



UT Neutral Citation Number: [2024] UKUT 00362 (IAC)

Manyo (EEA deportation; Imprisonment at 31/12/2020)

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Heard at Field House

THE IMMIGRATION ACTS

Heard on 14 February 2023
Promulgated on 14 September 2023

Before

THE PRESIDENT, MR JUSTICE DOVE
and
UPPER TRIBUNAL JUDGE MANDALIA

Between

Secretary of State for the Home Department

Appellant

and

Kingsley Manyo
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: Ms A Jones, instructed by Tann Law

- 1. An EEA national who had not acquired the right of permanent residence and who was in prison on 31 December was not exercising Treaty Rights in accordance with Article 7 of Directive 2004/34/EC, and therefore was not lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016 immediately before IP completion day.*
- 2. It follows that where the appellant cannot benefit from the saving of the EEA Regulations 2016 during the grace period and whilst applications are finally determined as set out in the Citizens' Rights Regulations 2020, a*

deportation decision must be taken and assessed by reference to the domestic legal framework by reference to the Immigration Act 1971, UK Borders Act 2007 and the Immigration Rules.

DECISION AND REASONS

1. The appellant in the appeal before us is the Secretary of State for the Home Department (“SSH”) and the respondent to this appeal is Mr Kingsley Manyo. However, for ease of reference, in the course of this decision we adopt the parties’ status as it was before the FtT. We refer to Mr Manyo as the appellant, and the Secretary of State as the respondent.
2. On 27 January 2022, a decision was made to make a deportation order in respect of the appellant by virtue of section 32(5) of the UK Borders Act 2007, and a decision was made to refuse a human rights claim. The appellant’s appeal against that decision was allowed on human rights grounds by First-tier Tribunal Judge Cartin for reasons set out in a decision promulgated on 16 June 2022.
3. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Perkins on 8 November 2022.
4. Following the Agreement on the withdrawal of the United Kingdom from the European Union, the appeal before us raises the important question of the regime that applies where the decision of the respondent concerns an EEA national, but the decision made by the respondent is made under the Immigration Act 1971 and UK Borders Act 2007.

The background

5. The appellant is a national of Italy. He claims to have arrived in the United Kingdom on 1 February 2016. On 25 April 2017 he was issued with a registration certificate as a family member of an EEA national. On 11 October 2018 he was convicted at Warwick Crown Court for offences of robbery, possession of a bladed article and possession of cannabis. On 7 July 2020 he was sentenced to a 3 years and 10 months term of imprisonment.
6. On 7 September 2019, the appellant made an application under the EU Settlement Scheme. On 28 July 2020 he was issued with a Notice of liability to deportation pursuant to the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations 2016”). The appellant made representations to the respondent in response. On 23 July 2021, the appellant was served with a Notice of Decision to make a Deportation Order and also given the opportunity to set out any further reasons, with any further evidence, setting out why he should not be deported, including evidence that immediately prior to 23:00hrs on 31 December 2020, the appellant was lawfully resident in the UK by virtue of the EEA Regulations 2016 or that he is a ‘relevant person’ as defined in regulation 3 of the

Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020. In response, submissions were received from the appellant dated 02 August 2021, setting out reasons why he should not be deported from the UK.

7. On 27 January 2022, the respondent made a decision to refuse the appellant's human rights claim. The respondent concluded there is no evidence that immediately prior to 23:00 GMT on 31 December 2020, the appellant was lawfully resident in the United Kingdom by virtue of those regulations and that he has an outstanding application under the EU Settlement Scheme. The respondent therefore decided to pursue the appellant's deportation under the UK Borders Act 2007.
8. The respondent noted the appellant has been convicted of criminal offences, as set out in her notice of decision dated 23 July 2021. The respondent deemed the appellant's deportation to be conducive to the public good under section 5(1) of the Immigration Act 1971 pursuant to section 3(5) and in accordance with section 32(5) of the UK Borders Act 2007. The respondent concluded the exceptions to deportation set out in section 33 of the UK Borders Act 2007 do not apply and the respondent is therefore required to make a deportation order against the appellant. In a separate decision, the extant application made by the appellant under the EU Settlement Scheme on 7 September 2019 was refused by the respondent on suitability grounds.
9. The appellant's appeal against the respondent's decision dated 27 January 2022 to refuse the appellant's human rights claim was allowed by the First-tier Tribunal for reasons set out in a decision promulgated on 16 June 2022.
10. At the outset of the hearing before the First-tier Tribunal, counsel for the appellant raised a preliminary matter. That is, whether the respondent had adopted the correct deportation regime in reaching her decision. The appellant claimed the respondent should have reached a decision under the EEA Regulations 2016, rather than the Immigration Act 1971 and UK Borders Act 2007. Having considered the Withdrawal Agreement, and the various Acts, Regulations, and the respondent's guidance; *Public policy, public security or public health decisions*, published for Home Office staff on 17 November 2021, the judge concluded that the EEA Regulations 2016 continue to have effect as far as the appellant is concerned.
11. In summary, the judge had noted that the appellant's criminal conduct had occurred in December 2017 and that on 7 September 2019, the appellant had made an application under the EU Settlement Scheme. Although not expressed in this way, referring to the legal framework, the Judge concluded:
 - a. Article 20 of the Withdrawal Agreement is such that conduct that occurred before the end of the transition period, shall be considered in accordance with Chapter VI of Directive 2004/38/EC.

- b. Section 7A of the European Union (Withdrawal) Act 2018 operates so that all rights, arising by or under the withdrawal agreement, and all such remedies provided for by or under the withdrawal agreement, are to be (a) recognised and available in domestic law, and (b) enforced, allowed and followed accordingly.
- c. Section 7(1) of the European Union (Withdrawal Agreement) Act 2020 provides that a Minister of the Crown may by regulations make such provision as the Minister considers appropriate for the purpose of implementing Article 20(1), (3) and (4) of the Withdrawal Agreement.
- d. Regulation 4 of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020/1209 operates so that where a person has made an in-time application and immediately before IP completion day—
 - (i) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or
 - (ii) had a right of permanent residence in the United Kingdom under those Regulations

The provisions of the EEA Regulations 2016 specified in regulations 5 to 10 continue to have effect (despite the revocation of those Regulations) with the modifications specified in those regulations in relation to the applicant during the relevant period.

12. At paragraphs [41] to [45] of the decision, the First-tier Tribunal Judge said:

“41. There is no definition of what is meant by the period immediately prior to the end of the transition period. On balance, I am persuaded that the Appellant’s employment up until July 2020 before his imprisonment for the final months before the end of the transition period, does satisfy the requirement that the Appellant be exercising Treaty Rights in the period immediately prior to 23.00 on 31 December 2020.

42. I similarly consider that having not been made subject to any deportation order and having come to the UK lawfully under EU law, that he was continuing to reside in the UK ‘lawfully’ at the necessary date; to use the language of the Citizen’s Rights regulations.

43. Therefore, on the Respondent’s own policy and on my reading of the relevant Acts and Regulations, the Appellant was to be covered by the saved 2016 Regulations.

44. It is uncontroversial that the rights provided by directive 2004/38/EC as referred to in Article 20 of the WA, are reflected domestically in the Immigration (European Economic Area) Regulations 2016. Provision for deportation and exclusion is provided in those regulations through regulations 23 and 27. For this reason, I consider that a deportation decision

taken by the Respondent pursuant to domestic legislation rather than the 2016 regulations, is not in accordance with the law.

45. On this basis I find that the Respondent's decision would amount to a breach of the Appellant's Article 8 rights. As such, the decision to deport the Appellant would be unlawful pursuant to section 6 Human Rights Act 1998."

The issue

13. The respondent has filed a skeleton argument dated 10 February 2023 in which the issue before us is summarised in the following way:

"Did the FtTJ make a material misdirection in law by concluding the SSHD's decision to issue a deportation order under domestic legislation was not in accordance with the law?"

The parties' positions

14. The respondent submits, in summary, that the appellant was required to provide evidence that immediately prior to 23:00 GMT on 31st December 2020 he was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or that he was otherwise a 'relevant person' as defined in regulation 3 of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 ("the Citizens' Rights Regulations 2020"). The respondent submits the First-tier Tribunal Judge erroneously concluded the appellant satisfies the requirement that he was exercising Treaty Rights in the period immediately prior to 23.00 on 31 December 2020.
15. The focus is upon the words 'immediately prior to' in Regulations 3 and 4 of the Citizens' Rights Regulations 2020. The appellant had made an application on 7 September 2019 under the EU Settlement Scheme but, the respondent submits, the appellant was sentenced on 7 July 2020 to 3 years and 10 months imprisonment. Mr Clarke submits that periods in prison cannot be taken into consideration in the context of the acquisition of the right of permanent residence and it must rationally follow that the appellant was not exercising Treaty Rights immediately prior to 23:00hrs on 31 December 2020.
16. The appellant has filed a rule 24 response settled by the appellant's solicitors dated 24 January 2023. The appellant claims the respondent's grounds do not establish a material error of law in the decision of the First-tier Tribunal and amount to nothing more than a disagreement with the decision.
17. Ms Jones submits the Judge was entitled to have regard to the chronology of events and properly noted that the offending conduct had occurred significantly before 31 December 2020. As the relevant conduct had

occurred before the end of the transition period the Judge was entitled to find the appellant benefited from Article 20 of the Withdrawal Agreement and his removal from the UK should have been considered in accordance with Chapter VI of Directive 2004/38/EC.

18. Distilled to its essence, Ms Jones submits that here, the appellant had been granted a registration certificate on 25th April 2017 and he made an in-time application under the EU Settlement Scheme in September 2019, before the specified date. She submits it was open to the First-tier Tribunal Judge to conclude that the appellant's employment until July 2020 satisfies the requirement that immediately before 23:00hrs on 31 December 2020 the appellant was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016
19. Ms Jones submits that on a proper application of Regulation 4 of the Citizens' Rights Regulations 2020, Regulations 5 to 10 of the EEA Regulations 2016 continue to have effect during the relevant period. The relevant period here as defined by Regulation 4(6) of the Citizens' Rights Regulations 2020 is the period between the application deadline (here, 31 December 2020) and the date upon which the respondent reached her decision not to grant any leave to enter or remain in the United Kingdom in response to the applicant's application and the first day on which the applicant was no longer entitled to appeal against that decision (*regulation 4(6)(b)(ii)*).
20. Ms Jones submits the First-tier Tribunal Judge was right to conclude the appellant was covered by the saved 2016 Regulations and that the decision taken by the respondent by reference to domestic legislation rather than the EEA Regulations 2016, is not in accordance with the law. The question whether the decision is proportionate to the legitimate aim did not therefore arise. The judge did not therefore have to have regard to the public interest considerations set out in s117C of the Nationality, Immigration and Asylum Act 2002. Ms Jones submits it remains open to the respondent to make a decision to deport the appellant under the EEA Regulations 2016.

Decision

21. It is useful to begin by setting out the relevant legal framework, most of which is common ground between the parties. The EEA Regulations 2016 gave effect to the UK's obligations arising from membership of the EU. The United Kingdom and European Union reached an agreement at European Council on the United Kingdom's withdrawal from the European Union. The recitals to the Withdrawal Agreement stress that the objective of the Agreement is to ensure an orderly withdrawal of the United Kingdom from the Union and Euratom.
22. Article 20 of the Withdrawal Agreement is concerned with the restrictions of the rights of residence and entry and states:

“1. The conduct of Union citizens or United Kingdom nationals, their family members, and other persons, who exercise rights under this Title, where that conduct occurred before the end of the transition period, shall be considered in accordance with Chapter VI of Directive 2004/38/EC.

2. The conduct of Union citizens or United Kingdom nationals, their family members, and other persons, who exercise rights under this Title, where that conduct occurred after the end of the transition period, may constitute grounds for restricting the right of residence by the host State or the right of entry in the State of work in accordance with national legislation.

...”

23. Parliament legislated through the Immigration Rules and the European Union (Withdrawal Agreement) Act 2020 to protect the rights of EEA citizens and their family members who are resident in the UK by the end of the transition period (31 December 2020). The Citizens' Rights Regulations 2020 were made under the powers vested in the Minister in sections 7(1) and (4) of the Act.
24. The issue in this appeal centres upon Regulations 3 and 4 of the Citizens' Rights Regulations 2020:

“3.— Grace period

(1) This regulation has effect if the EEA Regulations 2016 are revoked on IP completion day (with or without savings).

(2) The provisions of the EEA Regulations 2016 specified in regulations 5 to 10 continue to have effect (despite the revocation of those Regulations) with the modifications specified in those regulations in relation to a relevant person during the grace period.

(3) The provisions specified in regulation 11 apply in relation to a relevant person during the grace period as if any reference to the EEA Regulations 2016 or any provision of those Regulations are to the Regulations or provision of the Regulations as continued in effect and modified by regulations 5 to 10.

(4) The enactments specified in regulation 12 apply in relation to a relevant person during the grace period with the modifications specified in that regulation.

(5) For the purposes of this regulation—

(a) the grace period is the period beginning immediately after IP completion day and ending with the application deadline;

(b) a person is to be treated as residing in the United Kingdom at any time which would be taken into account for the purposes of calculating periods when the person was continuously resident for the purposes of the EEA Regulations 2016 (see regulation 3);

(c) a person who does not have the right to reside in the United Kingdom permanently is to be treated as having such a right if the person had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15) and who, immediately before IP completion day, has been absent from the United Kingdom for a continuous period of 5 years or less (disregarding any period of absence before the person acquired the right of permanent residence).

(6) In this regulation—

...

"*relevant person*" means a person who does not have (and who has not, during the grace period, had) leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules and who—

(a) immediately before IP completion day—

(i) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or

(ii) had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15), or

(b) is not a person who falls within sub-paragraph (a) but is a relevant family member of a person who immediately before IP completion day—

(i) did not have leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules, and

(ii) either—

(aa) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or

(bb) had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15).

4.— Applications which have not been finally determined by the application deadline

(1) This regulation has effect if the EEA Regulations 2016 are revoked on IP completion day (with or without savings).

(2) This regulation applies to a person ("the applicant") who—

(a) has made an in-time application (see paragraph (6)), and

(b) immediately before IP completion day—

(i) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or

(ii) had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15).

(3) The provisions of the EEA Regulations 2016 specified in regulations 5 to 10 continue to have effect (despite the revocation of those Regulations) with the modifications specified in those regulations in relation to the applicant during the relevant period.

(4) The provisions specified in regulation 11 apply in relation to the applicant during the relevant period as if any reference to the EEA Regulations 2016 or any provision of those Regulations are to the Regulations or provision of the Regulations as continued in effect and modified by regulations 5 to 10.

(5) The enactments specified in regulation 12 apply in relation to the applicant during the relevant period with the modifications specified in that regulation.

(6) For the purposes of this regulation—

(a) an in-time application is an application for leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules which—

(i) is valid under residence scheme immigration rules;

(ii) is made on or before the application deadline, and

(iii) has not been withdrawn;

(b) the relevant period begins immediately after the application deadline and ends—

(i) if the applicant is, by virtue of the in-time application, granted leave to enter or remain in the United Kingdom, on the day on which that leave is granted;

(ii) if a decision is taken not to grant any leave to enter or remain in the United Kingdom in response to the applicant's application and the applicant does not appeal against that decision, on the first day on which the applicant is no longer entitled to appeal against that decision (ignoring any possibility of an appeal out of time with permission);

(iii) if a decision is taken not to grant any leave to enter or remain in the United Kingdom in response to the applicant's application and the applicant brings an appeal against that decision, on the day on which that appeal is finally determined, withdrawn or abandoned, or lapses under paragraph 3 of Schedule 1 to the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020;

(c) a person is to be treated as residing in the United Kingdom at any time which would be taken into account for the purposes of calculating periods when the person was continuously resident for the purposes of the EEA Regulations 2016 (see regulation 3);

(d) a person who does not have the right to reside in the United Kingdom permanently is to be treated as having such a right if the person had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15) and who, immediately before IP completion day, has been absent from the United Kingdom for a continuous period of 5 years or less (disregarding any period of absence before the person acquired the right of permanent residence).

25. Whether addressed through Regulation 3 or 4 of the Citizens' Rights Regulations 2020, an applicant is required to establish that immediately before IP completion day (*defined in s39 European Union (Withdrawal Agreement) Act 2020 as 11.00 p.m. on 31 December 2020*) the person or applicant was either: (i) lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or (ii) they had a right of permanent residence in the United Kingdom under those Regulations.
26. Before us, Ms Jones as she did before the First-tier Tribunal, referred to the respondent's guidance published for Home Office Staff: *'Public policy, public security or public health decisions* referred to above. The guidance confirms that a decision on grounds of public policy, public security or public health may need to be made in respect of any of the cohorts protected by the Withdrawal Agreements or the United Kingdom's domestic implementation of the Agreements, in relation to conduct occurring before 23:00 GMT on 31 December 2020. The guidance confirms a person is protected by the Agreements (or the UK's domestic implementation of the Agreements) if they, *inter alia*, have submitted an application to the EUSS (and if the application was submitted after the relevant deadline, they have reasonable grounds for doing so) and a decision or appeal is pending on the application.
27. The guidance adds little and does not assist us in addressing the issue that arises here. The guidance reiterates what is provided for by Regulation 4 of the Citizens' Rights Regulations 2020. In fact, as the respondent points out, the guidance states, at page 9:

"For the purpose of this guidance, 'lawfully resident' means having a 'right to reside' under the EEA Regulations 2016 under the EEA Regulations 2016. This includes:

- 3 months' initial right of residence under regulation 13
- extended rights of residence under regulation 14
- residence after having acquired a right of permanent residence under regulation 15
- derivative rights of residence under regulation 16

A period of imprisonment doesn't count as lawful residence and will break the continuous period of residence necessary to acquire permanent residence...."

28. Insofar as the guidance provides any assistance at all, it undermines the appellant's claim. In determining whether the appellant was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, the guidance indicates that for someone to be 'lawfully resident' means that they have a right to reside under the relevant provisions of the EEA Regulations 2016, and that a period of imprisonment does not count as lawful residence.

29. We do not accept the words 'immediately before' IP completion day in Regulations 3 and 4 of the Citizens' Rights Regulations 2020 can rationally be read as contended for by Ms Jones. As far as immigration rights are concerned, the preamble to the Withdrawal Agreement states inter alia:

"RECOGNISING that it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this Agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination; recognising also that rights deriving from periods of social security insurance should be protected,

RESOLVED to ensure an orderly withdrawal through various separation provisions aiming to prevent disruption and to provide legal certainty to citizens and economic operators as well as to judicial and administrative authorities in the Union and in the United Kingdom, while not excluding the possibility of relevant separation provisions being superseded by the agreement(s) on the future relationship,"

30. Mr Clarke referred us to the decision of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) in which the then President Mr Justice Lane said, at [60]:

"... One looks in vain in Article 18 and elsewhere in the Withdrawal Agreement for anything to the effect that a person who did not meet the relevant requirements as at 11pm on 31 December 2020 can, nevertheless, be treated as meeting those requirements by reference to events occurring after that time. If that had been the intention of the United Kingdom and the EU, the Withdrawal Agreement would have so specified. Article 31 of the Vienna Convention on the Law of Treaties (1969) requires a treaty to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". It would plainly be contrary to the Vienna Convention to interpret the Withdrawal Agreement in the way for which the appellant contends."

31. Although the Upper Tribunal in Celik [2023] EWCA Civ 921 was concerned with the rights of partners of EEA nationals who were unable to marry before the specified date, construing the words 'immediately before' in accordance with the ordinary meaning to be given to the terms of the treaty in context, and in the light of its object and purpose, in our judgement, the words 'immediately before', must be read as a reference to the situation as it was at 23:00hrs on 31 December 2020 or, where

relevant, the expiry of the grace period. There is nothing in the recent consideration of an appeal against the decision of the Upper Tribunal which disturbs this approach to the provisions of the Withdrawal Agreement. The Withdrawal Agreement recognised the need to provide reciprocal protection for Union citizens and for United Kingdom nationals, where they have exercised free movement rights before 23:00hrs on 31 December 2020.

32. The adverb 'immediately' imposes a requirement for something very close to a particular time. Read alongside the words 'before IP completion day' the phrase 'immediately before IP completion day' is in our judgment a reference to the particular circumstances as they were on IP completion day. That construction is in accordance with the need to ensure an orderly withdrawal aiming to prevent disruption and to provide legal certainty to citizens and economic operators as well as to judicial and administrative authorities in the Union and in the United Kingdom, as cited in the preamble to the Withdrawal Agreement.
33. Mr Clarke referred us to the decision of the Court of Justice of the European Union in Ziolkowski v Land Berlin (Directive 2004/38/EC) Joined Cases C-424/10 and C-425/10 and the decision of the Court of Justice of the European Union in Onuekwere v Secretary of State for the Home Department (Directive 2004/38/EC) Case C-378/12.
34. In Ziolkowski v Land Berlin the Grand Chamber held that a period of residence which complies with the law of a Member State but does not satisfy the conditions laid down in Article 7(1) of Directive 2004/38 ('Right of residence for more than three months') cannot be regarded as a 'legal' period of residence within the meaning of Article 16(1).
35. In Onuekwere v Secretary of State for the Home Department (Directive 2004/38/EC) the CJEU considered the circumstances in which, if any, a period of imprisonment constitutes legal residence for the purposes of the acquisition of a permanent right of residence under Article 16 of Directive 2004/38. The CJEU said:

"27. In view of all the foregoing considerations, the answer to the first question is that Article 16(2) of Directive 2004/38 must be interpreted as meaning that the periods of imprisonment in the host Member State of a third-country national, who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods, cannot be taken into consideration of the context of the acquisition by that national of the right of permanent residence for the purposes of that provision.

...

32. ... Article 16(2) and (3) of Directive 2004/38 must be interpreted as meaning that continuity of residence is interrupted by periods of imprisonment in the host Member State of a third-country national who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods."

36. Ms Jones submits that in each of the cases that are relied upon by Mr Clarke, the Grand Chamber and the CJEU were concerned with matters relevant to the acquisition of the right of permanent residence under European Union law, whereas here, the appellant had a residence card. Although that is correct, that does not assist the appellant. A residence card simply allowed EEA citizens to live, study and work in the UK, and the fact that the appellant had previously been issued with a residence card on the basis of an assessment of his circumstances at that time, does not assist the appellant establish and is not determinative of the question of fact as to whether the appellant was lawfully resident in the UK by virtue of the EEA Regulations 2016 immediately before IP completion day. In Ziolkowski v Land Berlin, the Grand Chamber confirmed the aim of Directive 2004/38 was to set out a structured approach to the right of freedom of movement and residence in order to facilitate the exercise of that right. The Directive and the EEA Regulations 2016 introduced a gradual system as regards the right of residence in the host Member State. The first stage concerns periods of residence up to three months and is addressed in Article 6. The second stage concerns periods of residence of longer than three months and is addressed in Article 7. The third stage provides for the acquisition of permanent residence, after residing legally, for a continuous period of five years in the host Member State. At paragraph [40], the Grand Chamber said:

“Second, for periods of residence of longer than three months, the right of residence is subject to the conditions set out in Article 7(1) of Directive 2004/38 and, under Article 14(2), that right is retained only if the Union citizen and his family members satisfy those conditions. It is apparent from recital 10 in the preamble to the directive in particular that those conditions are intended, inter alia, to prevent such persons becoming an unreasonable burden on the social assistance system of the host Member State.”

37. Article 7(1) of Directive 2004/38 provides that Union citizens have the right of residence on the territory of another Member State for a period of longer than three months if they are workers or self-employed persons in the host Member State. Continuity of residence is interrupted by periods of imprisonment. Put simply, the individual is not employed, self sufficient or exercising other Treaty Rights during the period of imprisonment.

38. An EEA national who had not acquired the right of permanent residence and who was in prison on 31 December was not exercising Treaty Rights in accordance with Article 7 of the Directive, and therefore was not lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016 immediately before IP completion day.

39. It follows that where the appellant cannot benefit from the saving of the EEA Regulations 2016 during the grace period and whilst applications are finally determined as set out in the Citizens’ Rights Regulations 2020, a deportation decision must be taken and assessed by reference to the domestic legal framework by reference to the Immigration Act 1971, UK Borders Act 2007 and the Immigration Rules.

The appeal before us

40. At paragraph [4] of the decision, the First-tier Tribunal Judge noted the respondent's conclusion in her decision that having entered the UK in February 2016, and having been imprisoned in July 2020, the appellant could not have continuously exercised Treaty Rights for the necessary 5 years to have acquired permanent residency. He was therefore not accepted to be lawfully resident in the UK immediately prior to 23.00 on 31 December 2020. The Judge did not expressly address that claim, but it has not been suggested by Ms Jones before us that the appellant had a right of permanent residence in the United Kingdom under the EEA Regulations 2016.
41. Here, the First-tier Tribunal Judge found that documents in the appellant's bundle cover the appellant's tax calculations for 2018 to 2019 and 2019 to 2020. Those documents indicate that he was economically active during those tax years in his own right. The judge found the appellant was therefore exercising Treaty Rights during that time. The judge went on to find the end date of the appellant's employment according to his P45 and payslips was 18 September 2020, although he was actually serving the sentence of imprisonment from 7 July 2020.
42. On a proper application of the law, the appellant was not exercising Treaty Rights in accordance with Article 7 of the Directive, and therefore was not lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016 immediately before IP completion day.
43. The Judge of the First-tier Tribunal erred in concluding the appellant was exercising Treaty Rights immediately prior to 23:00hrs on 31 December 2020 and in concluding that the deportation decision taken by the respondent pursuant to domestic legislation rather than the EEA Regulations 2016, was not in accordance with the law. Having reached that conclusion, the Judge erroneously concluded the interference with the appellant's private life is not in accordance with the law and is unlawful and contrary to section 6 of the Human Rights Act 1998.
44. The decision of the First-tier Tribunal Judge must therefore be set aside with no findings preserved.
45. As to disposal, there is no reason why the decision should not be remade in the Upper Tribunal. The appeal will be listed for the decision to be remade in the Upper Tribunal on the first available date after 21 days.

Notice of Decision

46. The decision of First-tier Tribunal Judge Cartin promulgated on 16 June 2022 is set aside with no findings preserved.
47. The decision will be remade in the Upper Tribunal.

48. The appeal will be listed for hearing on the first available date after 21 days with a time estimate of 2 hours.
49. Any further evidence relied upon by the appellant is to be filed and served no less than seven days before the hearing of the appeal.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 July 2023