrawal agreement and not in accordance with the Immigration Rules.

14. The Judge therefore allowed the appeal on human rights grounds and under the 2020 Regulations.

15. The Secretary of State sought permission to appeal on three grounds. Grounds 1 asserts the Judge made a material misdirection in law. There is reference to [14] of the determination in which the Judge finds that as the conduct associated with MR Bani's conviction was committed prior to 11 PM 31 December 2020 an EUSS application could only be refused on suitability grounds if the deportation order is justified on grounds of public policy, public security or public health, irrespective of whether the EEA Regulations apply. The ground assert the Judge failed to note that Mr Bani was in prison on 31 December 2020 and therefore any qualifying period relied on was broken. It is pleaded the qualifying period must not include any time serving an offence of imprisonment unless the conviction is overturned of which there was no evidence. Mr Bani was in prison at the date of decision and was not released until 27 September 2022.

16. The Ground also asserts the Judge erred Mr Bani could not succeed under Appendix EU of the Immigration Rules because he was not in the UK in a qualifying capacity on the relevant date because any qualifying period was broken by his imprisonment.

17. It is also submitted the courses undertaken by Mr Bani in prison were not related to his offending, that he had been released relatively recently before the hearing and that the period of time following release was insufficient to demonstrate he will not reoffend, particularly in light of the fact the offending was financially motivated and there was no evidence that his financial position was substantially different to that before the offending.
18. The Grounds assert the Judge failed to consider the seriousness or consequences of reoffending and asserts the decision to deport is proportionate.
19. Ground 2 asserts the making of a misdirection of law in that no statutory basis had been identified under which the appeal could have been allowed by reference to the available grounds of appeal. It is asserted the Judge failed to have regard to the practical effect of the decision of the Court of Appeal in Akinsanya and misunderstood the effect of a pending deportation order made under section 32 (5) of the 2007 Act, the revocation of which had not been sought and which alone would invalidate any leave to remain granted whilst it remains in force.
20. Ground 3 asserts there was no statutory basis to allow the appeal as the appeal lay against the refusal to grant leave to remain under the EUSS which could be advanced on two grounds, that the decision was not in accordance with the Scheme rules or that rights were breached under the Withdrawal Agreement, but it is submitted that neither apply for though the net effect of the proceedings in Akinsanya is that a review is underway of EU settlement scheme rules as they affect derivative rights of residents under regulation 16, the rules were not quashed and remain in place. The Grounds submit both a realistic prospect of obtaining leave on another basis and the fact of an existing deportation order against the application, and consequently the appeal, succeeding “under the rules” was relevant. It is submitted no Withdrawal Agreement rights exist to be breached.
21. Ground 4 asserts a lack of proper regard to the effect of an existing deportation order referring to the fact the existing deportation order was made under section 32 (5) of the 2007 Act which falls within the definition of “deportation order” in the Appendix EU as it concerns conduct before the specified date. The grounds assert that does not alter the fact that no leave can be granted until the deportation order is revoked or that no application for that was made.
22. Before the Upper Tribunal Miss Young submitted it was not a 2016 Regulation deportation decision and referred to Ground 1. It was submitted Mr Bani had not been exercising treaty rights as these had been broken by his imprisonment so he was not entitled to rely on Article 20 of the Withdrawal Agreement. It was submitted Mr Bani was not exercising treaty rights at the specified date as he was in prison and there needed to be a proper consideration of the domestic regulations which did not occur before the Judge.
23. It was submitted the Judge had not properly considered the impact of the period of imprisonment.
24. In reply to a question from me it was confirmed Mr Bani had status under the 2016 Regulations when he came back into the UK in 2019.

Discussion and analysis

25. In a letter addressed to Mr Bani dated 28 April 2022 the Secretary of State informs him that he has concluded that he is not a person to whom the EEA Regulations 2016, saved, applied, and that there was no evidence before the Secretary of State that immediately prior to 23:00 GMT on 31 December 2020 he was lawfully resident in the United Kingdom by virtue of these regulations or that he had an outstanding application to the EU Settlement Scheme. The Secretary of

State advised Mr Bani that he had therefore decided to pursue deportation pursuant to UK Borders Act 2007 and the Immigration Act 1971.

26. The Judge records disagreement between the parties as to which is the applicable regime. Guidance has been provided to First-tier Tribunal judges if such dispute arises, to which reference was made at the hearing.
27. The first point of focus is the date of the criminal conduct. That was recorded by the Judge as being 21 August 2019. If the criminal conduct occurred wholly prior to 23:00 hours on 31 December 2020 the European Regime may apply.
28. The second question the Judge was required to consider was whether Mr Bani is an EEA national, a family member of an EEA national, or a regulation 8 extended family member of an EEA national. It was accepted before me that when Mr Bani re-entered United Kingdom in 2019 it was under the 2016 Regulations which would have been with this Greek national wife and child. It was accepted before the Judge that he met the requirements of regulation 7 as a family member of an EEA national (spouse).
29. Reference is made to Article 20 of the Withdrawal Agreement which 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.
30. It is unarguable that as the offending occurred on the date identified by the Judge account charges required to consider the matter under the terms of the free movement directive incorporated into UK law in the 2016 Regulations. Even though Mr Bani was imprisoned he was exercising treaty rights as the spouse of an EEA national in relation to whom there had been no evidence of a decree absolute of divorce.

31. A point of issue that arises from the decision letter is that the Secretary of State did not accept that Mr Bani was entitled to a right of permanent residence in the UK. That appears to have been accepted by the Judge who records that he is only entitled to the lowest level of protection.
32. The reason the Secretary of State comes to this conclusion is because it was not accepted Mr Bani had been in the UK in accordance with the EEA Regulations 2016 for a continuous period of five years. It was noted he claimed to have entered the UK on 17 August 2018 which was 2 years and 1 month prior to his conviction and imprisonment with no other documentary evidence to show his residence or his exercising treaty rights in the UK for a continuous period of 5 years. The Judge clearly took into account the effect of Mr Bani's imprisonment.
33. I do not find it can be said the Judge has erred in law in concluding that the EEA Regulations are those that are applicable.
34. There are a number of grounds of appeal available to an appellant under the European regime being:
 - i) the decision under appeal is unlawful under Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020 in that it;
 - a) breaches the Withdrawal Agreement; Reg 8(2),
 - b) it is not in accordance with section 3 (5),3 (5A), or, 3 (6) of the Immigration Act 1971: Reg 8(3).
 - ii) The decision under appeal is unlawful under section 6 Human Rights Act 1998, or,
 - iii) Where the EEA regulations 2016 have been preserved there will also be available the ground that the decision breaches the EEA Regulations 2016, or the Withdrawal Agreement (following amendments by Reg 9 (i) of the Temporary Protection Regulations 2020).
35. As the Judge found the 2016 Regulations are applicable based upon the date the offence was committed, the Judge was entitled to establish whether Mr Bani was entitled to succeed by considering whether the deportation decision breached the EEA Regulations 2016 or the Withdrawal Agreement. I find no merit in the grounds of appeal suggesting there are only two grounds of appeal available to the Judge as this is a submission predicated on the basis of Secretary of State does not believe the 2016 Regulations are applicable. The Judge makes a sustainable finding in the alternative.
36. There is reference in the Grounds seeking permission to appeal to the decision of the Court of Appeal in Akinsanya. No reference is provided for the judgement to enable the specific case to be identified but there is reference to a review of the EUSS as they affect derived rights of residence under regulation 16. It appears to be a reference to the judgement handed down was neutral citation [2022] EWCA Civ 37 on 25 January 2022. That judgement resulted in changes to the Zambrano rules on 9 November 2022 and to the Zambrano policy guidance on 14 December 2022, but I find these are not applicable to this appeal.
37. The claim that a person with Zambrano rights cannot succeed if they have the potential to secure leave in another capacity, such as the basis of the suggestion in the grounds seeking permission to appeal as applied to the facts of this case, has no merit. The more recent decision of the High Court in R (on the application of Akinsanya and Aning-Adjei) v Secretary of State for the Home Department AC-2023-LON-001586 "EU Settlement Scheme: person with Zambrano right to reside", the Secretary of State erred in concluding that a person who did not have leave to remain at a realistic prospect of obtaining alternative leave to remain could not be a Zambrano carer for the purposes of EU law. If the ground of appeal is suggesting that because Mr Bani had a prospect of obtaining leave on

human rights grounds he could not rely on you ground undersea Regulations, such claim has no arguable merit as original legal basis for such an assertion. It is also the case that any prospect had to be realistic which we argued would not be the case under domestic law in light of the deportation decision if that was the appropriate regime. The suggestion of the existence of a deportation order act against an application and subsequent appeal looks succeeding “under the rules” is not made out in the ground sufficient to establish material legal error.

38. As the Judge finds that Mr Bani is only entitled to the basic level of protection the focus had to be upon whether the Secretary of State had established a “genuine, present and sufficiently serious threat to one or more of the fundamental interests of society”. That required the Judge to consider:
- i. Is the threat posed by Mr bani genuine/realistic?
 - ii. Is it a present threat are you current? Past conduct alone can be sufficient to establish that threat depending on the facts.
 - iii. The date of assessment is the date on which the appeal is heard in the test must be proved on the balance of probabilities.
 - iv. It is sufficiently serious threat, the property affects one of the fundamental interests society? Consideration needed to be given to Schedule 1 to the EEA Regulations 2016 and the fact deportation may not be used simply as additional punishment.
39. If one looks at the structure of the determination this is the exercise the Judge undertook. The specific question the Judge was required to consider is that that she dealt with from [34]. Although the Grounds assert the Judge should have given greater weight to, and failed to consider, the effect of Mr Bani’s offending, the Judge accepted that the offence for which he had been imprisoned was a very serious offence but also notes it was an isolated offence and refers to the fact the Secretary of State accepting that the risk of reconviction was low, a matter on which the Judge felt able to attach significant weight. The Judge was not satisfied that the one offence alone was sufficient to persuade her that Mr Bani was a present threat. In relation to the steps taken to improve himself in prison by undertaking courses and working, although the Grounds assert that the courses were not directly related to his offending that claim is, in reality, no more than a disagreement with the Judge’s findings that the courses undertaken and Mr Bani’s situation are matters upon which proper weight could be placed. The Judge specifically found his remorse to be sincere and accepted his claim that he would not wish to go to prison given the impact it had on him and his family.
40. If one looks at the chronology it is accepted there would not have been a very great period of time from Mr Bani’s release from custody and the date of the hearing, but the Judge was aware of the chronology and clearly paid particular attention to the arguments from both sides including the factors in Schedule 1 of the 2016 Regulations. The Judge was required to consider the position at the date of the hearing when she was making the assessment.
41. A key finding of the Judge is that at [35] that on the balance of probabilities the Secretary of State had not persuaded her that it was more likely than not that Mr Bani represented a genuine, present, and sufficiently serious threat. The Grounds do not establish that finding is outside the range of those reasonably open to the Judge on the evidence.
42. The Grounds assert a lack of proper regard to the effect of the existing deportation order, but the Judge does not make a finding contrary to the legal position that until the deportation order is revoked no leave could be granted. The Judge does not dispute, and could not do so, that no application to revoke the deportation order had been made. What the Judge does is find that to deport Mr

Bani will be contrary to the EEA Regulations. That is because the Judge finds that is the proper legal basis on which the merits of the appeal should be considered, not under the domestic regime. The Judge allowed the human rights appeal, decision 1, solely on the basis that she had allowed the appeal in relation to decision to the EEA matter.

43. Having considered the guidance provided by the Court of Appeal in *Volpi v Volpi* [2022] EWCA Civ 462 at [2] and *Ullah v Secretary of State for the Home Department* [2024] EWCA Civ 201 at [26], together with the points set out above, I do not find the Secretary of State has established that the Judge has erred in a manner material to the decision to allow the appeal.

Notice of Decision

44. The First-tier Tribunal has not been shown to have materially erred in law. The determination shall stand.

C J Hanson
Judge of the Upper Tribunal
Immigration and Asylum Chamber
26 April 2024