



THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 6th of November 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

**The Secretary of State for the Home Department
(NO ANONYMITY ORDER MADE)**

Appellant

and

Mr Saad Adan

Respondent

Representation:

For the Appellant: Mr P Georget, Counsel instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mrs R Arif, Home Office Presenting Officer

Heard at Cardiff on 20 September 2024

DECISION AND REASONS

1. The Secretary of State appeals in this matter against the decision of First-tier Tribunal Judge O'Rourke who, on 22 November 2023, allowed Mr Adan's appeal under the Immigration (European Economic Area) Regulations 2016. I have referred to the parties hereinafter, as they were described in the First-tier Tribunal, that is Mr Adan as the appellant and the Secretary of State as the respondent.
2. The appellant, a national of the Netherlands, of Somali descent born on 11 December 1980 had lived in the UK since 2004. On 20 January 2012 the appellant was convicted of sexual assault at Cardiff Crown Court and sentenced and detained on 22 January 2013 under Sections 37 and 41 of the Mental Health Act 1983, having been diagnosed as suffering from paranoid schizophrenia.
3. On 22 February 2021 and after the United Kingdom's exit from the European Union, the appellant was served with a notice of liability to deportation pursuant to the Immigration (Economic Area) Regulations 2016 (as saved) and on 18 October 2021 the appellant was invited to provide reasons not to be deported but failed to respond.

4. Further, on 11 November 2021 the appellant signed a disclaimer stating he wished to return to the Netherlands.
5. On 26 January 2022 a decision was taken to make a deportation order by virtue of Section 5 of the Immigration Act 1971 against the appellant. At the same time, his human rights claim was refused, so too his application under the EU Settlement Scheme. That application had been made previously on 4 May 2019 but a further application was made in February 2021. The appellant raised an appeal against the decision on human rights grounds, which was allowed by Judge O'Rourke.

The grounds of appeal

6. In the grounds of appeal it was submitted that First-tier Tribunal Judge O'Rourke had failed to apply the applicable law relevant in this case, which fell to be considered under the domestic law framework given the deportation decision of 26 January 2022 was made on conducive grounds under the Immigration Act 1971 and the appellant had raised a human rights appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002.
7. It was submitted that the appellant was not given a right of appeal under the EEA Regulations 2016 and therefore the judge had erred in law by allowing the appeal under the EEA Regulations 2016.
8. The judge had conflated the Immigration Rules and Regulations and failed properly to consider the statutory legal framework under Section 117C of the Nationality Immigration and Asylum Act 2002 as set out at (7) relevant to the appellant's appeal in respect of his Article 8 rights and whether he met any of the exceptions.
9. Nor could it be said that on Article 3 medical grounds any appropriate consideration was given with regard to the threshold set out in **AM (Zimbabwe)** given that on the one hand the judge stated the appellant would receive treatment in the Netherlands equivalent to that he had received in the UK but then stated that on arriving in the Netherlands that would place him at risk without the requisite treatment and care plan in place, which in itself was a speculative finding. There was no evidence to suggest that the appellant would be deported without any reconsideration to his mental health needs by either his medical team or border force.

The hearing

10. At the hearing before me Mrs Arif relied substantially on the written grounds of appeal. She submitted that the judge had materially misdirected himself in law. The decision to deport the appellant was made after the end of the transition period and the end of the grace period under the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 ('the Grace Period Regulations'), although it was accepted that the conduct had occurred before the cutoff date. There was no EEA decision on the grounds of public policy. The judge had erred by not applying applicable law and further inadequate reasons have been given in relation to the Article 3 medical ground.
11. By contrast Mr Georget submitted that he relied on his skeleton argument and pointed out that the Secretary of State had waited until the 2016 Regulations had

been revoked and only then sought to bring deportation proceedings under the statutory regime while denying the EEA citizen the basic entitlement to be considered under the EEA deportation regime. The Secretary of State had failed to argue that the appellant would meet the criteria for deportation under the more generous EEA scheme. The Secretary of State initially even stated in unambiguous terms, in the letter of 22 February 2021, that the appellant was eligible for consideration under the EEA Regulations 2016. The procedural history of this case was addressed in the decision under appeal and identified as an issue in the appeal from the outset and subject to specific case management directions. The Secretary of State was essentially bringing a jurisdictional challenge but no mention of that was made in the initial grounds of appeal. The background explained why the judge proceeded in the way that he did.

12. It was accepted that the appellant had long suffered from a very serious mental illness, which was well-documented. He was convicted in 2012 of a sexual assault and sentenced in 2013. Following a number of deferrals he was conditionally discharged to a community placement in Cardiff in February 2018 and provided with an independent flat. Overall the view of his treating clinicians and support workers was that despite some setbacks, the appellant had done well and successfully managed his mental health.
13. Although the appellant had never made any applications under EU law prior to the announcement of Brexit, after the EU Settlement Scheme was opened he made two. His first application was made on 4 May 2019, but after receiving no response his second application was made on 10 February 2021. The latter application appeared initially to have resulted in a decision dated 28 April 2021 granting the appellant indefinite leave although this document was not served and marked file copy and only obtained following a subject access request and it was now submitted that the decision was taken in ignorance of the pending deportation and was never served.
14. After the end of the grace period it was then the changed position of the Secretary of State (owing to failure of the appellant to respond) that the appellant fell for consideration only under the domestic human rights deportation regime, not the EEA 2016 Regulations because he had not been lawfully resident in the UK immediately before 31 December 2020 and so the EEA 2016 Regulations (as extended) no longer applied to him. At the time the appellant was being supported by his community mental health team and was without legal representation and only signed a disclaimer indicating he did not wish to contest deportation because he was in that condition. Owing to his serious mental health condition, in effect the appellant had not responded to previous enquiries made by the Secretary of State.
15. This all culminated in the decision under appeal dated 26 January 2022 refusing his human rights claim, together with a separate decision of the same date refusing his EUSS application and which purported to be a decision on the first May 2019 application despite it having been varied, because there was now a deportation order against him. It was accepted that the Secretary of State was legally correct that the decision not to grant leave under EUSS on an application made *before* exit day did not attract a right of appeal under the Immigration (Citizen Rights Appeals) (EU Exit) Regulations 2020, further to Regulation 3(2) prior to amendment. However, the earlier application had been superseded and varied by the later application under the EUSS of 10 February 2021, which fell to be considered under EU10(2) of Appendix EU of the Immigration Rules. However

the Secretary of State did not consider the varied EUSS application made on 10th February 2022. As such the application was made after exit day and then should, as a matter of law, have attracted a right of appeal under the Appeals Regulations. Third, the Secretary of State was incorrect in substance that the application could have fallen for refusal on suitability grounds on account of the deportation order because at all material times, Appendix EU has defined “deportation order” as one which must have been taken by reference to the EU Law under Regulations 23 and 27 of the EEA 2016 Regulations, where it relates to conduct, which occurred before the specified date, as it did in this case. The deportation decision issued against the appellant was made under domestic legislation so it was not, on a correct reading of Appendix EU, a legitimate ground for refusal. In short, properly analysed there was no lawful way for the Secretary of State of getting round treating the appellant’s deportation case as one which fell under the EEA regime, whether through the EUSS or the EEA 2016 Regulations as extended. That was the basic point.

16. Mr Georget submitted that during the FtT hearing, it was agreed by the parties from the outset that the question whether the appellant fell for consideration under the EEA 2016 Regulations turned on the issue of whether or not the appellant had been lawfully resident in the UK prior to 31 December 2020 or indeed had acquired the right of permanent residence and this was a matter specifically considered in the appeal decision. The Secretary of State’s position changed from the initial February 2021 letter. Under Regulation 4(2) of the Grace Period Regulations the appellant would have a right of appeal with reference to the EEA Regulations and it was common ground that the appellant had made an “in time application” under the EUSS. It was the appellant’s case that the EEA 2016 Regulations did continue to apply to him by virtue of the Temporary Protection Regulations. As, for that matter, did the Withdrawal Agreement because the appellant had acquired a right of permanent residence prior to his sentence in 2012 and/or was lawfully resident in the UK before 31 December 2020.
17. Indeed, prior to the hearing, the appellant had sought further time to produce evidence of his activities prior to 2012 and the appeal was adjourned accordingly.
18. As can be seen from the decision, the judge did consider and determine the relevant issues as he was invited to do and concluded not only that the appellant had acquired a right of permanent residence in the UK, having exercised treaty rights for five years in 2004 (see [20(i)] of the determination, but also that he was entitled to protection on “imperative” grounds and his deportation was not in any event justified on either serious or imperative grounds of public safety. The judge therefore found the decision was not in accordance with the law or the 2016 Regulations and disposed of the appeal by allowing it under the EEA 2016 Regulations.
19. The Secretary of State appealed essentially on the issue of jurisdiction but no reference was made to any of the material procedural background cited above. It was submitted at [18] of Mr Georget’s skeleton argument that although the judge did err in law in certain respects by exceeding jurisdiction, those errors were not material to the outcome of an appeal in which the appellant would invariably have succeeded in any event on the judge’s unchallenged findings, which he did have the jurisdiction to make.

20. It was agreed by both parties in the FtT that the issue as to whether or not the EEA Regulations 2016 applied was a matter properly before the Tribunal. That was specifically raised in the decision of 26 January under appeal and could not have been a new matter. What was critical was whether the appellant had been lawfully resident in the UK immediately prior to 31 December 2020 or had previously acquired a right of permanent residence. If that submission was right, whatever the judge did thereafter was not relevant.
21. The primary issue between the parties, was whether the appellant should have been treated under the EEA deportation regime or not. On that basis alone, it was submitted that the appellant's appeal could only have been allowed by reference to Article 8 since the decision was neither in accordance with the law nor proportionate. The judge was effectively led into error by the parties but was able to make the relevant findings, which he did and none of the errors were material to the outcome of the appeal.

Conclusions

22. There was force in Mr Georget's submissions. At the hearing Mr Georget encouraged me to find there was no material error of law but I make particular reference to **Abdullah and others (EEA; deportation appeals; procedure) [2024] UKUT 00066 (IAC)**. As stated at [E] of the headnote *'If a decision to deport was not made under the EEA Regulations, then there is no right of appeal under those regulations.'*
23. What, however, is critical in this matter is that the findings made by the judge remained unchallenged and it was effectively the jurisdiction which was subject to the challenge. It appears to have been agreed between the parties in the FtT that it was the appellant's residence in accordance with the EEA Regulations 2016 prior to the UK's departure from the EU which was in issue. This was not therefore a new matter. It would appear that it was the previous lack of evidence before the Secretary of State (owing to the appellant's ill health) which caused her to proceed under the domestic deportation regime.
24. Applying the relevant questions at (A 1-6) of **Abdullah**, this was an EEA citizen (on the findings of the judge) whose conduct had occurred prior to 31 December 2020, which had given rise to a decision to deport him. The appellant was resident in the UK before that date and for the relevant continuous period as defined in Regulation 3 of the EEA Regulations 2016 and in accordance with those regulations. The appellant had acquired permanent residence as found by the judge at [20] of his determination and, I accept, he had also made an application under the EUSS (February 2021) before the end of the grace period, that is 30 June 2021.
25. Thus the appellant comes within the scope of the Withdrawal Agreement and the Grace Period Regulations and the appellant is classified as a "relevant person" (Regulations 3, 4 and 12(1)(b) of the Grace Period Regulations) (B) of **Abdullah**.
26. The EEA Regulations 2016 should have applied to the appellant in accordance with (C) of the headnote of **Abdullah** because the individual was an EEA citizen lawfully resident under the EEA Regulations and he had made a valid application under the EUSS before 30 June 2021, which was still pending by the date of the

deportation decision. Indeed it appears that the deportation decision responded only to the earlier EUSS application.

27. It was not disputed by Mrs Arif that the appellant had made a further application prior to the grace period and dated 10 February 2021 (see paragraph EU10(2) of Appendix EU) which at the date of deportation was pending (indeed his previous EUSS application was refused because of the deportation decision).
28. That said, as specified at (F) of the headnote, in an appeal under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations (the CRA Regulations), it will be necessary to consider the application of Regulation 27 of the EEA Regulations 2016 and this can arise under ground of appeal as follows (i) if the EEA citizen is within the scope of the Withdrawal Agreement (articles 20 and 21 of the WA apply) or if not, (ii) the definition of deportation order is such that only one which is justified by reference to reg 27 of the EEA Regulations 2016 makes the EEA citizen ineligible for a grant of status under the EUSS. The effect of a finding that deportation was not justified with reference to Regulation 27 of the EEA Regulations is that Exception 7 under Section 33 of the United Kingdom Borders Act 2007 is met and then the deportation order should be revoked, at which point leave to remain under EUSS can be granted.
29. Finally, (J) of the headnote of **Abdullah** states:

“(J) 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.”
30. However, as made clear in **Abdullah** at (E) of the headnote, if no decision to deport was made under the EEA Regulations, then there is no right of appeal under those Regulations.
31. As confirmed in **AA (Poland)** and referenced at [97] of **Abdullah** the application of the 2016 Regulations is a legally distinct exercise from the assessment of the human rights claim. As such, in this particular case, no such appeal under the EEA Regulations was, in error, afforded to the appellant. (The refusal of the EUSS application did not have attached the detail of the appellant’s appeal rights but apparently gave no such rights.) It was held in **AA (Poland)** that the consideration of the EEA Regulations 2016 should be addressed first and whether the deportation would comply with the EU principle of proportionality. In effect, that is the exercise which the judge has undertaken and his findings on those facts not challenged. Where a human rights issue or appeal has been raised, the question is whether the deportation would be in accordance with the law and as it states at [72] of **AA (Poland)**, “That will not be so if deportation would be contrary to the 2016 Regulations. In such a case the human rights analysis need go no further”.
32. As pointed out by Mr Georget, if the Secretary of State wished to deport the appellant she must do so by reference to the correct legal regime, not continue an appeal against a decision which had now been established was made on the wrong legal basis. Whether she chose to do so by reference to the EEA Regulations 2016 or by reference to Appendix EU and the Withdrawal Agreement

was a matter for her, but they ultimately led to the same point that the appellant was entitled to be treated under the EEA deportation regime because he was an EEA national who had lived in the UK in accordance with the EEA regulations since 2004 and his conduct occurred before 31 December 2020. Further he had an outstanding EUSS application.

33. I find an error on the judge allowing the appeal on the basis of the EEA Regulations 2016 when the appellant had not been given such an appeal. I set aside that conclusion and notice of decision. Nevertheless I preserve the findings of the judge in relation to the 2016 Regulations and I remake the decision with the above considerations in mind and allow the appeal on human rights grounds.

Notice of Decision

34. The appellant's (SA's) appeal is allowed on human rights grounds.

Helen Rimmington

Judge of the Upper Tribunal
Immigration and Asylum Chamber

1st November 2024