IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000796

First-tier Tribunal No: HU/50645/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 15th October 2024

Before

UPPER TRIBUNAL JUDGE LANDES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARIUSZ WALDOWSKI
(No anonymity order made)

Respondent

Representation:
For the Appellant: Not present; no representative
For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

Heard at Field House on 9 October 2024

DECISION AND REASONS

1. The Secretary of State appeals, with the permission of Judge Lester, the decision of Judge Hamilton promulgated on 15 January 2024 allowing Mr Waldowski's appeal against the Secretary of State's refusal of his human rights claim by decision of 14 December 2021. On the same date the Secretary of State made an automatic deportation order against Mr Waldowski under the provisions of the UK Borders Act 2007.

Background

2. Mr Waldowski is a citizen of Poland. On 11 December 2020 he committed an offence of wounding/inflicting grievous bodily harm without intent and was subsequently sentenced to 2 years' imprisonment on 4 March 2021.

3. After initially being informed, in April 2021, that he was liable to be deported under the Immigration (European Economic Area) Regulations 2016 ("EEA

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Regulations"), Mr Waldowski was then informed in October 2021 that his deportation would be pursued under the provisions of the UK Borders Act 2007. In the December 2021 decision letter, the Secretary of State explained that this decision had been arrived at because there was no evidence before the Secretary of State that immediately prior to 23:00 GMT on 31 December 2020, Mr Waldowski was lawfully resident in the United Kingdom by virtue of the EEA Regulations and he did not have an outstanding application to the EU Settlement Scheme.

4. On 24 May 2023, Mr Waldowski made a late application to the EU Settlement Scheme. It has not yet been determined.

The judge's decision

5. Judge Hamilton refused an application for adjournment made on behalf of Mr Waldowski. The judge said that he had failed to engage with his solicitors until very shortly before the hearing [31] and he did not appear at the hearing, having gone to his solicitor's office instead. Mr Waldowski was told by his solicitors to get to the hearing centre as quickly as possible and this was followed up by a call left to his voicemail by the Polish interpreter telling him that the hearing had been put back to 2pm and that he should contact his representative to confirm attendance. He did not do so and did not attend [32]. The judge refused an adjournment deciding that Mr Waldowski had been given the opportunity to attend and participate but had decided not to attend and given the history the judge was not confident that postponing the hearing would secure his attendance in the future [34].

6. The judge decided that Mr Waldowski was exercising Treaty rights from the April 2018 tax year up to and including 31 December 2020; although his recorded earnings were not high his work was genuine and effective [38]. He had been working in the UK since 2017 [53] but he had not shown he had been in the UK since 2013 as he had claimed [52]. He was not on remand on 31 December 2020; but even if he had been he would not have been serving a sentence of imprisonment so that there was no break in continuity of residence [39].

7. The judge found Mr Waldowski was protected by the terms of the Withdrawal Agreement irrespective of any application made under the EUSS [41]. Accordingly his deportation had to be conducted under the legal framework of the deportation provisions in the EEA Regulations [42]. He was however only entitled to the lowest level of protection under the EEA regulations, but the judge found that it had not been shown that he was a genuine, present or sufficiently serious threat to the fundamental interests of society [56]. The judge also found for completeness that his removal would be disproportionate on EU law principles even if he did pose such a threat [61].

8. Considering domestic law, the judge held that it was not suggested that Mr Waldowski could meet either the private or family life exceptions and he did not consider that there were factually "very compelling circumstances" [64]. However he considered the Secretary of State was wrong to submit that the outstanding EUSS application was irrelevant to the appeal because it could not be granted under Appendix EU as Mr Waldowski was subject to a deportation order; to meet the definition of a deportation order in Appendix EU, the deportation decision must have been made applying the criteria in reg 27 EEA regulations even where the deportation order was being made under the automatic

deportation provisions [66]. It could not therefore be argued that the EUSS application would inevitably fail [67].

9. Removing Mr Waldowski from the UK before his EUSS application had been decided would, the judge found, be denying him due process and effectively prejudging the outcome of the outstanding EUSS application. Removing him from the UK whilst he still had a potential right to remain living here would be a serious interference with his private life; there was a strong public interest in observing due process and accordingly the judge found Mr Waldowski had shown that there were very compelling circumstances in his case such that the public interest did not require his deportation and removing him from the UK would be a disproportionate interference with his ECHR Article 8 rights [69] and [70].

10. In the "Notice of Decision" section, the judge added that the Withdrawal Agreement required the deportation decision in respect of Mr Waldowski to be made by reference to the deportation provisions contained in European law as reflected in the EEA regulations and the appeal was allowed because the Secretary of State had not shown he could be deported under European law [74] [75].

The non-appearance of Mr Waldowski

11. The appeal was first listed for hearing before Judges Norton-Taylor and Mahmood on 5 August 2024. Mr Waldowski did not appear but the information on the Upper Tribunal's database was incorrect. When his previous solicitors came off the record they provided an up-to-date address for him which had not been registered on the Upper Tribunal database. His email address had also not been properly registered.

12. Accordingly the judges adjourned the hearing. The notice for this hearing was, on 10 September, sent to the address given by Mr Waldowski's previous solicitors (an Alton address with the postcode ending 9HX) by post and was also emailed to the email address the tribunal had for him.

13. Mr Waldowski did not appear at this hearing. Mr Parvar confirmed that the last-known address the Home Office had for Mr Waldowski was the same address to which the notice of hearing had been sent. I enquired whether Mr Waldowski had been reporting. Mr Parvar said that the last entry he could see was in January 2023, i.e. long before the hearing before Judge Hamilton, but he did not know if the records were up to date or how often reporting events were set up. There was nothing he could see on his records which would assist as to why Mr Waldowski was not present.

14. I was accordingly satisfied that Mr Waldowski had been properly notified of the hearing as the notice of hearing was sent in good time to the address which he had given to his former solicitors and to the Home Office, as well as to his email address. I considered rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and considered that it was in the interests of justice to proceed with the hearing despite Mr Waldowski's absence. He had not attended the hearing before Judge Hamilton in the circumstances described above, and as he had not responded to the notice of hearing for today, there was nothing to indicate that the circumstances would be any different if the hearing were adjourned to another occasion. I therefore proceeded to hear from Mr Parvar.

Error of law?

15. Judge Norton-Taylor had, in directions given on adjourning the appeal, directed the Secretary of State's attention to the case of Abdullah and others (EEA; deportation appeals; procedure) [2024] UKUT 00066 and in particular directed consideration of paragraph I of the judicial headnote. Paragraph I states "*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. The Secretary of State's skeleton argument submits that the matter should not be adjourned by the Upper Tribunal to await the outcome of the EUSS application, but an appropriate direction could be made if an error of law were found.

17. I told Mr Parvar that I thought there was no question of staying the appeal in the Upper Tribunal, but it would clearly be appropriate if I found an error of law to remit the appeal to the First-Tier Tribunal so that it could await the outstanding EUSS application. He agreed.

18. Having discussed the grounds and the skeleton with Mr Parvar I told Mr Parvar that the following were my preliminary views. He concurred with those views:

    (i) The judge was wrong to make findings under the EEA regulations. The EEA regulations did not apply directly to Mr Waldowski. Despite the judge's findings, which were not directly challenged in the grounds, that Mr Waldowski was lawfully resident under the EEA regulations at the end of the transition period, Mr Waldowski had not made an application to the EUSS before 30 June 2021. Accordingly, for the reasons explained in Abdullah, the EEA regulations did not apply directly to Mr Waldowski and there was no right of appeal under those regulations (see headnote [C] of Abdullah and paras [21] – [25], [74]). Insofar as the judge directly applied the EEA regulations that would be an error of law;

    (ii) However it was wrong and contrary to the Secretary of State's policy for her to assert that Mr Waldowski was not protected by the Withdrawal Agreement. The judge had found that Mr Waldowski was resident in the UK in accordance with EU law at the end of the transition period. Contrary to the assertions in the skeleton argument he did not need to hold status as a "documented" EEA national. He had applied, albeit late, for status under the EUSS and the Secretary of State's stance was that those within the scope of Article 10 of the Withdrawal Agreement (as Mr Waldowski is for the reasons the judge explained, namely he was in the UK as a worker at the end of the transition period) are protected under the Withdrawal Agreement if they have made an application to the EUSS, even if it is a late application. As [68] of Abdullah explained "*We acknowledge that the Secretary of State takes the view that the protections flowing from article 18.3 apply to those who have made applications, even late. That is, we accept, a reasonable interpretation; the alternative - that those who made late applications did not have the rights conferred - would be contrary to the reference to "any application" within 18.1 which is not qualified by any reference to time;"*

    (iii) Equally it was wrong for the Secretary of State to suggest that the obvious conclusion for Judge Hamilton to reach would be that the EUSS application would be refused for criminality. As Judge Hamilton correctly explained, before an EUSS application can be refused on suitability grounds the public

policy criteria would have to be considered. The application could not simply be refused because Mr Waldowski was subject to an automatic deportation order;

(iv) However the Secretary of State could not and would not, contrary to Judge Hamilton's findings, remove Mr Waldowski from the UK before the conclusion of the EUSS application. I quote from the conducive deportation policy (the current policy is version 3.0 of March 2024 but as far as I am aware the previous policy in force at the time of the hearing before Judge Hamilton was the same) p 22 of 65 "*Where a late application is submitted and a deportation decision has already been made, that application is a barrier to removal and no enforcement action must be taken until the application has been concluded";*

(v) Accordingly I considered there was force in ground 2 that the judge had failed to adequately reason how or why Mr Waldowski's circumstances amounted to very compelling circumstances. At the time the deportation order was made there was no EUSS application so the Secretary of State could not have been criticised for proceeding as they did; there now was an EUSS application and Mr Waldowski was protected by the Withdrawal Agreement, but he could not be removed until it had been considered, when considering that EUSS application, whether he met the test set out in regulation 27 EEA Regulations with appropriate modifications, so that there would be no infringement of his procedural or substantive rights looking at the matter as a whole. I note that at [83] of Abdullah the judges did not accept the argument that the making of a deportation order against an EEA national was itself contrary to the Withdrawal Agreement. It was evident that an expulsion decision could be taken before an appeal and if the appeal were successful then the deportation order would be revoked.

19. Judge Hamilton was not assisted by the arguments presented on behalf of the Home Office. The Home Office did not ask for an adjournment to enable them to decide the EUSS application, indeed they opposed the application for an adjournment on behalf of Mr Waldowski. Judge Hamilton's decision was before Abdullah was promulgated so there was no case law to guide him and as I have described above, many of his findings were clearly open to him and in accordance with the law.

20. However I conclude that there was a material error of law in Judge Hamilton's decision. He allowed the appeal on the basis that there were very compelling circumstances such that section 117C (6) of the Nationality, Immigration and Asylum Act 2002 applied but as I have explained above gave no adequate reasons for so doing; the reasons he gave could not amount to very compelling circumstances as I have explained at paragraphs 18 (iv) and (v) above.

21. The appropriate course is to set aside the decision and to follow the process described in Abdullah to await the resolution of the EUSS application. Mr Parvar unfortunately had no idea of what the timescale would be, and the application has now been outstanding for well over a year. There is no reason at all why it should not now be progressed swiftly.

22. I discussed with Mr Parvar what if any findings should be preserved. I agree with his submissions that no findings under regulation 27 of the EEA regulations should be preserved as the judge had no jurisdiction to hear an appeal under the EEA regulations. I considered whether the finding that Mr Waldowski came within scope of the Withdrawal Agreement as being in the UK as a worker at the end of

the transition period should be preserved, but noted that his primary case was that he had permanent residence and as the judge had made findings against Mr Waldowski because he had not attended to address apparent discrepancies and lack of documentary evidence, I did not want to inadvertently prejudice any better evidenced case he might make to support his EUSS application or any appeal therefrom. In fairness to Mr Waldowski as well as the Secretary of State, I considered that the appeal should simply be looked at afresh if the EUSS application were decided against Mr Waldowski. Of course, if the EUSS application were decided in his favour the deportation order would be revoked.

Notice of Decision and Directions

The judge's decision contains errors of law and is set aside with no findings preserved.

The appeal is remitted to the First-Tier Tribunal at Hatton Cross to be decided by another judge, but the appeal is to be stayed pending resolution of Mr Waldowski's EUSS application.

The Secretary of State is to update the First-Tier Tribunal at Hatton Cross by 13 January 2025 as to progress with the EUSS application, such update to include the then current address for Mr Waldowski from Home Office records.

The First-Tier Tribunal are of course at liberty to reconsider the stay after 13 January 2025 if no progress has been made or if circumstances change.

A-R Landes

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 October 2024