**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Ammari (EEA appeals - abandonment) [2020] UKUT 00124 (IAC)

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 13 January 2020** | |
| | ..... |

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**
**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**ACHREF AMMARI**
(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

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

i. *Under the 2000 and 2006 EEA Regulations there was provision for appeals brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002 to be treated as abandoned where an appellant was issued with documentation confirming a right to reside in the United Kingdom under EU law. Following the changes to the 2002 Act brought about by the Immigration Act 2014 that abandonment provision was revoked and never replaced.*

ii. *There has never been provision under any of the EEA Regulations for an appeal against an EEA decision brought under those Regulations to be treated as abandoned following a grant*

*of leave to remain or the issuance of specified documentation confirming a right to reside in the United Kingdom under EU law.*

*iii. 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 EEA Regulations being treated as abandoned.*

## DECISION AND REASONS

### Introduction

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?

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 has never been a legislative mechanism for an appeal brought under the 2016 Regulations or their predecessors 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.

4. In undertaking this exercise, we shall refer to the 2016 Regulations, the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003 - "the 2006 Regulations"), and the Immigration (European Economic Area) Regulations 2000 (SI 2000/2326 - "the 2000 Regulations). The three sets of Regulations shall be referred to collectively as "the EEA Regulations".

### Relevant background

5. 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.

6. In 2013 the Appellant married a Spanish national and was issued with a residence card under 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.

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

8. 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.

9. 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.

10. 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.

11. Mr Deller subsequently filed and served concise written submissions, for which we are grateful. These set out the concession summarised in paragraph 2, above.

**Abandonment: two key matters**

12. In determining whether an appeal is to 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.

13. However, if the appeal is against an "EEA decision", as defined by Regulation 2(1) of the 2016 Regulations (or its predecessors under the 2006 and 2000 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 and Regulation 29 of the 2000 Regulations.

14. An appeal brought under the EEA Regulations is/was subject to the regime established by the applicable Regulations.

15. The significance of the distinction between the regimes for the purposes of abandonment becomes apparent when we examine the EEA Regulations in a little more detail, below.

16. The second matter of importance relates to the changes to the appellate regime in Part 5 of NIAA 2002 over the course of time. Prior to the significant amendments brought about by the Immigration Act 2014 appellants were able to appeal under section 82(1) against an extensive range of immigration decisions on a wide variety of grounds. Amongst those was the assertion that the decision in question breached the appellant's rights under the EU Treaties (contained in what was section 84(1)(d)). Thus, an appellant was able to rely on claimed rights of residence under EU law in an appeal brought "under section 82(1)" NIAA 2002.

17. Upon the coming into force of section 15 of the Immigration Act 2014 on 20 October 2014 (subject to certain savings and transitional provisions) the range of appealable decisions was dramatically reduced and the corresponding grounds of appeal similarly constrained. Appellants could no longer rely on EU law rights as a ground in an appeal brought "under section 82(1)" NIAA 2002.

18. With these two points in mind, we turn to examine the circumstances in which an appeal concerning the assertion of rights under EU law was or is to be treated as abandoned.

**Abandonment of appeals brought under section 82(1) NIAA 2002**

19. In its original form, section 104(4) NIAA 2002 provided that:

> "104 Pending appeal
>
> …
>
> (4) An appeal under section 82(1) shall be treated as abandoned if the appellant-
>
> (a) is granted leave to enter or remain in the United Kingdom…" (Emphasis added)

20. Following changes brought about on 13 November 2006 by the Immigration, Asylum and Nationality Act 2006, section 104(4A) NIAA 2002 has provided, in so far as is relevant for the purposes of this appeal, 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…" (Emphasis added)

21. As we have seen, prior to the amendments to NIAA 2002 made by the Immigration Act 2014, appellants were able to rely on an EU law ground of appeal in an appeal brought "under section 82(1)" NIAA 2002 against "an immigration decision". It followed that such an appeal in which EU law rights were relied on was to be treated as abandoned if leave to remain was granted.

22. There was a second legislative mechanism by which an appeal under section 82(1) NIAA 2002 concerning the assertion of EU law rights was to be treated as abandoned.

23. Between 1 January 2004 and its revocation on 30 April 2006, Regulation 33(1A) of the Immigration (European Economic Area) Regulations 2000 provided:

> "33.— Appeals under the 2002 Act
>
> …
>
> (1A) A person who has been issued with a residence permit, a residence document or a registration certificate or whose passport has been stamped with a family member residence stamp shall have no right of appeal under section 82(1) of the 2002 Act. Any existing appeal shall be treated as abandoned." (Emphasis added)

24. From its commencement on 30 April 2006 until its revocation on 6 April 2015, 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)

25. The issuance of specified documentation therefore resulted in statutory abandonment, but only where the appeal had been brought "under section 82(1)" NIAA 2002. The rationale behind this provision was presumably 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.

26. Once the ability of an appellant to rely on EU law rights in an appeal brought under section 82(1) NIAA 2002 was removed by the Immigration Act 2014, the only means by which such rights could be asserted in an appellate process was under the 2006 Regulations and, in due course, the 2016 Regulations.

**Appeals brought under the 2000 Regulations**

27. Although of historical interest only, we should briefly describe the position relating to appeals brought under the 2000 Regulations.

28. Those Regulations did not provide for statutory abandonment following either a grant of leave to remain or the issuance of specified documentation. Further, as an appeal against an EEA decision was brought under the 2000 Regulations and not under section 82(1) NIAA 2002, the abandonment mechanism provided by what was then section 104(4) did not apply unless it was listed under para 1 of Schedule 2 to the 2000 Regulations as one of the "following provisions of, or made under" the NIAA 2002 which applied to an appeal brought 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 2. Therefore, an appeal brought under the 2000 Regulations could not have been treated as abandoned by virtue of an appellant being granted leave to remain in the United Kingdom.

**Appeals brought under the 2006 Regulations**

29. As with the 2000 Regulations, the 2006 Regulations did not provide for statutory abandonment where an appellant had been granted leave to remain or issued with specified documentation. Again, the abandonment mechanism contained in what had become section 104(4A) NIAA 2002 did not apply unless it was listed under para 1 of Schedule 1 to the 2006 Regulations as one of the provisions of the 2002 Act to be "read across" to an appeal brought under the 2006 Regulations. Section 104 was not so listed. As was the position under their predecessor, an 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.

30. Alternatively, would the issuance of specified documentation confirming a right to reside in the United Kingdom under EU law have resulted in the statutory abandonment of an appeal brought under the 2006 Regulations, with reference to paragraph 4(2) of Schedule 2 to those Regulations prior to its revocation? The answer to this is clearly "no". As we have seen, this provision related only to appeals brought "under section 82(1)" NIAA 2002.

31. Following its revocation, 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. Presumably, the reason for this is that its utility had ceased once the amended NIAA 2002 precluded appellants from relying on rights under EU law in appeals brought under section 82(1).

32. Para 4(2) of Schedule 2 to the 2006 Regulations 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."

33. As with the First-tier Tribunal's Procedure Rules, we find a reference to para 4(2) of Schedule 2 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."

34. On our analysis, these provisions of the Procedure Rules can only have application to appeals brought "under section 82(1)" NIAA 2002 which were pending when the appellant had been issued with a document confirming a right of residence under EU law prior to the revocation of paragraph 4(2) of Schedule 2 to the 2006 Regulations on 16 April 2015. It must be the case that appeals have in the past been treated as abandoned in accordance with this provision and the Procedure Rules. Whilst the possibility of such cases existing even now cannot be excluded, they would form a very small and ever-diminishing cohort.

**Appeals brought under the 2016 Regulations**

35. Following on from its predecessors, the 2016 Regulations do not contain any provision which directly provides for statutory abandonment of an appeal where an appellant has been granted leave to remain. As with appeals under the 2006 Regulations, the statutory abandonment mechanism contained in section 104(4A) NIAA 2002 can only apply to appeals brought under the 2016 Regulations if it is to be "read across" to such appeals. It is apparent that section 104 NIAA 2002 is not amongst those provisions listed in para 1 of Schedule 2 to those Regulations. Therefore, as was the position under both the 2000 Regulations and 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.

36. For reasons set out previously, it is unsurprising that the 2016 Regulations have never contained an equivalent provision to paragraph 4(2) of Schedule 2 to the 2006 Regulations: appellants who have brought appeals under section 82(1) NIAA 2002 cannot rely on a ground of appeal asserting a breach of rights under EU law and therefore the issuance of specified documentation would be immaterial to such appeals.

37. 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. The Regulation makes no provision for abandonment following a grant of leave to remain.

38. 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**

39. Our conclusions on the abandonment issue are as follows:

    i. Under the 2000 Regulations and the 2006 Regulations there was provision for appeals brought under section 82(1) NIAA 2002 to be treated as abandoned where an appellant was issued with documentation confirming a right to reside in the United Kingdom under EU law. Following the changes to NIAA 2002 brought about by the Immigration Act 2014, as of 6 April 2015, that abandonment provision was revoked and never replaced;

    ii. There has never been provision under any of the EEA Regulations for an appeal against an EEA decision brought under those Regulations to be treated as abandoned following a grant of leave to remain or the issuance of specified documentation confirming a right to reside in the United Kingdom under EU law;

    iii. 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.

40. As a consequence of these conclusions, the Respondent's concession on the abandonment issue is correct.

41. At first blush, it might be thought that a grant of ILR to an appellant seeking to rely on rights under EU law would result in them achieving all that they could hope 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. In respect of appeals against EEA

decisions brought under the 2016 Regulations, an individual is entitled to pursue this course of action.

42. 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.

**Error of law and remaking the decision**

43. 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.

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

45. 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.

46. 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**

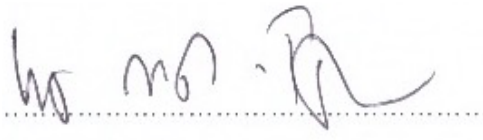
47. The First-tier Tribunal did not make an anonymity direction and, in all the circumstances, nor do we.

**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: 20 March 2020
Upper Tribunal Judge Norton-Taylor