IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003412
UI-2023-003413

First-tier Tribunal No: HU/01968/2022
EA/12224/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

12th January 2024

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARTUR FURMANIAK

Respondent

(NO ANONYMITY ORDER MADE)

Representation:
For the Appellant: Ms J. Isherwood, Senior Home Office Presenting Officer
For the Respondent: In person

Heard at Royal Courts of Justice on 08 January 2024

DECISION AND REASONS

1. For the sake of continuity, I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The original appellant (Mr Furmaniak) is a Polish national who says that he has lived in the UK exercising rights of free movement since 2005. On 02 October 2020 he was convicted of supplying Class A drugs (cocaine) and was later sentenced to a period of imprisonment of 4 years and 6 months. The appellant's criminal conduct and conviction took place before the United Kingdom exited from the European Union on 31 December 2020.

3. On 01 November 2021 the respondent (SSHD) issued a notice of intention to make a deportation order with reference to section 32 of the UK Borders Act 2007

('UKBA 2007') and section 3(5)(a) of the Immigration Act 1971 ('IA 1971') i.e. after the United Kingdom exited from the European Union.

4. On 03 November 2021 the appellant made representations on human rights grounds In response to the stage one deportation notice.

5. On 24 November 2021 the appellant made an application for leave to remain under the domestic immigration rules relating to the EU Settlement Scheme.

Human Rights decision

6. The respondent treated the representations made on 03 November 2021 as a human rights claim and refused the application in a decision dated 07 November 2022. The decision attracted a right of appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002'). The available ground of appeal is that the decision is unlawful under section 6 of the Human Rights Act 1998 ('the HRA 1998').

EUSS decision

7. The respondent accepted the application for leave to remain under the EUSS even though it was made outside the 'grace period' for such applications set out in The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 ('the 'Grace Period' Regulations 2020').

8. The application was refused in a decision also dated 07 November 2022. The application was refused on grounds of 'Suitability' under rule EU15 Appendix EU of the immigration rules and with reference to regulation 27 (removal on public policy grounds) of the Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016'). The decision attracted a right of appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the CRA Regulations 2020'). The available grounds of appeal are:

   (i) that the decision breaches any right which the appellant has by virtue of the Withdrawal Agreement ('WA'), EEA EFTA Separation Agreement or the Swiss Citizens' Rights Agreement;

   (ii) the decision is not in accordance with the provision of the immigration rules by virtue of which it was made, is not in accordance with the residence scheme immigration rules, is not in accordance with section 76(1) or (2) of the 2002 Act (revocation of ILR) or is not in accordance with section 3(5) or (6) of the 1971 Act (deportation).

First-tier Tribunal decision

9. First-tier Tribunal Judge Mills ('the judge') allowed both appeals in a decision sent on 27 June 2023. The judge noted that the following concessions were made by the Secretary of State's representative at the hearing. First, because the appellant's criminal conduct pre-dated 31 December 2020 'it was necessary for his deportation to be justified by way of the tests set out at Regulation 27 of the 2016 Regulations' [12]. Second, that the Secretary of State accepted that the appellant had been exercising rights of free movement for a period of more than 10 years before his imprisonment. It was agreed that the appellant had the benefit of the highest level of protection contained in regulation 27(4) EEA

Regulations 2016 i.e. the Secretary of State needed to show that there were 'imperative grounds of public security' to justify removal [13]. Third, that the Article 8 (private life) human rights claim would 'stand or fall' with the outcome of the EUSS appeal [14].

10. The judge went on to make findings in relation to the evidence and with reference to the agreed legal framework. The judge explained in detail why he came to the conclusion that the highest threshold of 'imperative grounds of public security' was not met with reference to the evidence [27]-[36]. Even if he was wrong in that respect, he went on to consider whether the evidence showed that the appellant presented a 'genuine, present and sufficiently serious threat to one of the fundamental interests of society'. He made his findings with reference to the evidence contained in the OASys assessment and the evidence given by the appellant [37]-[41]. He concluded that the evidence did not show that he was likely to present such a threat. For these reasons, he concluded that the EUSS appeal should be allowed. In light of the concession made by the Secretary of State recorded at [14], the judge dealt with the human rights appeal in a brief concluding paragraph. Having found that removal pursuant to the deportation order would be disproportionate under the relevant principles of EU law, he concluded that there were 'very compelling circumstances' that would also render removal a breach of Article 8 of the European Convention with reference to section 117C NIAA 2002 [42].

Grounds of appeal

11. The Secretary of State applied for permission to appeal to the Upper Tribunal on the following grounds:

    (i) The First-tier Tribunal 'had no jurisdiction to consider …[the] human rights appeal under the EEA Regulations 2016.' The decision letter refusing the human rights claim noted that the application for leave under the EU Settlement Scheme was made outside the 'grace period'. His liability to deportation did not therefore fall under the saved provisions of the EEA Regulations 2016 (ground 1).

    (ii) The First-tier Tribunal erred in allowing the EUSS (ground 2) and human rights (ground 3) appeals. It was submitted that the error identified in the first ground infected the findings in relation to the EUSS appeal as well.

12. First-tier Tribunal Judge Hamilton granted permission to appeal to the Upper Tribunal in an order dated 08 August 2023. No reasons were given as to why the grounds were considered arguable 'nothwithstanding the apparent concessions made by the respondent's representative [at] the appeal hearing'.

13. I have considered the First-tier Tribunal decision, the documentation that was before the First-tier Tribunal, the grounds of appeal, and the submissions made at the hearing, before coming to a decision in this appeal. It is not necessary to summarise the oral submissions because they are a matter of record, but I will refer to any relevant arguments in my findings.

Decision and reasons

14. Ms Isherwood accepted that the second and third grounds made no more than bare statements that the judge erred in allowing the appeal because of the error

argued in the first ground. Therefore, the only meaningful ground relied upon by the Secretary of State is the argument that the judge did not have 'jurisdiction' to consider the findings relating to the EEA Regulations 2016 in relation to the human rights appeal.

15. The grounds are poorly pleaded. In my view the first ground makes an inappropriate submission to the Upper Tribunal that borders on an abuse of the court process given the concession made before the First-tier Tribunal that, if the EUSS appeal was allowed with reference to the EEA Regulations 2016, it would follow that removal was also likely to amount to a breach of Article 8. Those were the findings made by the First-tier Tribunal. It is not open to the Secretary of State to make a diametrically opposed submission in a later application to the Upper Tribunal.

16. In the circumstances of this case, it would be a disproportionate use of court time to set out the complex set of provisions saving aspects of the EEA Regulations 2016 in relation to deportation following the United Kingdom's exit from the EU on 31 December 2020. In short, Article 20(1) of the Withdrawal Agreement made provision for EU law relating to removal on public policy grounds to continue to apply where the 'conduct' occurred before the end of the transition period. The Secretary of State has sought to give effect to this obligation through amendments made to the UKBA 2007 (a new 'Exception 7' in section 33), IA 1971 (new sections 3(5A) and 3(6A)), provisions in various sets of implementing regulations, by provisions contained in the domestic immigration rules, and by way of policy guidance.

17. Although the application made under the EUSS immigration rules was made outside the 'grace period' (ending 30 June 2021), the Secretary of State nevertheless exercised discretion to consider the application. The Secretary of State's EUSS decision was made with reference to the saved provisions contained in relation to removal on public policy grounds under EU law. The decision attracted a right of appeal. Given the clear agreement that the criminal conduct in this case occurred before the end of the transition period, the judge was obliged to consider whether the decision amounted to a breach of the appellant's rights under the Withdrawal Agreement, which was given effect to by various statutory amendments post EU exit.

18. The only meaningful point is made in the first ground of appeal, which only seeks to challenge the First-tier Tribunal decision in so far as it related to the human rights appeal. No challenge has been made to the substance of the judge's findings relating to the EU law test for removal on 'imperative grounds of public security'. No adequately particularised challenge is made to the conclusion that the EUSS appeal should be allowed for the reasons explained by the judge. In my assessment, those findings were open to the judge to make on the evidence and do not disclose any errors of law.

19. The point made in the first ground is misconceived. First, a clear concession was made by the Secretary of State's representative before the First-tier Tribunal that if removal under EU law was disproportionate then that finding was likely to be determinative of the proportionality of removal under Article 8 of the European Convention. Second, even if that concession had not been made, it was open to the judge to find that if removal was not justified or proportionate under the saved provisions of EU law in accordance with Article 20(1) of the Withdrawal Agreement, removal would also amount to a disproportionate breach of Article 8.

Nothing in the decision suggests that the judge applied incorrect principles of law to the Article 8 assessment or did not have 'jurisdiction' to consider his findings relating to the proportionality of removal under EU law as part of the overall assessment. He made clear that he had considered the relevant test of 'very compelling circumstances' under section 117C NIAA 2002.

20. The fact that the human rights decision letter stated that the deportation decision was not subject to the saved provisions under the EEA Regulations 2016 because the EUSS application had been made out of time appears to contradict the EUSS decision letter, which nevertheless admitted and decided the EUSS application with reference to the EEA Regulations 2016. There was a valid appeal before the First-tier Tribunal against the EUSS decision under the CRA Regulations 2020. That appeal could be determined on the ground that the decision was not in accordance with the Withdrawal Agreement and/or the relevant provisions of the IA 1971. The judge determined the EUSS appeal with reference to the relevant legal framework and was entitled to consider his findings relating to the EUSS appeal when deciding whether removal would also be disproportionate for the purpose of the human rights appeal.

21. For the reasons given above, I conclude that the First-tier Tribunal decision did not involve the making of an error of law, either in relation to the EUSS appeal or the human rights appeal. The decision shall stand.

Notice of Decision

The First-tier Tribunal decision did not involve the making of an error on a point of law

M.Canavan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

08 January 2024