IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002506

First-tier Tribunal No:
EU/51319/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 17th of December 2024

Before

UPPER TRIBUNAL JUDGE PINDER

Between

GABRIEL RODRIGUES METSAVAHT
(NO ANONYMITY ORDER MADE)

Appellant in the FtT

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent in the FtT

Representation:
For the Appellant: In person.
For the Respondent: Ms A. Nolan, Senior Presenting Officer.

Heard at Field House on 12 November 2024

DECISION AND REASONS

1. The Secretary of State appeals with the permission of Upper Tribunal Judge Landes granted on 1st August 2024 against the decision of First-tier Tribunal Judge Fern. By their decision of 13th January 2024, Judge Fern ('the Judge') allowed Mr Metsavaht's appeal against the Respondent Secretary of State's decision to refuse his EU Settlement Scheme ('EUSS') application.

2. I refer to the Secretary of State as the Respondent and to Mr Metsavaht as the Appellant, as they respectively appeared before the First-tier Tribunal ('FtT').

Background

3. The Appellant is a dual national of Brazil and Estonia. He acquired his Estonian citizenship in early 2019. The Appellant's mother has also been residing in the UK since in or about 2004 - she holds settled status/Indefinite Leave to Remain in the UK. The Appellant had entered the UK previously as a Brazilian citizen and thereafter, following his acquiring Estonian citizenship, he entered in October 2019 and travelled in and out on a few occasions thereafter.

4. The Appellant made several applications to the Respondent under the EUSS and the most recent of which was on 3rd October 2022. That application was refused by the Respondent on 8th February 2023 on the basis that the Appellant had not completed a continuous period in the UK of less than five years. The Respondent noted that the Appellant had resided in the UK periodically between October 2019 and January 2023 but the Appellant had not provided sufficient evidence to confirm that he was resident in the UK six months prior to 31st December 2020 – the evidence provided showed that the Appellant's most recent residence in the UK prior to 31st December 2020 was October 2019. As this was more than six months prior to the specified date, the Respondent concluded that the Appellant's residence had been broken and had not resumed until after 31st December 2020.

5. The Appellant appealed against that decision and his appeal was heard by the Judge on 9th January 2024. The Appellant pursued his appeal on the basis that his residence in the UK had not been broken because he had been in the UK until January 2020 and thereafter, he had not been able to return because of the public health restrictions resulting from the Covid-19 pandemic. He returned in April 2021 and relied on the various exceptions relating to the Covid-19 pandemic, which meant that a single absence of longer than six months should be disregarded and his residence should be considered continuous or unbroken.

6. Before the Judge, the Appellant represented himself, as he did before me, and the Respondent did not attend, nor was she legally represented. The Judge heard from the Appellant himself as well as from his mother. Following the Appellant's oral submissions, the Judge reserved their decision.

The Decision of the First-tier Tribunal Judge

7. In their decision at [4], the Judge found the Appellant's and his mother's evidence to be highly credible. With regards to the Appellant's residence in the UK, the Judge found that the Appellant had applied for a UK National Insurance ('NI') number in November 2019 and that he had left the UK

shortly before the Covid pandemic. He had then not been able to return to the UK for slightly over a year, until April 2021.

8. The Judge also found that the Appellant had ended his employment in Europe on 13th March 2021 and on 17th March 2021, he had applied for leave to remain under the EUSS rules as a family member of a person with settled status. That application was refused but the Appellant had not sought to challenge this decision by way of an appeal. At [5], the Judge also briefly recorded that the Appellant had resided in the UK with the financial and emotional support of his mother since 2021.

9. The Judge returned to the Appellant's evidence at [16] and recorded again that his oral evidence had been consistent with his written statements and submissions filed with the Tribunal. The Judge noted again the Appellant's application for an NI number and added that he had also attended a related interview with the DWP on or around 21st November 2019. That the Appellant had left the UK in January 2020 in order to make arrangements for his move to the UK but he had been barred from returning as a result of strict travel laws "until certification was permitted in December 2020". The Judge recorded the Appellant's evidence that he had finally been able to move to the UK on 25th April 2021 and had lived and worked here since, with his mother and the Appellant supporting each other.

10. At [19], the Judge summarised the evidence of the Appellant's mother and found that this was consistent with that of the Appellant's.

11. The Judge then went on to summarise and extract from the relevant legal framework from [22] to [34], including the summaries of the relevant definitions contained in Appendix EU. The Judge noted at [35] in particular that the definition of "continuous qualifying period" has been termed by the Court of Appeal as part of the "Byzantine" EUSS definitions, so as to allow certain Covid-related absences from the UK to be excluded when considering continuity.

12. The Judge then concluded, also at [35], that the Appellant's period of absence from the UK was slightly in excess of one year. The Judge was satisfied that this was based wholly or very substantially on a refusal by the European authorities to allow travel. At [36], the Judge further found that the Appellant had been residing in the UK in 2019 following his acquiring of Estonian citizenship until he left for what was meant to be a short departure in early 2020 but he had been unable to return until April 2021 as a result of the pandemic. The Judge concluded at [37] that the Appellant had established that he met the requirements of paragraph EU14 of Appendix EU to the Immigration Rules and thus qualified for a grant of limited leave to remain. The Judge proceeded to allow the Appellant's appeal.

The Appeal to the Upper Tribunal

13. The Respondent pursued a single ground of appeal when seeking permission to appeal, submitting that the requirements of paragraph EU14 dictated that the Appellant must both have been resident in the UK prior to 31st December 2020 and not have broken the continuity of his residence by more than 12 months, even if the concession relating to Covid was applied.

14. In both sets of grounds of appeal – the first lodged with the FtT and the second in this Tribunal, the Respondent submitted that the Judge had erred since they had been mistaken with regards to the start date of the Appellant's absence from the UK. Before the FtT, the Respondent had submitted that the Appellant's absence from the UK had started from November 2019 and was therefore of a much longer duration. Before this Tribunal, the Respondent noted that on the Appellant's own evidence he had not resigned from his employment in France until 13th March 2021 and could not have therefore started his residence in the UK in January 2020.

15. It was further submitted that the Judge's finding at [16] that certificated travel had been permitted from December 2020 also meant that there had been no engagement with the reasons, if any, as to why the Appellant had not sought to return to the UK prior to April 2021.

16. Upper Tribunal Judge Landes in granting permission to the Respondent found that it was arguable that the Judge's reasons were inadequate to explain why further delay in returning after December 2020 was attributable to travel restrictions from to the Covid-19 pandemic. Noting the Judge's finding at [16] in respect of the certificated travel permitted in December 2020, Judge Landes also noted that the Judge had found at [35], without further explanation, that the period of absence was based wholly or very substantially on a refusal from the European authorities to allow travel.

17. With regards to the Respondent's submissions as to any factual error on the part of the Judge concerning the Appellant's residence in the UK and/or length of absence from the UK, Judge Landes stated as follows:

> I observe that the renewed grounds refer to a finding that residence was commenced in January 2020 and say that ignores the fact that the appellant did not resign from his job in Europe until 13 March 2021. This appears to be a mistake; the judge found that the appellant left the UK in January 2020, and his job in Europe was begun when he was unable to return to the UK due to the pandemic. I observe further that the RFRL and the review do not appear to have taken any point about the appellant not being resident in the UK before January 2020.

18. The Appellant had filed a response pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('Procedure Rules'). I provided Ms Nolan with a copy of this document, at the start of the hearing. Ms Nolan did not object to my admitting this document and for those reasons, I duly admitted this.

19. The Appellant also confirmed that he had made an application for further documents to be admitted under Rule 15(2A) of the Procedure Rules. Those documents had been duly uploaded onto the Tribunal's online portal but not served on the Respondent. With the Appellant's assistance, I was able to provide a copy of these documents to Ms Nolan and a short adjournment was facilitated to enable Ms Nolan to go through those documents. As with the Appellant's Rule 24 response, Ms Nolan did not object to my considering the Appellant's further documents *de bene esse*, i.e. on a provisional basis, without determining its admissibility. The latter was because, in answer to me, the Appellant had not been entirely clear whether he was seeking to rely on these documents in support of his defence of the Judge's decision or as part of any re-making of the Appellant's appeal in the event that I found in favour of the Respondent and set aside the Judge's decision. In the end, there was very little reference to these new documents as part of the Appellant's submissions before me.

20. Ms Nolan, on behalf of the Respondent, made further oral submissions before me maintaining the Respondent's single ground of appeal. She acknowledged that the Judge found that the Appellant had been in the UK in November 2019 and that he had left in early January 2021. She also acknowledged that there may have been a misunderstanding on the Respondent's behalf when submissions were made concerning the Appellant having left the UK in November 2019 when lodging the Respondent's application for permission to appeal with the FtT. Mr Metsavaht duly responded defending the Judge's decision and maintaining that no material error of law had been made. I have fully addressed the parties' respective submissions in the section immediately below when setting out my analysis and conclusions.

21. I reserved my decision at the conclusion of the parties' respective submissions.

Analysis and Conclusions

22. In her submissions, Ms Nolan accepted that the EUSS Immigration Rules permitted certain absences, so as not to break the continuity of a person's residence in the UK, as long as certain conditions were met. Those conditions varied depending on the length of the absence. Both parties agreed that the Appellant had been absent from the UK from 5th January 2020, when the Appellant returned to Geneva, Switzerland until 25th April 2021 when he returned to the UK, in line with the Judge's findings to that effect. So the Appellant was absent from the UK for a total and continuous period of more than 1 year and three months.

23. Ms Nolan first argued however that the error of law committed by the Judge was finding that the Appellant was resident in the UK. She addressed me on the Judge's findings and recordings of the Appellant's time spent in the UK prior to becoming an Estonian citizen. It was clear to

me however that the Judge had not based her reasoning for allowing the Appellant's appeal on his residence in the UK prior to him becoming an EEA national and I was satisfied therefore that there was no error in this respect.

24. With regards to the Appellant's time spent in the UK from November 2019, Ms Nolan then submitted that the short durations of the Appellant's stays in the UK during that time were not sufficient to make the Appellant a 'resident' in the UK. Ms Nolan was not however able to suggest any authority or provision contained in Appendix EU that defined 'residence' in the way that she was suggesting, namely that something more than a mere presence was required. Accordingly, I am satisfied that there is no error of law on the Judge's part in finding that the Appellant had started his period of residence in the UK prior to 31st December 2020.

25. With regards to the Appellant's absence from the UK after 5th January 2020 - the focus of the Respondent's grounds of appeal - Ms Nolan helpfully took me through the exception that applied when a person was absent from the UK for a continuous period of more than 12 months. Contrary to the submissions made in the Respondent's grounds for permission to appeal lodged with the FtT, an absence of more than 12 months can be disregarded. This exception had also been extracted by the Respondent in their Review of the decision in the Appellant's application at §11-12. I re-produce this passage for ease of reference immediately below:

> 11. The definition of a continuous qualifying period within Annexe 1 at (b) describes a range of absence scenarios. By his own evidence the A cannot meet the requirements of a continuous qualifying period that began before the specified date and continued to the date of application.
>
> 12. Attention is drawn to (b) (i) (ee) of the definition that reads:
>
> (ee) a period of absence under sub - paragraph (b)(i)(aa), (b)(i)(bb), (b)(i)(cc) or (b)(i)(dd) above which exceeded 12 months because COVID -19 meant that the person was prevented from, or advised against, returning earlier; where this is the case, the period of absence under this sub - paragraph exceeding 12 months will not count towards any period of residence in the UK and Islands on which the person relies;

26. Ms Nolan submitted that whilst the Judge directed herself correctly at [31]-[32] in respect of Paragraph EU14 and its Condition 1, the Judge had not set out in her decision the definition of 'continuous qualifying period' and as a result of this, the Judge had misdirected themselves.

27. Against that background, Ms Nolan submitted that the Judge's consideration of the legal framework and her findings on the Appellant's evidence were deficient. At [16], the Judge referred to the certificated travel permitted from December 2020. Ms Nolan confirmed, with the Appellant's agreement, that this referred to a document in the appeal bundle before the FtT. This document – duly translated in English – is entitled "CERTIFICATE OF EXEMPTION FOR TRAVEL" and contains the

following sub-title: “In accordance with decree no. 2020-1310 of 29th October 2020 setting forth general measures required to deal with the COVID-19 epidemic in the framework of the pandemic”.

28. Ms Nolan submitted, in line with the Respondent’s grounds of appeal, that the Judge had failed to consider the Appellant’s reasons for not travelling back to the UK after this certificate was issued to him in December 2020 and the reasons for his continued absence from the UK. The Judge had found at [35] that his continued absence had been “wholly or substantially on a refusal by the European authorities to allow travel” but Ms Nolan submitted that the certificate did permit travel.

29. There is little detail of this document in the Judge’s decision but it is clearly referred to at [16]. The certificate in question is addressed to the Appellant and effectively authorises the recipients of such documents to undertaken the activities listed therein (if ticked) in a tick-box format. The only box that is ticked in the Appellant’s certificate is the following:

> Travel to visit a certified cultural or religious establishment; travel to purchase goods and items, authorised services, to collect orders and household deliveries;

30. The other activities listed include different purposes for travelling, such as travelling to work if this cannot be postponed or avoided, travelling to collect children from school, travelling in a person’s local area to undertake exercise and so on… No other boxes/purposes of travel were ticked in the Appellant’s certificate and there is no activity listed therein in any event that would permit a person to travel internationally or across longer distances for a purpose such as visiting family without them having some form of caring need. It is very clear therefore that whilst the Judge noted at [16] that “certificated travel” was permitted in December 2020 for the Appellant, the travelling and activities that were permitted were very restricted in their nature and in their distance.

31. On a plain reading of the certificate therefore, travel and other public health restrictions were very much still in force where the Appellant was living in December 2020. It cannot be said on any reading of this certificate that the Appellant would have been permitted to travel a further distance away from his home so as to enable international travel to the UK when this certificate was issued to him. On this basis, I am satisfied that the Judge heard oral evidence from the Appellant and his mother, and accepted that evidence for the reasons that I have already summarised earlier on in my decision. I am also satisfied that the Judge had clearly considered this certificate as part of their decision and had interpreted this correctly when finding at [35] that there was a refusal by the European authorities to allow travel, which wholly or very substantially caused the Appellant’s continued absence from the UK. The Judge’s findings were therefore reasonably open to them on the evidence before them and more specifically, those findings were entirely supported in the

Appellant's and his mother's evidence as well as the contents of the certificate.

32. I am also able to take judicial notice, as am sure the Judge at first instance was able to as well, to recall that the UK also experienced a second period of national lockdown announced in January 2021, which was only eased in July 2021. These dates are consistent with the travel restrictions that the Appellant focused on in his submissions before me and before the Judge at first instance and which were eased for him in late April 2021, thereby enabling his travel back to the UK at that point in time. For the avoidance of doubt however, I would have reached my conclusions at [31] above, in any event, without having taken into consideration any judicial notice of mine, for the reasons that I have also set out above.

33. Therefore, whilst it is correct that the Judge had not set out the relevant parts of the definition concerning 'continuous qualifying period', as Ms Nolan submitted, I am satisfied that the Judge considered this definition and applied it correctly to this appeal. She found that the Appellant was wholly or substantially prevented from travelling as a result of a refusal from the European authorities to allow travel. This is sufficient to demonstrate that the Judge had at the forefront of their mind that the Appellant needed to show that he was prevented from, or advised against, returning earlier – as per the definition, as extracted above.

34. In light of the above, it was not necessary for me to determine the Appellant's Rule 15(2A) application. On the evidence before them, I am satisfied that the Judge has not materially erred in law in reaching their findings at [35] and overall conclusions in favour of the Appellant, ultimately allowing his appeal.

35. In the circumstances, I dismiss the Respondent Secretary of State's appeal and order that the decision of the Judge shall stand.

Notice of Decision

36. The Respondent Secretary of State's appeal is dismissed. The Judge's decision to allow the Appellant's EUSS appeal stands.

Sarah Pinder

Judge of the Upper Tribunal
Immigration and Asylum Chamber

06.12.2024