



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-005442
UI-2023-005443

First-tier Tribunal Nos: HU/01381/2023
EA/02717/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

15th February 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

The Secretary of State for the Home Department

Applicant

and

Iurie Ciorba
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A. Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr C. Mannan, Counsel instructed by Law Lane Solicitors

Heard at Field House on 31 January 2024

DECISION AND REASONS

1. By a decision promulgated on 8 November 2023 First-tier Tribunal Judge Easterman (“the judge”) allowed the appeals brought against two linked decisions of the Secretary of State dated 27 June 2023 to (i) refuse an application for pre-settled status under the EU Settlement Scheme (“the EUSS”) and (ii) to refuse a human rights claim, each in relation to the same applicant, who was the appellant before the judge. The judge heard the appeals under the regulation 3(1)(c) of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (“the Appeals Regulations”) and section 82(1) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) respectively.
2. The Secretary of State now appeals against the decision of the judge with the permission of First-tier Tribunal Judge Thapar.

3. Although this is an appeal brought by the Secretary of State, I will refer to the appellant before the First-tier Tribunal as “the appellant”.

Factual background

4. The appellant is a citizen of Romania born in 1995. He claims to have been residing in the United Kingdom since 2016. On 15 June 2020, he applied for pre-settled status under the EUSS (“EUSS Application 1”).
5. On 28 June 2020, he was arrested and found to be in possession of a quantity of cocaine.
6. On 27 January 2021, the appellant’s wife, EP, a citizen of Albania, was issued with a residence card under the 2016 Regulations as the family member of an EEA national.
7. On 27 June 2022, having pleaded guilty, the appellant was sentenced in the Crown Court at Guildford to 26 months’ imprisonment for possession of a Class A drug with intent to supply in respect of his arrest in June 2020. By this stage, EUSS Application 1 had not been determined.
8. On 19 August 2022, the appellant submitted a further EUSS application (“EUSS Application 2”). That application was rejected on account of the accompanying photograph failing to meet the prescribed requirements.
9. On 30 December 2022, the appellant submitted a third EUSS application (“EUSS Application 3”).
10. Meanwhile, in response to the appellant’s conviction, the Secretary of State initiated deportation action against him. By letter dated 13 January 2023 she invited him to set out his representations in response to her proposal to deport him to Romania. The representations made by the appellant dated 8 February 2023 were treated as a human rights claim by the Secretary of State.
11. On 27 June 2023, the Secretary of State issued two decisions. The first decision (“the EUSS Decision”) refused EUSS Applications 1 and 3. The second decision was a refusal of human rights claim, made in response to the appellant’s human rights claim (“the Human Rights Decision”). The EUSS Decision attracted a right of appeal under the Appeals Regulations, and the Human Rights Decision attracted a right of appeal under section 82(1) of the 2002 Act.

The decisions of the Secretary of State

The EUSS Decision

12. The EUSS Decision refused EUSS Applications 1 and 3 on three principal bases.
13. First, the appellant was the subject of a deportation order: see para. 3. The deportation order was that made in the course of the parallel Human Rights Decision that had been taken on the same day, by reference to the 2002 Act criteria.
14. Secondly, pursuant to paragraph EU14 of Appendix EU to the Immigration Rules, the appellant was required to have completed a “continuous qualifying period” of residence in the UK which began before 11 PM on 31 December 2020, and which

was continuing at the date of application. That period of residence must not have included any period of time serving a sentence of imprisonment. Since the appellant was imprisoned on 27 June 2022, he was not eligible for limited leave to remain on that basis. The decision added that the appellant had provided no evidence of exercising treaty rights.

15. Thirdly, the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society in accordance with regulation 27 of the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”). The decision explained why the conduct leading to appellant’s drugs conviction demonstrated that he represented that level of threat. That conclusion was reached principally on the basis of the detrimental impact on society which follows from the illicit trade in drugs, the harm caused by Class A drugs themselves, and the role performed by the appellant in the offending which led to his conviction.

The Human Rights Decision

16. The Human Rights Decision stated that the appellant was not a person to whom the 2016 regulations applied. See page 1:

“...there is no evidence before the Secretary of State that immediately prior to 2300 GMT on 31 December 2020, you were lawfully resident in the United Kingdom by virtue of [the 2016 Regulations] and that you have an outstanding application to the EU Settlement Scheme.”

17. Accordingly, the decision said that the appellant’s human rights claim would be determined by reference to the automatic deportation provisions contained in the UK Borders Act 2007.
18. The decision addressed the relationship with his Albanian wife, EP, whom he married in the UK on 7 October 2019, and concluded that the relationship was not genuine and subsisting. The appellant did not meet the private life requirements. There were no very compelling circumstances over and above the statutory exceptions to deportation.

The decision of the First-tier Tribunal

19. The appeal before the judge on 31 August 2023 was a single hearing at which both the EUSS Decision and the Human Rights Decision were challenged.
20. The appellant’s case before the judge was that the deportation decision taken in the course of the Human Rights Decision should have been taken under the 2016 Regulations, rather than the automatic deportation regime contained in the 2007 Act. The appellant was, he submitted, a person to whom the 2016 Regulations applied because the offending for which his deportation was pursued took place before 31 December 2020. That being so, the refusal decisions were fundamentally flawed. The deportation order which followed the refusal of human rights claim in the Human Rights Decision was treated as blocking the EUSS decision in circumstances when the appellant’s rights under the 2016 regulations, as preserved by the Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 (“the Grace Period Regulations”) should have had preference.

21. The Secretary of State's position before the judge was that both decisions had been taken appropriately. The EUSS decision dealt, in substance, with the protections which would have been enjoyed by the appellant under regulation 27 of the 2016 regulations in any event.
22. In his decision, the judge was critical of the decisions of the Secretary of State. He found that the human rights decision incorrectly stated that the appellant had no outstanding EUSS applications, whereas, in fact, EUSS Applications 1 and 3 remained outstanding until that letter (para. 31). The EUSS Decision said at para. 4 that the appellant did not qualify for leave under the EUSS on account of the deportation order made on the same date under the 2007 Act scheme, yet that deportation order (which was made pursuant to the Human Rights Decision) had been made without any reference to any EUSS rights enjoyed by the appellant "because the Respondent was convinced they did not apply to the Appellant" (para. 34).
23. The judge added at para. 35:

"This appears is to my mind rather circular, with the Respondent purporting to go through the sort of considerations that should have been gone through when making the deportation order, as proper reasons for excluding under the EUSS, when they have already stated clearly that the reason for excluding under the Settlement Scheme was the making of the deportation order."
24. At para. 37, the judge considered why the Secretary of State may not have treated the appellant as an EEA national, at least initially:

"I also note that the early stages of this decision making took place when the Appellant was in custody, and it may well be that the Respondent was right in some of her statements about lack of evidence, but the main decision appears to have been made after the Appellant had representation, and the facts had been put in front of the Respondent, and that included evidence of pay slips, etc., but even without that, the fact is that the Appellant is an E.E.A. national residing in the United Kingdom, and to the best of my understanding there is nothing that requires him to show he was exercising treaty rights, in order for him to have been lawfully in the country and to attract the advantages of Regulation 27, which only permit removal on the specified grounds."
25. The judge found that the basis for the deportation decision was "fundamentally flawed" (para. 38). He found that the EUSS Decision was in breach of the EU Withdrawal Agreement (para. 40), and that the Human Rights Decision was not lawful because the Secretary of State had failed to follow the relevant legislation, nor extend to the appellant the protections of regulation 27 of the 2016 Regulations.

Issues on appeal to the Upper Tribunal

26. The Secretary of State advances two grounds of appeal, each primarily targeting the judge's analysis of the EUSS Decision:
 - a. First, the judge failed properly to apply the Grace Period Regulations by concluding that all EU citizens were entitled to the protections of

regulation 27 of the 2016 Regulations, regardless of whether they were residing in the UK in accordance with the Regulations at the relevant time.

- b. Secondly, the EUSS Decision did not breach the EU Withdrawal Agreement. It applied the protections from Article 27 of Directive 2004/38/EC and regulation 27 of the 2016 Regulations to the appellant in any event, thereby complying with Article 20(1) WA.

27. In relation to the first issue, Ms Ahmed submitted that the appellant had submitted only minimal supporting documents demonstrating that he was residing in the United Kingdom as a worker or self-employed person prior to the conclusion of the implementation period. There was an absence of payslips for 2020, and his continuity of residence was broken by his period of imprisonment. The judge failed to determine whether the appellant was a “relevant person” for the purposes of regulation 3 of the Grace Period Regulations, and although there was extensive documentary and other evidence before him, he did not engage with those materials when reaching his findings. Indeed, he expressly said that he was not going to address the evidence (para. 38). It was incumbent upon the judge to do so, since that was a matter that had been raised by the Secretary of State in the EUSS Decision. The errors made by the judge in reaching those conclusions subsequently infected his analysis of the human rights decision.
28. In relation to the second issue, the EUSS Decision adequately addressed the very EU level protections from removal that the judge said had not been considered, Ms Ahmed submitted.
29. In response, Mr Mannan submitted that the judge plainly had considered the evidence, for he had made references to it throughout his decision. See, for example, para. 36 in which the judge highlighted the appellant’s wife having been issued with a residence card as his spouse. It was not that the judge had not considered the evidence, it was simply that he considered the decisions to have been so poor, and so fundamentally flawed, that it was not necessary to address the evidence in any detail.

The law

The 2016 Regulations and the Grace Period Regulations

30. The 2016 Regulations were the primary legislative instrument which made provision for the rights of residence enjoyed by EU citizens and their family members prior to the UK’s withdrawal from the EU.
31. Regulation 14 of the 2016 Regulations provided that a “qualified person” was entitled to reside in the United Kingdom for as long as that person remained a “qualified person”. Regulation 6 defined a “qualified person” to include a worker or self-employed person, within the meaning of the EU treaties. Put simply, a person who is a worker or self-employed person for the purposes of the 2016 Regulations enjoyed a right to reside under those regulations.
32. Regulation 27 transposed Article 27 of Directive 2004/38/EC, and provided that an “EEA national” (that is, an EU citizen, or a citizen of a non-EU EEA state) could only be removed if the criteria there specified were met. Regulation 27 of the 2016 regulations makes provision for decisions taken on grounds of “public policy, public security and public health”. Regulation 27(5) sets out a number of

principles which govern the removal of EU citizens and their non-EU family members from the UK. Those principles include the following:

- “(a) the decision must comply with the principle of proportionality;
- (b) the decision must be based exclusively on the personal conduct of the person concerned;
- (c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
- (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
- (e) a person's previous criminal convictions do not in themselves justify the decision;
- (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.”

33. The UK withdrew from the EU at 11.00PM on 31 January 2020. However, many aspects of EU law continued to apply to the UK during the “implementation period” that followed, and which came to an end at 11.00PM on 31 December 2020. EU law relating to the free movement of persons continued to apply to the UK, and to British citizens and their family members residing in the EU, during the implementation period. The 2016 Regulations remained in force until the conclusion of the implementation period, at which point they were revoked.

34. The EU Withdrawal Agreement requires the UK to extend the protection from removal conferred by Article 27 of Directive 2004/38/EC (and regulation 27 of the 2016 Regulations) to EU citizens and their family members in relation to conduct that occurred before the end of the transition period. See Article 20(1):

“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.”

35. The Grace Period Regulations make provision for certain provisions of the 2016 Regulations to continue to have effect following their revocation at 11.00PM on 31 December 2020. Regulation 3 makes provision for what is termed the “grace period”, and specifies the persons in relation to whom the 2016 Regulations continue to have effect. A “relevant person” who enjoys the continued effect of the 2016 Regulations is defined in regulation 3(6) to include:

“‘relevant person’ means a person who does not have (and who has not, during the grace period, had) leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules and who—

- (a) immediately before IP completion day—

(i) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or

(ii) had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15)..."

36. Accordingly, a "relevant person" as defined by regulation 3 of the Grace Period Regulations continues to enjoy a right to reside and the corresponding protection from removal conferred by those regulations.

37. The term "residence scheme immigration rules" is defined by section 17(1) of the European Union Withdrawal Act 2020 to include Appendix EU of the Immigration Rules.

The EUSS

38. Paragraph EU14 of Appendix EU to the Immigration Rules provides:

EU14. The applicant meets the eligibility requirements for limited leave to enter or remain where the Secretary of State is satisfied, including (where applicable) by the required evidence of family relationship, that, at the date of application, condition 1 or 2 set out in the following table is met:

Condition	Is met where:
1.	(a) The applicant is: (i) a relevant EEA citizen; or (ii) a family member of a relevant EEA citizen; or (iii) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or (iv) a person with a derivative right to reside; or (v) a person with a Zambrano right to reside; and (b) The applicant is not eligible for indefinite leave to enter or remain under paragraph EU11 of this Appendix solely because they have completed a continuous qualifying period of less than five years; and (c) Where the applicant is a family member of a relevant EEA citizen, there has been no supervening event in respect of the relevant EEA citizen

Issue 1: no error in relation to the Grace Period Regulations

39. I agree with the overall conclusion reached by the judge, although for slightly different reasons.

40. First, the EUSS Decision applied para. EU14 of Appendix EU incorrectly. Contrary to what is stated at para. 9 of the EUSS Decision, there is no requirement in para. EU14 for in-time applications, such as EUSS Application 1, to demonstrate a continuous qualifying period. The only mention of a “continuous qualifying period” in para. EU14 is in Condition 1, in the context of distinguishing an applicant for pre-settled status from an applicant for indefinite leave to remain which requires a five year continuous qualifying period. Since the applicant had applied for pre-settled status on 15 June 2020, less than five years after his arrival in the UK, there could be no question at that stage of his having to have accrued a continuous qualifying period of that length.
41. Secondly, even if there was a requirement for a continuous qualifying period, uninterrupted by a period of imprisonment at the time of the application, the appellant met that criterion at the date of EUSS Application 1. Of course, by the time the appellant submitted EUSS Application 3, he had been imprisoned. But EUSS Application 1 was submitted before the appellant’s imprisonment two years earlier.
42. Thirdly, there was evidence before the judge to demonstrate that the appellant was a “qualified person” immediately before 11.00PM on 31 December 2020. At page 143 of the Upper Tribunal bundle is a subcontractor monthly statement for the “month ending 2021-01-05” (i.e., the month leading to 5 January 2021). That throws the Secretary of State’s position, as set out in the Human Rights Decision, that the appellant was not residing lawfully under the 2016 Regulations immediately before 11.00PM on 31 December 2020, into sharp relief. Para. 26 of the Grounds of Appeal are therefore incorrect to contend that there was no evidence for 2020. There was a document dated 5 January 2021 which covered the preceding month.
43. Two conclusions flow from the above analysis:
 - a. The EUSS Decision was not in accordance with residence scheme immigration rules. It imposed a requirement, namely for there to be a continuous qualifying period, which did not feature in para. EU14, and, in any event, erroneously concluded that the appellant did not meet that requirement as imposed. On the evidence before the judge, the appellant did (and there can be no question over the judge’s ability to take into account post-decision evidence: see regulation 9(4) of the Appeals Regulations).
 - b. The Human Rights Decision’s conclusion that the appellant was not a “relevant person” for the purposes of reg. 3 of the Grace Period Regulations was at odds with the appellant’s history of economic activity in the UK.
44. It is therefore not necessary to determine the correctness of the judge’s analysis at para. 37 in which he stated that his understanding was that it was not necessary for an EEA national to be exercising Treaty Rights in order to benefit from the regulation 27 protections.
45. I therefore dismiss ground 1 of the appeal. The EUSS Decision was not in accordance with residence scheme immigration rules, and the judge did not err by dismissing the EUSS appeal.

Ground 2: any error concerning Article 20(1) of the Withdrawal Agreement is immaterial

46. I accept that the EUSS Decision sought to extend to the appellant the benefit of the protections conferred by Art. 27 of Directive 2004/38/EC, as required by Article 20(1) of the Withdrawal Agreement. To the extent the judge concluded that it did not, that would have been an error.
47. However, properly understood, the judge did not overlook the EUSS Decision's purported Article 27 compliance. The judge noted at para. 34 that the EUSS Decision had sought to engage in such considerations. By contrast, his concern was that the primary reason given by the EUSS Decision for refusing the application was the existence of a non-EEA deportation order. See para. 3 of the EUSS Decision:
- "You do not meet these requirements because you are subject to a deportation order which was made on 27 June 2023."* (Emphasis added)
48. The judge's concern was that *that deportation order* had not been made in accordance with the regulation 27 protections, yet it was relied upon by the Secretary of State as the primary reason for concluding that those protections were not available to the appellant. Put another way, while paras 13 to 39 of the EUSS Decision sought to comply with Article 20(1) of the Withdrawal Agreement, the preceding – and primary – reasons given by the decision for refusing the application were not in accordance with residence scheme immigration rules. On the judge's analysis, the entirety of the EUSS Decision was based on an erroneous footing.
49. While it could be said that the judge perhaps should have engaged with the detail of the Secretary of State's risk analysis from paras 13 to 39 to determine whether, in substance, the decision was in accordance with residence scheme immigration rules, his approach is not one that this tribunal will criticise. The EUSS Decision itself was not in accordance with the residence scheme immigration rules for the reasons set out above. That meant that the ground of appeal available to the appellant – namely that the decision was not in accordance with "residence scheme immigration rules" – had been made out. The judge was entitled to allow the appeal on that basis alone. Against the background of the judge's broader concerns about the erroneous footing upon which the Human Rights Decision was taken, and the improper reliance on the deportation order made pursuant to that decision, it was within the judge's discretion not to engage in further analysis of the EUSS Decision.

The Human Rights Decision

50. Grounds 1 and 2 did not expressly challenge the judge's analysis of the Human Rights Decision. Para. 9 of the grounds featured a general criticism of both decisions on the basis that the judge had failed to apply the relevant law and make the necessary findings on the evidence in light of the relevant instruments.
51. There are two reasons why I decline to find that the judge's analysis of the Human Rights Decision involved the making of an error of law.
52. First, it is essential for grounds of appeal to be pleaded properly. Procedural rigour is important in this jurisdiction. It is vital that respondents to appeals in

the Upper Tribunal know the case that they face, and that the Upper Tribunal is able quickly and accurately to identify the grounds of challenge. Generic criticisms of a decision of the First-tier Tribunal are an insufficient basis upon which to expand the scope of a challenge that is properly pleaded in relation to discrete issues elsewhere within the grounds of appeal.

53. Secondly, and in any event, in my judgment, the judge was entitled to allow the appeal against the refusal of the human rights claim. Any interference with the appellant's Article 8 rights would be disproportionate in the present circumstances of this case. That is because the Human Rights Decision failed correctly to engage with the applicability of the 2016 Regulations pursuant to the Grace Period Regulations: see para. 2 of the decision, in light of the analysis above. That was a significant omission. The decision was not in accordance with the law, and a decision to deport the appellant would be incapable of being proportionate for the purposes of Article 8(2) of the ECHR in circumstances in which the parallel EUSS decision was not in accordance with the residence scheme immigration rules.

Conclusion

54. For the reasons set out above, these appeals are dismissed.
55. It was common ground at the hearing before me that, if the Secretary of State's appeal was dismissed and the judge's decision was upheld, the effect would simply be that the decisions of the Secretary of State would be set aside. There would be nothing to prevent the Secretary of State from taking fresh decisions, addressing the concerns raised by the judge and by this decision, if so advised.

Notice of Decision

The appeals of the Secretary of State are dismissed.

The decision of the First-tier Tribunal did not involve the making of an error of law such that it should be set aside.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 February 2024