IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000502

First-tier Tribunal No: HU/58398/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 17th of September 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

Secretary of State for the Home Department

Appellant

and

Ionut-Mihai Sofroniei

Respondent

Representation:
For the Appellant: Nicholas Wain, Senior Presenting Officer
For the Respondent: Alexis Slatter, instructed by TMC Solicitors

Heard at Field House on 5 September 2024

DECISION AND REASONS

1. The Secretary of State appeals with the permission of First-tier Tribunal Judge Grimes against the decision of First-tier Tribunal Judge Zahed. By his decision of 14 January 2024, Judge Zahed ("the judge") allowed Mr Sofroniei's appeal against the Secretary of State's refusal of his human rights claim. That claim was made in response to deportation proceedings which were initiated against him as a result of a conviction for robbery for which he was sentenced to 7 years' imprisonment.

2. To avoid confusion, I will refer to the parties as they were before the First tier Tribunal: Mr Sofroniei as the appellant and the Secretary of State as the respondent.

Background

3. The appellant is a Romanian national who was born on 16 November 1994. He first came to the United Kingdom in 2014 but he came to live here, with his uncle

and aunt, in the following year. He worked in the construction industry, as a steel fixer. He received a conviction for a summary offence in 2017 but on 10 February 2020, he was convicted of robbery which involved him and two associates robbing a prostitute and her transexual co-worker of their takings. The offence involved violence and mockery of the trans woman and a search of the property over the course of about twenty minutes. The appellant was identified by one of the complainants, who had been able to locate his Facebook account using the mobile telephone number which had been used to arrange the appointment with her.

4. On 2 June 2020, the appellant was served with a notice that he was liable to deportation. He made Article 8 ECHR representations in response to that notice, stating that he had lived in the UK for many years and that he had a Lithuanian partner and a baby daughter with whom he lived in Feltham. The appellant's partner also subsequently wrote in support.

5. On 19 January 2023, the respondent decided to make a deportation order against the appellant. The appellant's solicitors responded to that decision on 16 February 2023.

6. The respondent made a deportation order on 5 July 2023. She did not accept that the Immigration (EEA) Regulations 2016 applied to the appellant, as he had not been lawfully resident in the UK immediately prior to 31 December 2020 and he had not made an application under the EU Settlement Scheme. His representations were therefore considered as a human rights claim. The respondent did not accept that the appellant's deportation would be unlawful under section 6 of the Human Rights Act 1998, as she had concluded that the interference which was proposed with his private and family life in the United Kingdom was a proportionate one.

7. The appellant appealed to the First-tier Tribunal. His appeal was listed to be heard before the judge, sitting at Hatton Cross, on 12 December 2023. At around 6pm on 11 December 2023, the appellant made an application under the EU Settlement Scheme, noting that he had 'wanted to make an application under the EU Settlement Scheme, but unfortunately this was not possible as he was arrested for an offence at around that time'. The application was automatically acknowledged by email from the respondent.

8. Evidence of the appellant's application under the EUSS was presented to the judge at the hearing. He found, correctly, that the appellant had 'made a proper EUSS application which is before the respondent'. The judge also noted that the respondent had commenced 'deportation action under the Immigration (EEA) Regulations 2016'. He concluded that the EUSS application entitled the appellant to consideration under that part of the Immigration Rules and the 'transitional provisions of the Withdrawal Agreement' and that 'the respondent having not considered the application on that basis makes it an exceptional circumstance'. Largely for that reason, the judge found that this was an exceptional case which should be allowed under Article 8 ECHR.

9. The respondent sought permission to appeal. There are two grounds of appeal. The first is that the judge misdirected himself in law in two respects: in concluding that the respondent had made an appealable decision under the EEA Regulations and in failing to consider the significance of the fact that the EUSS application was made outside the Grace Period. The second ground is that the

judge had failed to give any adequate reasons for allowing the appeal on Article 8 ECHR grounds.

10. Judge Grimes considered both grounds to be arguable.

11. A response to the grounds of appeal was settled somewhat belatedly by Mr Slatter of counsel, who handed it up shortly in advance of the hearing. I gave Mr Wain time to consider it. On resuming, I heard submissions from both advocates.

Analysis

12. I am grateful to both advocates for their clear and measured submissions, and to Mr Slatter in particular for recalibrating his submissions in response to observations I made during the hearing.

13. It is quite clear that the judge erred in the manners contended by the Secretary of State. There was no decision under the EEA Regulations and there was no appeal on those grounds: *Abdullah & Ors (EEA; deportation appeals; procedure)* [2024] UKUT 66 (IAC), at paragraph (E) of the judicial headnote. The appellant having failed to make an in-time application under the EUSS, and having failed to demonstrate that he was lawfully resident in the UK on 31 December 2020, the judge was wrong to attach significance to the mention of the EEA Regulations at the start of the respondent's deportation consideration.

14. It is also clear that the judge failed to give any adequate reasons for concluding that the appellant's case was an exceptional one in which deportation would be unlawful under the Human Rights Act 1998. That conclusion was premised almost entirely on the fact that the appellant had made an application under the EUSS a few hours before the judge heard the appeal. The judge gave no consideration to the question of whether the public interest might necessitate the deportation of the appellant despite that application being pending before the respondent. He gave no consideration to any of the statutory public interest factors in Part 5A of the Nationality, Immigration and Asylum Act 2002 in reaching his short decision.

15. Mr Slatter was initially minded to ask me to uphold the decision of the judge for reasons he set out at [1]-[12] of his rule 24 response. I intend him no discourtesy in summarising those submissions quite shortly. The essence of the submission was that the judge would have been entitled to stay the appeal because of the pending EUSS application and that his decision to allow the appeal on Article 8 ECHR grounds essentially achieved the same result. Mr Slatter relied on the guidance given at paragraph (I) of the judicial headnote to *Abdullah* in that connection:

> *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.*

16. Ultimately, however, Mr Slatter accepted that the result was substantially different, in that it brought the appellant's human rights appeal to an end which conferred no benefit, and that a stay would have been a preferable outcome for the appellant, in that it preserved the human rights appeal with a view to linking it to the appeal against the inevitably adverse decision which will be made in the

EUSS application. He was therefore content for me to set aside the decision of the FtT and to remit and stay the human rights appeal to await linkage with the future appeal.

17. That was also the relief sought by Mr Wain, although he did wish to say something about the Grace Period, which was a point made in the grounds of appeal. Mr Wain asked me to note that the timing of the appellant's application under the EUSS meant that he could not avail himself of the protection of the Withdrawal Agreement. That seems to me to be correct, but it is a point of no real consequence for present purposes. If the respondent refuses the pending EUSS application, the appellant will be able to raise any Withdrawal Agreement arguments in the context of the resulting appeal. It is in any event clear, as was accepted by Mr Wain, that the appellant's failure to make that application before the end of the Grace Period does not, in itself, shut the door to an application under the residence scheme Immigration Rules. As I observed at the hearing, therefore, it appears that the rationale behind the guidance given at paragraph (I) of the headnote to *Abdullah* might apply regardless of the timing of an application under the EUSS. I should perhaps observe that I did not hear full argument on that point, however, and that it might need to be resolved after full argument on a different occasion.

18. In the circumstances, I agree with both advocates that the correct course in this case is to set aside the decision of the FtT and to remit the appeal to that Tribunal. I will also order that this appeal is stayed to await the respondent's decision in the pending EUSS application.

19. I asked Mr Wain at the end of the hearing whether he was able to give any indication as to when the pending EUSS application might be decided. He was not. I considered with the advocates whether to make any directions in that respect, so as to optimise the chances of the appeal proceeding smoothly when it returns to the FtT. In the event, they agreed with me that the better course would be to suggest to the FtT that the appeal might sensibly be listed for a case management hearing in early December.

20. That timescale will doubtless be communicated to the decision-making department by Mr Wain, as a result of which it is to be hoped that a decision will have been reached by then (which would, I observe, represent a clear year after the application was lodged). Steps can be taken thereafter to ensure that this appeal and the appeal against the likely refusal of the EUSS application (on grounds of suitability and/or extant deportation order) can be linked to be heard and determined together.

Notice of Decision

The decision of the FtT involved the making of an error on a point of law and that decision is set aside.

The appeal is remitted to the FtT to be heard by a judge other than Judge Zahed.

I also direct, under section 12(3)(b) of the Tribunals, Court and Enforcement Act 2007, that the appeal be stayed by the FtT to await the respondent's decision on the appellant's pending EUSS application.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 September 2024