Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00609/2019

<u>THE IMMIGRATION ACTS</u>

Heard at Field House	**Decision & Reasons Promulgated**
On 13 January 2020	**On 02 March 2020**

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ACHREF AMMARI
(ANONYMITY DIRECTION NOT MADE)

<u>Appellant</u>

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

<u>Respondent</u>

<u>Representation</u>:

For the Appellant:	Mr A Slatter, Counsel, instructed by Sterling & Law Associates
For the Respondent:	Mr C Avery, Senior Home Office Presenting Officer

<u>DECISION AND REASONS</u>

<u>Introduction</u>

1. Must an appeal brought under the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052 - "the 2016 Regulations") against an EEA decision be treated as abandoned following a grant of leave to remain to the appellant?

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2. The position originally adopted by the Respondent in answer to this question was "yes". However, she now concedes that this is not the case and that there is no legislative mechanism for an appeal brought under the 2016 Regulations to be treated as abandoned following a grant of leave to remain or the issuance of documentation confirming a right to reside under EU law.

3. In addition, the Respondent accepts that the First-tier Tribunal erred in law when dismissing the Appellant's appeal, and that the decision should be remade and the appeal allowed. Consequently, the substance of this appeal can be dealt with in fairly short order. However, the jurisdictional question of abandonment requires a little more exploration to determine whether the Respondent's concession is correct.

Relevant background

4. The Appellant, a Tunisian national, appeals against the decision of First-tier Tribunal Judge Cassel ("the judge"), promulgated on 15 July 2019, by which he dismissed the Appellant's appeal against the Respondent's refusal to issue him with a permanent residence card under the 2016 Regulations.

5. In 2013 the Appellant married a Spanish national and was issued with a residence card under the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003 - "the 2006 Regulations"). The relationship subsequently broke down, divorce proceedings were initiated on an unknown date in November 2016, and a decree absolute was issued in April 2017. A further residence card was issued to the Appellant, this time based upon his retained right of residence. The application for a permanent residence card was made in October 2018 and refused by the Respondent on 12 December 2018 on the ground that there was insufficient evidence of the ex-spouse's employment during the period relied on by the Appellant. The Appellant appealed to the First-tier Tribunal.

6. The Appellant then applied for settled status under the EU Settlement Scheme (as set out in Appendix EU to the Immigration Rules). On 22 May 2019 he was granted Indefinite Leave to Remain ("ILR").

7. Apparently unaware of the grant of ILR and no jurisdictional issue having been raised by either party, the judge proceeded to dismiss the appeal on the basis that the Appellant had failed to demonstrate that he had been "exercising Treaty rights" as a "qualified person", and that there was insufficient evidence of the ex-spouse having worked for five years prior to the divorce.

8. Following the grant of permission, the Respondent provided a rule 24 response, in which it was asserted, for the first time, that the grant of ILR meant that the Appellant's appeal should be treated as abandoned. The Appellant refuted this, but in further correspondence the Respondent maintained her original position.

9. At the hearing on 13 January 2020, Mr Avery accepted that the judge had erred in law and that the decision should be remade and the appeal allowed. However, these concessions would be immaterial if the grant of ILR to the Appellant resulted in his

appeal being treated as abandoned prior to the hearing before the judge. On this issue, Mr Avery requested additional time in which to provide a considered response on behalf of the Respondent. In all the circumstances, we acceded to this.

10. Mr Deller subsequently filed and served concise written submissions, for which we are grateful. These set out the concession summarised in paragraph 2, above. In addition, they record that whilst there was provision under the 2006 Regulations for appeals brought under those Regulations to be treated as abandoned where relevant documentation was issued to an appellant, this ceased to be the case from 6 April 2015.

Abandonment: a key distinction

11. In determining whether an appeal is be treated as abandoned, it is first important to identify the legal basis upon which the appellant brought that appeal in the First-tier Tribunal. If the appeal is against a decision listed under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002" - whether in its current iteration or prior to the amendments made by the Immigration Act 2014), that appeal is brought "under section 82(1)" and is governed by the regime established by NIAA 2002.

12. However, if the appeal is against an "EEA decision", as defined by Regulation 2(1) of the 2016 Regulations (or its predecessor under the 2006 Regulations), that appeal is brought under those Regulations by virtue of Regulation 36(1), which provides:

> "36.— Appeal rights
>
> (1) The subject of an EEA decision may appeal against that decision under these Regulations.

The same right of appeal was previously afforded under Regulation 26 of the 2006 Regulations.

13. An appeal brought under either the 2016 or 2006 Regulations is subject to the regime established by the applicable Regulations.

14. The significance of the distinction between the regimes for the purposes of abandonment becomes apparent when we examine the 2016 and 2006 Regulations in a little more detail, beginning with the first in time.

Abandonment under the 2006 Regulations

15. Section 104(4A) NIAA 2002 provided, in so as is relevant, as follows:

> "104 Pending appeal
>
> …
>
> (4A) An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or

> remain in the United Kingdom (subject to subsection (4B))" [the reference to subsection 4C having been removed when that provision was repealed by the Immigration Act 2014]

16. As an appeal against an EEA decision was brought under the 2006 Regulations and not under section 82(1) NIAA 2002, section 104(4A) did not apply unless it was listed under para 1 of Schedule 1 to the 2006 Regulations as one of the "following provisions of, or made under" the NIAA 2002 which applied to an appeal under those Regulations "as if it were" an appeal "under section 82(1)" (this "reading across" legislative device is discussed in Munday (EEA decision: grounds of appeal) [2019] UKUT 00091(IAC) in a context different from that with which we are presently concerned). Section 104 of the NIAA 2002 was not one of those provisions contained in para 1 of Schedule 1. Therefore, a pending appeal brought under the 2006 Regulations could not have been treated as abandoned by virtue of an appellant being granted leave to remain in the United Kingdom.

17. We note that Regulation 25(4) precluded statutory abandonment of an appeal solely on the basis that an appellant left the United Kingdom.

18. There was however one provision pursuant to which an appeal against a relevant EEA decision was to be treated as abandoned. Prior to its revocation on 6 April 2015 (by virtue of para 16 of Schedule 2 to the Immigration (European Economic Area)(Amendment) Regulations 2015 (SI 2015/694), para 4(2) of Schedule 2 to the 2006 Regulations read as follows:

> "4.— Appeals under the 2002 Act and previous immigration Acts
>
> …
>
> (2) A person who has been issued with a registration certificate, residence card, derivative residence card, a document certifying permanent residence or a permanent residence card under these Regulations (including a registration certificate under these Regulations as applied by regulation 7 of the Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013) or a registration certificate under the Accession (Immigration and Worker Registration) Regulations 2004, or an accession worker card under the Accession (Immigration and Worker Authorisation) Regulations 2006, or a worker authorisation registration certificate under the Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013, or a person whose passport has been stamped with a family member residence stamp, shall have no right of appeal under section 2 of the Special Immigration Appeals Commission Act 1997 or section 82(1) of the 2002 Act. Any existing appeal under those sections of those Acts or under the Asylum and Immigration Appeals Act 1993, the Asylum and Immigration Act 1996 or the 1999 Act shall be treated as abandoned." (emphasis added)

19. Thus, the issuance of relevant documentation resulted in statutory abandonment. This was consistent with the fact that the individual concerned would have been given all that he/she had sought in the appeal, namely a document confirming his/her right under EU law to reside in the United Kingdom. What this provision

did <u>not</u> cover was the situation in which an appellant had been granted leave to remain, which was an immigration decision taken under domestic law.

20. Paragraph 4(2) of Schedule 2 to the 2006 Regulations was not replaced with an equivalent provision prior to the revocation of those Regulations in their entirety on 1 February 2017.

21. Para 4(2) of Schedule 2 continues to be mentioned in legislation, notwithstanding its revocation. The relevant requirements of Rule 16 of the Tribunal Procedure (First-tier Tribunal) Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604) state:

> "16.— Appeal treated as abandoned or finally determined
>
> (1) A party must notify the Tribunal if they are aware that—
>
> …
>
> (d) a document listed in paragraph 4(2) of Schedule 2 to the 2006 Regulations has been issued to the appellant.
>
> (2) Where an appeal is treated as abandoned pursuant to section 104(4A) of the 2002 Act or paragraph 4(2)of Schedule 2 to 2006 Regulations, the Tribunal must send the parties a notice informing them that the appeal is being treated as abandoned or finally determined, as the case may be."

22. As with the First-tier Tribunal's Procedure Rules, we find a reference to para 4(2) of Schedule 2 to the 2006 Regulations in Rule 17A(1)(d) and (2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698):

> "17A.—(1) A party to an asylum case or an immigration case before the Upper Tribunal must notify the [Upper] Tribunal if they are aware that—
>
> …
>
> (d) a document listed in paragraph 4(2) of Schedule 2 to the Immigration (European Economic Area) Regulations 2006(c) has been issued to the appellant.
>
> (2) Where an appeal is treated as abandoned pursuant to section 104(4) or (4A) of the Nationality, Immigration and Asylum Act 2002(d) or paragraph 4(2) of Schedule 2 to the Immigration (European Economic Area) Regulations 2006, or as finally determined pursuant to section 104(5) of the Nationality, Immigration and Asylum Act 2002, the Upper Tribunal must send the parties a notice informing them that the appeal is being treated as abandoned or finally determined."

23. Even though the Procedure Rules continue to refer to para 4(2) of Schedule 2 to the 2006 Regulations, it is clear that an appeal cannot be treated as abandoned where a document confirming a right to reside under EU law has been issued after the revocation of that provision on 6 April 2015. To this extent, the continued reference in the Procedure Rules to para 4(2) of Schedule 2 appears anachronistic. However, there were appeals that were treated as abandoned under para 4(2) of Schedule 2 and the possibility cannot be excluded that there may still be long-standing pending appeals

brought under the 2006 Regulations where the appellant was issued with relevant documentation prior to 6 April 2015, with the consequence that such appeals would fall to be treated as abandoned under those Regulations and the relevant provisions of the Procedure Rules would apply.

Abandonment under the 2016 Regulations

24. As with appeals under the 2006 Regulations, the statutory abandonment mechanism contained in section 104(4A) of the NIAA 2002 can only apply to appeals brought under the 2016 Regulations if it is to be "read across" to such appeals. Para 1 of Schedule 2 to the 2016 Regulations stipulates that the "following provisions of, or made under" the NIAA 2002 apply to an appeal under those Regulations "as if it were" an appeal "under section 82(1)". It is apparent that section 104 of the NIAA 2002 is not amongst those provisions.

25. Therefore, as was the position under the 2006 Regulations, an appeal brought under the 2016 Regulations cannot be treated as abandoned by virtue of an appellant being granted leave to remain in the United Kingdom.

26. What is conspicuous by its absence is an equivalent provision in the 2016 Regulations to para 4(2) of Schedule 2 to the 2006 Regulations. The previous mechanism for an appeal to be treated as abandoned upon the issuance of documentation confirming a right to reside under EU law has not been replicated.

27. Regulation 35 (the successor to Regulation 25 of the 2006 Regulations) confirms that an appeal under the 2016 Regulations is to be treated as pending until the appeal (or a further appeal) is finally determined, withdrawn or abandoned. Regulation 35(4) specifies that an appellant's departure from the United Kingdom during the life of an appeal specifically does not result in statutory abandonment. The Regulation makes no provision for abandonment following a grant of leave to remain.

28. We have had regard to the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal. Whilst Direction 5 refers to pending appeals and abandonment, it adds nothing to our analysis.

Conclusions on the abandonment issue

29. We conclude that the Respondent's concession on the abandonment issue is correct. Prior to 6 April 2015, there was provision under para 4(2) of Schedule 2 to the 2006 Regulations for appeals brought under those Regulations to be treated as abandoned where an appellant was issued with documentation confirming a right to reside in the United Kingdom under EU law. As of 6 April 2015, that abandonment provision was revoked and never replaced. There was never any provision under the 2006 Regulations for an appeal to be treated as abandoned following a grant of leave remain in the United Kingdom.

30. There is no mechanism for an appeal against an EEA decision brought under the 2016 Regulations to be treated as abandoned as a consequence of an appellant being

granted leave to remain in the United Kingdom or issued with a document confirming a right to reside under EU law.

31. It follows that a grant of leave to remain following an application under the EU Settlement Scheme does not result in an appeal against an EEA decision brought under the 2016 Regulations being treated as abandoned.

32. Whether the omission of a mechanism for treating appeals under the 2016 Regulations as abandoned is by design or otherwise is uncertain. At first blush, it might be thought that a grant of ILR to an appellant would result in them achieving all that they could wish for, namely settled status in United Kingdom. It should be appreciated, however, that ILR involves a grant of leave under domestic law, whereas an individual may well wish to assert, and have confirmed, rights under EU law; rights which may in certain respects offer additional protective features. At least in respect of appeals brought under the 2016 Regulations, an individual is entitled to pursue this course of action.

33. In light of the foregoing, the Appellant's appeal against the EEA decision, brought under the 2016 Regulations, did not fall to be treated as abandoned by virtue of the grant of ILR on 22 May 2019. In consequence, the First-tier Tribunal had jurisdiction to decide that appeal. The appeal is before the Upper Tribunal and we too have jurisdiction to deal with it.

Postscript to the abandonment issue: The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020

34. On 31 January 2020, the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (SI 2020/61) came into force. EU citizens have rights of appeal against a variety of decisions made on or after exit day (that being 31 January 2020) relating to leave to enter, leave to remain, and deportation. Regulation 13(3) specifically provides for an appeal brought under the Regulations to be treated as abandoned if the appellant is granted leave to enter remain in the United Kingdom by virtue of "residence scheme immigration rules", subject to exceptions under Regulation 13(4). We note that by virtue of paras 5 and 6 of Schedule 4 to the Regulations, Rule 17A of the Upper Tribunal's Procedure Rules and Rule 16 of the First-tier Tribunal's Procedure Rules have been amended so as to make reference to the abandonment provision in Regulation 13. However, somewhat oddly given what we have set out when analysing the current legal framework relating to abandonment, the references to the 2006 Regulations in the Procedure Rules for both Tribunal are left untouched.

Error of law and remaking the decision

35. As noted earlier in our decision, the Respondent has conceded that the judge erred in law. In our judgment that concession was correctly made. The judge wrongly sought proof from the Appellant that he was "exercising Treaty rights" and that he was a "qualified person", and failed to appreciate that time accrued with a retained right of

residence counted towards the five years necessary for the acquisition of a permanent right of residence.

36. We therefore set the judge's decision aside.

37. Based on the evidence adduced before the First-tier Tribunal, the Respondent has also conceded that the Appellant has acquired a permanent right of residence in this country. Again, we agree with this concession.

38. Accordingly, we go on to remake the decision and conclude that the Respondent's decision of 12 December 2018 breaches the Appellant's rights under EU law.

Anonymity

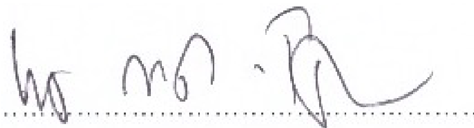
39. The First-tier Tribunal did not make an anonymity direction and, in all the circumstances, nor do we.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision of the First-tier Tribunal.

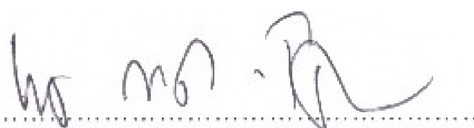
We remake the decision by allowing the appeal.



Signed Date: 24 February 2020
Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make a full fee award of £140.00. The Appellant succeeded on the basis upon which he made an application to the Respondent in the first instance.



Signed Date: 24 February 2020
Upper Tribunal Judge Norton-Taylor