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Abdullah & Ors (EEA; deportation appeals; procedure)

UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Heard at Field House

THE IMMIGRATION ACTS

Heard on 3 and 6 November 2023
Promulgated on 28 February 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE RINTOUL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ZAIN-AL-ABIDIN ABDULLAH

Respondent

and

AIRE CENTRE

Intervenor

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADRIAN ANDRZEJ SZUBA

Respondent

and

AIRE CENTRE

Intervenor

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROKAS RUDOKAS

Respondent

and

AIRE CENTRE

Intervenor

Representation:

For the Secretary of State: Ms J Smyth and Ms K Elliot, instructed by GLD
For Mr Abdullah: Ms I Sabic KC and Ms E Doerr, instructed on a Direct Access basis
For Mr Szuba: Ms G Patel, instructed by A & M Solicitors
For Mr Rudokas: no appearance
For the AIRE Centre: Mr T Buley KC, Ms B Asanovic and Mr A Shattock, AIRE Centre

(A) In an appeal where conduct prior to 11pm on 31 December 2020 gives rise to a decision to deport an EEA citizen is in issue, it is necessary to determine whether, as at 31 December 2020 (and at the point a decision is taken):

(1) Was the EEA citizen resident in the United Kingdom?
(2) If so, for what continuous period (as defined in reg 3 of the EEA Regulations) before that?
(3) Was the EEA citizen's residence lawful, that is, in accordance with the EEA Regulations?
(4) Had the EEA citizen acquired permanent residence under the EEA Regulations?
(5) Had the EEA citizen made an application under the EUSS before the end of the Grace Period, that is 30 June 2021, and
(6) If so, is it pending?

(B) The answers to these questions will determine whether the EEA citizen came within the scope of the Withdrawal Agreement, the Grace Period Regulations or the EUSS. They will also determine whether that individual is a "relevant person" for the purposes of section 3 (5A) and (10) of the Immigration Act 1971 and section 33 (6B and (6C) of the UK Borders Act 2007, as expanded by regs 3(4) and 12(1)(b) of the Grace Period Regulations.

(C) In respect of conduct carried out prior to 31 December 2020, the EEA Regulations only apply directly to an individual (and thus gave rise to an appeal under those regulations) if:

(1) The decision was taken under the EEA Regulations prior to 31 December 2020 or in connection with an application pending under the regulations; or,

(2) The individual was an EEA citizen (or a family member of such a person) lawfully resident under the EEA Regs (including those who had acquired permanent residence under reg 3. the EEA Regulations) and either:

(i) The decision was taken by 30 June 2021; or

(ii) Was taken after that date but when a valid application under the EUSS had been made before 30 June 2021 and was still pending (but not if they had been granted leave under the EUSS); or

(3) Is a person who falls within the scope of the CRRE Regulations

(D) With the passage of time, the class of individuals falling under the EEA Regulations and entitled to a right of appeal under those provisions will diminish to very small numbers.

(E) If a decision to deport was not made under the EEA Regulations, then there is no right of appeal under those regulations.

(F) In an appeal under the CRA Regulations, it will be necessary to consider the application of reg.27 of the EEA Regulations. This can arise under either ground of appeal as:

(1) if the EEA citizen is within the scope of the WA, then articles 20 and 21 of the WA apply;

(2) if not in scope of the WA, the definition of deportation order is such that only one which is justified by reference to reg.27 of the EEA Regulations makes the EEA citizen ineligible for a grant of status under the EUSS.

(G) There is a distinction between (1) and (2) because under the definition of deportation order under the EUSS, only 5 years continuous residence (as opposed to lawful residence under the EEA Regulations) is needed to acquire enhanced protection.

(H) The effect of a finding that the deportation is not justified by reference to reg 27 of the EEA Regulations is that Exception 7 under section 33 of the United Kingdom Borders Act 2007 is met, and the Secretary of State's policy is then to revoke any deportation order, at which point leave to remain under the EUSS can be granted.

(I) 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.

(J) Where an appeal has been allowed under the EEA Regulations; or, in an appeal under the CRA Regulations on the basis the deportation decision is not justified by reference to reg 27 of the EEA Regulations, it follows that any linked appeal against the same decision under section 82 of the 2002 Act will be allowed on the basis that the decision under appeal was not in accordance with the law.

Preliminary matters

Abbreviations

1971 Act	Immigration Act 1971
2002 Act	Nationality, Immigration and Asylum Act 2002
2007 Act	UK Borders Act 2007
AS	Adrian Andrzej Szuba, the respondent in the Second Appeal UI-2023-000505
Citizens' Rights Directive	Directive 2004/38/EC
CRA Regulations	Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020
CRRE Regulations	Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations
EEA Regulations	Immigration (European Economic Area) Regulations 2016 SI
EUSS	EU Settlement Scheme
EUWA 2018	European Union (Withdrawal) Act 2018
EUWA 2020	European Union (Withdrawal Agreement) Act 2020
FtT	First-tier Tribunal
Grace Period Regulations	Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020
ISSCA 2020	Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020
RR	Rukas Rudokas, the respondent in the Third Appeal UI-2023-001538.
SSHD	Secretary of State for the Home Department
TFEU	Treaty on the Functioning of the European Union
Transitional Provisions Regulations	Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020
WA	Withdrawal Agreement
ZA	Zain-al-Abidin Abullah, the respondent in the First appeal UI-2022-006321

Introduction

1. These three appeals were listed together in order to permit the Upper Tribunal to resolve a number of issues of law concerning the SSHD's power to deport EEA nationals who had resided in the United Kingdom and have done so since before the United Kingdom left the European Union and the rights of appeal against such decisions.

2. We are in these appeals concerned only with EU nationals, rather than Swiss nationals or nationals of other EEA states. There are different Withdrawal Agreements relating to those states but they mirror broadly the WA with the EU, as do the domestic legal provisions.

The appeals

ZA (Abdullah)

3. Mr ZA is a citizen of the Netherlands. He has resided in the United Kingdom since 2008 when he was 15/16 years of age. His case is that he had acquired the right of permanent residence under EU law (which the SSHD does not accept) prior to his conviction on 30 July 2021 for Grievous Bodily Harm in an incident which took place on 28 November 2019. On 30 June 2021 he made an application under the EUSS and on 11 October 2021 was notified by the SSHD of her intention to make a deportation order against him. He made representations as to why he should not be deported; and made a human rights claim. On 3 May 2022, the SSHD made two decisions: to refuse his human rights claim and to make a deportation order pursuant to s 32 (5) of the 2007 Act; and, to refuse his EUSS application.

4. ZA's appeal to the FtT was allowed on human rights grounds but was dismissed under the EUSS on the basis that ZA had not acquired permanent residence. The SSHD was granted permission to appeal and on 3 May 2023, UTJ Kebede set aside the decision in its entirety.

AS (Szuba)

5. AS is a national of Poland. He has resided in the United Kingdom since 2007 when he was 11. He has been convicted of multiple offences between 2013 and 2020, the most serious being a conviction on 14 October 2020 for possession with intent to supply drugs for which he was sentenced to five years' and three months' imprisonment. On 24 October 2021, the SSHD served a notice of intention to deport him on the basis that s32 of the 2007 Act applied. On 9 November 2021, AS' solicitors made representations, making a human rights claim, and asserting that he had made an application under the EUSS in February 2020. On 7 March 2022 he was asked to provide details of that application. The SSHD was not satisfied by what was provided that he had made an application under the EUSS in February 2020.

6. On 23 May 2022 the SSHD refused AS's human rights claim and made a deportation order against him. He was, however, satisfied that he had

been lawfully resident in the United Kingdom at the end of the transition period. On 30 May 2022, AS appealed against that decision under section 82 of the 2002 Act and on 30 June 2022 made an application under the EUSS which is still pending.

7. On 20 January 2023, having concluded that this was an appeal to which the EEA Regulations applied and that the relevant test was whether imperative grounds were met, FtTJ Dixon allowed the appeal. The SSHD was granted permission to appeal on the grounds that the FtT had wrongly considered the appeal under the EEA Regulations and had failed to give adequate reasons for finding that the AS had made an application under the EUSS in February 2020.

RR (Rudokas)

8. RR is a national of Lithuania. He came to the United Kingdom in about 2005. On 21 January 2020 he was granted settled status under the EUSS. On 13 July 2022 he was convicted of several offences which had started on 12 October 2021 and for which he was sentenced to two years' imprisonment. On 9 August 2022, the SSHD notified him that she intended to deport him pursuant to s32 of the 2007 Act; that he had a right of appeal under reg 6 of the CRA Regulations; and that consideration would be given to any representations and whether those would give rise to an appeal under s82 of the 2002 Act. A one-stop notice under section 120 of that Act was attached to that notification.

9. On 23 August 2022, RR appealed against the decision on the grounds that it breached his article 8 rights and that his deportation was not conducive to the public good. On 18 December 2022, the SSHD made a deportation order against him.

10. On 12 February 2023, the FtT allowed RR's appeal on human rights grounds. The SSHD was granted permission to appeal against that decision on the grounds that the judge had misdirected himself as to the law and had given inadequate reasons for his decision.

Procedural history

11. There have been two case management hearings in these appeals with a view to identifying the issues. These were to a substantial extent agreed. The AIRE centre was also granted permission to intervene.

12. The issues as identified in each of the appeals are set out in the form settled by the Upper Tribunal in the annex to this decision.

13. Subsequent to the hearing, and before an embargoed draft was circulated to the parties, the Court of Appeal handed down SSHD v AA(Poland) [2024] EWCA Civ 18. The SSHD drew attention to that decision in the response to the draft, and the panel then gave directions for written submissions on that case to be served. We have taken them into account in reaching our decision.

Broad outline of the issues

14. In these appeals we are concerned with the scope of the protection against deportation provided by the WA to those EEA citizens who had resided in the United Kingdom prior to 31 December 2020 and with the scope of protection afforded to such individuals by other domestic legislation. We are concerned also with the mechanism of how decisions to deport EEA nationals can be appealed and on what grounds.

15. The first issue we must consider is the scope of the WA: does it, as ZA and AS and the Aire Centre submit, apply regardless of whether ZA and AS were exercising Treaty Rights at the end of the implementation period so that they qualify for protection under Article 20 of the WA? Second, if so, should a decision to deport such a person be made under the EEA Regulations? Or, as the SSHD submits, is the correct position that for an individual to benefit from the WA, he or she must have been exercising Treaty Rights and so a decision to deport a person who had not done so should proceed under domestic law? Further, what are the relevant rights of appeal and grounds of appeal? And, does it make a difference if, as the SSHD submits, the test applied under either route is the same?

The Law

16. We have endeavoured to set out the law as it applies to EEA nationals and we are grateful to counsel, in particular Ms Smyth in her skeleton argument setting out the legal framework, for their assistance. We are also grateful to counsel for their further submissions which the panel considered necessary in the light of the Court of Appeal's decision in AA (Poland).

Background

17. The United Kingdom has left the EU. The transition period during which EU law had continued to apply came to an end at 11pm on 31 December 2020. At that point, EU Free Movement rights ceased to be effective or enforceable – see section 1 and schedule 1 of the ISSCA - and the EEA Regulations were revoked. Two discrete bodies of law, however, remained – retained EU law which is not relevant to these appeals, and the WA which has direct effect by operation of section 7A of EUWA 2018.

18. The rights of EU nationals under EU law to enter and reside in the United Kingdom are described in detail in Celik v SSHD [2023] EWCA Civ 921 at [10]-[18]. Prior to the United Kingdom's exit from the EU, by operation of section 7 of the Immigration Act 1988, those having a right to enter or reside under European Law did not (absent any exclusion or deportation order) require leave to enter or remain that would otherwise have been imposed by section 3 of the 1971 Act. Those rights to enter and reside were primarily set out, for domestic purposes, in the EEA Regulations, although those relied on the machinery of the 1971 Act to effect deportation.

19. Although these rights came to an end, one of the purposes of the WA was to provide reciprocal protection for United Kingdom and EU nationals who had exercised free movement rights, and to ensure that their rights under the WA were enforceable as part of the United Kingdom's withdrawal from the EU. Article 18 of the WA permits states to require applications for a new residence status to be made. The United Kingdom chose to require such applications to be made, setting up a residence scheme, the EUSS which enables EU, other EEA and Swiss citizens resident in the United Kingdom prior to 31 December 2020, and their family members, to obtain the necessary immigration status – a grant of leave pursuant to the Immigration Rules.

20. Despite being revoked by ISSCA, certain provisions of the EEA Regulations were preserved by the Grace Period Regulations and the Transitional Provisions Regulations.

The Grace Period Regulations

21. The purpose of the Grace Period Regulations was to preserve the residence rights enjoyed under the EEA Regulations at the end of the transition period, that is, 31 December 2020 until 30 June 2021, the date on which the "grace period" ended. In the case of those who made applications under the EUSS which remained undecided as at that date, the residence rights are preserved until a decision is made and any appeal rights are exhausted. Although the Grace Period Regulations do not make provision for late applications to be made, this can be done under the Immigration Rules as set out in Appendix EU in certain circumstances.

22. It is, however, important to note that (a) only some of the EEA Regulations continue to apply[1] and (b) they continue to apply only to a "relevant person" as defined in reg. 3(6).

23. To meet the "relevant person" test the person in question must have been lawfully resident (or had a right of permanent residence), in accordance with the EEA Regulations, immediately before 23:00 GMT on 31 December 2020 and does not yet have leave to enter or remain under the EUSS. Whether a person was "residing" in the United Kingdom at a time when it would be taken into account for purposes of calculating continuous residence under reg 3 of the EEA Regulations – see reg 3 (5)(b).

24. Reg 4 of the Grace Period Regulations also protects "an applicant", that is, a person who has made an in-time application under the EUSS and who was lawfully resident in the United Kingdom, or had a right of permanent residence, under the EEA Regulations at the end of the transition period until that application is finally decided.

25. It must, however, be noted in the context of deportation, that in order to come within reg 3 or 4 of the Grace Period Regulations "residence" immediately before 31 December 2020 requires falling within the meaning

[1] Grace Period Regulations regs. 3 (2) and 3(3)

of continuous residence as set out in reg.3 of the EEA Regulations which provided:

> **3**. (1) This regulation applies for the purpose of calculating periods of continuous residence in the United Kingdom under these Regulations.
>
> (2) Continuity of residence is not affected by—
>
> (a) periods of absence from the United Kingdom which do not exceed six months in total in any year;
>
> (b) periods of absence from the United Kingdom on compulsory military service; or
>
> (c) one absence from the United Kingdom not exceeding twelve months for an important reason such as pregnancy and childbirth, serious illness, study or vocational training or an overseas posting.
>
> (3) Continuity of residence is broken when—
>
> (a) a person serves a sentence of imprisonment;
>
> (b) a deportation or exclusion order is made in relation to a person; or
>
> (c) a person is removed from the United Kingdom under these Regulations.
>
> (4) Paragraph (3)(a) applies, in principle, to an EEA national who has resided in the United Kingdom for at least ten years, but it does not apply where the Secretary of State considers that—
>
> (a) prior to serving a sentence of imprisonment, the EEA national had forged integrating links with the United Kingdom;
>
> (b) the effect of the sentence of imprisonment was not such as to break those integrating links; and
>
> (c) taking into account an overall assessment of the EEA national's situation, it would not be appropriate to apply paragraph (3)(a) to the assessment of that EEA national's continuity of residence.

Withdrawal Agreement

26. The relevant provisions of the WA are set out in detail in Celik at [19] to [29]. Part Two of the WA makes provision in relation to citizens' rights. The scope of Part Two, and the rights and obligations arising under it are matters we will address in due course.

Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations ("CRRE Regulations")

27. Although these regulations are not directly applicable to any of these cases, they do form part of the framework whereby some rights conferred by EU law are preserved by the WA. In brief, these regulations preserve the EEA Regulations (as amended by the CRRE regulations) for a person who is "protected by the citizens' rights provisions" (reg 2(2)):

(2) For the purposes of paragraph (1), a person is protected by the citizens' rights provisions if that person—

(a) has leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules;

(b) is in the United Kingdom (whether or not they have entered within the meaning of section 11(1) of the Immigration Act 1971) having arrived with entry clearance granted by virtue of relevant entry clearance immigration rules; [i.e under Appendix EUSS or EU-FP]

(c) is in the United Kingdom (whether or not they have entered within the meaning of section 11(1) of the Immigration Act 1971) having arrived with entry clearance granted by virtue of Article 23 of the Swiss citizens' rights agreement; or

(d) may be granted leave to enter or remain in the United Kingdom as a person who has a right to enter the United Kingdom by virtue of—

(i) Article 32(1)(b) of the withdrawal agreement;

(ii) Article 31(1)(b) of the EEA EFTA separation agreement; or

(iii) Article 26a(1)(b) of the Swiss citizens' rights agreement, whether or not the person has been granted such leave.

(3) For the purposes of these Regulations, a person is also protected by the citizens' rights provisions if that person was protected by the citizens' rights provisions at the time that they became subject to a decision to remove them under regulation 23(6)(b) of the EEA Regulations 2016, including as those Regulations continue to have effect by virtue of these Regulations.

28. The rights under the EEA Regulations which are preserved are limited by these regulations, as the “EEA decision” against which an appeal under reg. 36 can lie is limited to a decision to remove a person from the United Kingdom. Reg 27 is preserved, subject to amendments the more important of which (para 4 of the Schedule) are to preserve the enhanced protection for those with permanent residence and ten years residence but with the change that “permanent residence” is amended to cover those eligible for, indefinite leave to enter or remain in the United Kingdom granted under Appendix EUSS or EU-FP. That mirrors the definition of “deportation order” within Appendix EUSS (see [50] below)

29. The appeal rights against an EEA decision in reg. 36 of the EEA Regulations are preserved, albeit with the omission of regs 36 (3) to (6) and (12) which imposed the requirement to provide certain documents in order for an appeal to be effective.

Criminality and deportation

30. We turn next to the specific provisions relating to the power to deport EU and EEA nationals.

31. As is well–established, prior to the United Kingdom’s exit from the EU, there were in effect two deportation regimes: one applicable to EU (and

EEA) nationals and their family members; one applicable to other foreign nationals (see e.g. Straszewski v SSHD [2015] EWCA 1245 at [12] ff and Goralczyk v Upper Tribunal [2018] CSIH 60 at [21] to [22]) but both regimes were subject to the requirement that deportation be deemed conducive to the public good but EEA nationals were subject to the regime under the 2007 Act, but subject to the exception set out in section 33.

Deportation under the EEA Regulations

32. Under the EEA Regulations, the deportation of an EEA national was a decision taken on grounds of public policy, public security or public health and so subject to the provisions of reg 27 which in turn gave effect to Chapter VI of the Citizens' Rights Directive.

Domestic law on deportation

33. Under section 5 of the 1971 Act, the SSHD may make a deportation order against a person whose deportation is deemed to be conducive to the public good, by operation of section 3(5)(a), or is a member of the family of such a person; or whose deportation has been recommended by a court (section 3(6)). We are concerned here only with the first category of persons.

34. Section 32 (4) of the 2007 Act deems the deportation of foreign criminals (as defined) to be conducive to the public good for the purposes of section 3 (5)(a) of the 1971 Act and requires the SSHD to deport such persons unless an exception set out in section 33 of the 2007 Act applies.

35. Prior to 31 December 2020, if the removal of the foreign criminal would breach his rights under the EU Treaties, an exception applied with the result that it was assumed neither that deportation was conducive to the public good, or that it was not conducive to the public good; the application of an exception did not however prevent the making of a deportation order.

36. The EUWA 2020 introduced s 3 (5A) of the 1971 Act which provides:

> (5A) The Secretary of State may not deem a **relevant person** [our emphasis]'s deportation to be conducive to the public good under subsection (5) if the person's deportation—
>
> (a) would be in breach of the obligations of the United Kingdom under Article 20 of the EU withdrawal agreement, Article 19 of the EEA EFTA separation agreement or Article 17 or 20(3) of the Swiss citizens' rights agreement, or
>
> (b) would be in breach of those obligations if the provision in question mentioned in paragraph (a) applied in relation to the person.

37. A relevant person is defined in section 3 (10) of the 1971 Act which, so far as is relevant, provides:

> (10) For the purposes of this section, a person is a "relevant person"—

(a) if the person is in the United Kingdom (whether or not they have entered within the meaning of section 11(1)) having arrived with entry clearance granted by virtue of relevant entry clearance immigration rules,

(b) if the person has leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules [*i.e*. *under EUSS*]

38. This definition must also, as the SSHD submits, be read subject to regs 3 (4) and 12 (1)(b) of the Grace Period Regulations which provide that "relevant person" within s 3(10) of the 1971 Act also includes a person who is a "relevant person" for the purposes of those Regulations. In effect, it expands s 3 (10) to include those who had resided here under the EEA Regulations prior to 31 December 2020 (a) until 30 June 2021, and (b) beyond that, if they had made an application under the EUSS before that date which is still pending or under appeal.

Automatic Deportation

39. As noted above at [34] the 2007 Act requires the SSHD to make a deportation order against a foreign criminal unless an exception applies. If no exception applies, then there is no need to assess whether deportation is conducive to the public good[2].

40. Section 33 of the 2007 Act provides:

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

(a) a person's Convention rights

(6B) Exception 7 is where—

(a) the foreign criminal is a relevant person, and

(b) the offence for which the foreign criminal was convicted as mentioned in section 32(1)(b) consisted of or included conduct that took place before IP completion day.

(6C) For the purposes of subsection (6B), a foreign criminal is a "relevant person"—

(a) if the foreign criminal is in the United Kingdom (whether or not they have entered within the meaning of section 11(1) of the Immigration Act 1971) having arrived with entry clearance granted by virtue of relevant entry clearance immigration rules

(b) if the foreign criminal has leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rule [i.e. EUSS]

(7) The application of an exception—

(a) does not prevent the making of a deportation order;

[2] See Hesham Ali v SSHD [2016] UKSC 60 at [10]

(b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;

but section 32(4) applies despite the application of Exception 1 or 4.

The WA in detail

41. Article 10 provides, in full, as follows:

"Personal scope

1. Without prejudice to Title III, this Part shall apply to the following persons:

(a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;

(b) United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter;

(c) Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter;

(d) United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union law before the end of the transition period and continue to do so thereafter;

(e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:

(i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;

(ii) they were directly related to a person referred to in points (a) to (d) and resided outside the host State before the end of the transition period, provided that they fulfil the conditions set out in point (2) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph;

(iii) they were born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period, whether inside or outside the host State, and fulfil the conditions set out in point (2)(c) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph and fulfil one of the following conditions:

— both parents are persons referred to in points (a) to (d);

— one parent is a person referred to in points (a) to (d) and the other is a national of the host State; or

— one parent is a person referred to in points (a) to (d) and has sole or joint rights of custody of the child, in accordance with the applicable rules of family law of a Member State or of the United Kingdom, including applicable

rules of private international law under which rights of custody established under the law of a third State are recognised in the Member State or in the United Kingdom, in particular as regards the best interests of the child, and without prejudice to the normal operation of such applicable rules of private international law;

(f) family members who resided in the host State in accordance with Articles 12 and 13, Article 16(2) and Articles 17 and 18 of Directive 2004/38/EC before the end of the transition period and continue to reside there thereafter.

2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.

3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter.

4. Without prejudice to any right to residence which the persons concerned may have in their own right, the host State shall, in accordance with its national legislation and in accordance with point (b) of Article 3(2) of Directive 2004/38/EC, facilitate entry and residence for the partner with whom the person referred to in points (a) to (d) of paragraph 1 of this Article has a durable relationship, duly attested, where that partner resided outside the host State before the end of the transition period, provided that the relationship was durable before the end of the transition period and continues at the time the partner seeks residence under this Part.

5. In the cases referred to in paragraphs 3 and 4, the host State shall undertake an extensive examination of the personal circumstances of the persons concerned and shall justify any denial of entry or residence to such persons."

42. Article 13 of the WA provides that those within scope of Article 10 are entitled to reside in the host State (in this case the United Kingdom), subjection to various limitations, and at Article 13 (4) provides:

13.4. The host State may not impose any limitations or conditions for obtaining, retaining or losing residence rights on the persons referred to in paragraphs 1, 2 and 3, other than those provided for in this Title. There shall be no discretion in applying the limitations and conditions provided for in this Title, other than in favour of the person concerned.

43. Article 18.1 and Article 18.3 of the WA provide:

1. The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.

...

3. Pending a final decision by the competent authorities on any application referred to in paragraph 1, and pending a final judgment handed down in case of judicial redress sought against any rejection of such application by the competent administrative authorities, all rights provided for in this Part shall be deemed to apply to the applicant, including Article 21 on safeguards and right of appeal, subject to the conditions set out in Article 20(4).

44. Articles 20 and 21 of the WA provide:

> Article 20
>
> 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.
>
> 3. The host State or the State of work may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Title in the case of the abuse of those rights or fraud, as set out in Article 35 of Directive 2004/38/EC. Such measures shall be subject to the procedural safeguards provided for in Article 21 of this Agreement.
>
> 4. The host State or the State of work may remove applicants who submitted fraudulent or abusive applications from its territory under the conditions set out in Directive 2004/38/EC, in particular Articles 31 and 35 thereof, even before a final judgment has been handed down in the case of judicial redress sought against any rejection of such an application.
>
> Article 21
>
> The safeguards set out in Article 15 and Chapter VI of Directive 2004/38/EC shall apply in respect of any decision by the host State that restricts residence rights of the persons referred to in Article 10 of this Agreement.

Appendix EU of the Immigration Rules

45. Appendix EU gives effect to Title II of Part 2 of the WA, setting out the rules for applications under the EUSS. There are three broad requirements: the applicant must make a valid application, must meet the suitability requirements and must meet the eligibility requirements. Rules EU14 and EU 11 set out the eligibility requirements for pre-settled and settled status.

46. Rule EU11 provides, so far as it is material:

> EU11. The applicant meets the eligibility requirements for indefinite leave to enter or remain as a relevant EEA citizen … where the Secretary of State is satisfied… that, at the date of application, one of conditions 1 to 7 set out in the following table is met:

...

Condition 3: (a) The applicant:

(i) is a relevant EEA citizen… and

(b) The applicant has completed a **continuous qualifying period** of five years in any (or any combination) of those categories; and

(c) Since then, no **supervening event** has occurred in respect of the applicant

47. "Continuous qualifying period" is defined in Annex 1, so far as is relevant to these appeals, as

> a period of residence in the UK and Islands… (a) which began before the specified date… and (b) during which none of the following occurred [absences from the United Kingdom] and(b)
>
> (ii) any period of absence due directly to an order or decision to which sub-paragraph (b)(iii) below refers, where that order or decision has been set aside or revoked; or
> (ii) the person served or is serving a sentence of imprisonment of any length in the UK and Islands, unless the conviction which led to it has been overturned; or
> (iii) any of the following in respect of the person, unless it has been set aside or revoked
>
> [note: the numbering is taken from the bundle and appears to be incorrect there being two sub-paragraphs (ii)]

48. "Supervening event" is defined in Annex 1 as occurring when:

> (a) a person has been absent from the UK and islands for (a) more than five consecutive years or
>
> (b) any of the following events has occurred in respect of the person, unless it has been set aside or revoked:
>
> (i) any decision or order to exclude or remove under regulation 23 or 32 of the EEA Regulations (or under the equivalent provisions of the Immigration (European Economic Area) Regulations of the Isle of Man); or
>
> (ii) a decision to which regulation 15(4) of the EEA Regulations otherwise refers, unless that decision arose from a previous decision under regulation 24(1) of the EEA Regulations (or the equivalent decision, subject to the equivalent qualification, under the Immigration (European Economic Area) Regulations of the Isle of Man); or
>
> (iii) an exclusion decision; or
>
> (iv) a deportation order, other than by virtue of the EEA Regulations; or
>
> (v) an Islands deportation order; or
>
> (vi) an Islands exclusion decision

49. With regard to suitability, we note that rule EU 15 provides:

EU15. (1) An application made under this Appendix will be refused on grounds of suitability where any of the following apply at the date of decision:

(a) The applicant is subject to a **deportation order** or to a decision to make a deportation order; or

(b) The applicant is subject to an **exclusion order** or **exclusion decision**

50. A deportation order is defined in Annex 1 as follows:

as the case may be:

(a) an order made under section 5(1) of the Immigration Act 1971 by virtue of regulation 32(3) of the EEA Regulations; or

(b) an order made under section 5(1) of the Immigration Act 1971 by virtue of section 3(5) or section 3(6) of that Act in respect of:

(i) conduct committed after the specified date; or

(ii) conduct committed before the specified date, where the Secretary of State has decided that the deportation order is justified on the grounds of public policy, public security or public health in accordance with regulation 27 of the EEA Regulations, irrespective of whether the EEA Regulations apply to the person (except that in regulation 27 for "with a right of permanent residence under regulation 15" and "has a right of permanent residence under regulation 15" read "who meets the requirements of paragraph EU11 or EU12 of Appendix EU to the Immigration Rules"; and for "an EEA decision" read "a deportation decision")

in addition, for the avoidance of doubt, (b) includes a deportation order made under the Immigration Act 1971 in accordance with section 32 of the UK Borders Act 2007".

51. We pause here to note that, as Ms Smyth submitted, the effect of the amendment of reg 27 of the EEA Regulations is that the enhanced right of protection granted by reg 27 (3) to those who had acquired permanent residence through five years' residence in accordance with the EEA Regulations is extended by the EUSS to those who had simply resided in the United Kingdom for that period.

52. In addition to the legislative provisions set out above, we note also that the SSHD has provided guidance on conducive deportation which sets out under which power a deportation decision should be made.

Grounds of appeal

53. Although the EEA Regulations have been revoked, as noted above [20], in a case where the Grace Period Regulations do not apply, the appeal rights under those regulations have been preserved by paragraphs 4 and 5 to Schedule 3 of the Transitional Provisions Regulations. Paragraph 5 (1) of those regulations draws a distinction between appeals and decisions taken prior to 31 December 2020 on the one hand (1(a) to 1(c)) and those taken after that date (1 (d)). That distinction is maintained in paragraph 6 (1)(cc) which sets out the rights of appeal in each of these different categories.

54. Thus, in an appeal against a decision taken under the EEA Regulations after 31 December 2020, the ground of appeal is whether the decision under challenge breached the appellant's rights under the EEA Regulations as they are continued in effect by the Transitional Provisions Regulations or the CRA Regulations, not whether they breached Treaty Rights.

55. Under the CRA Regulations a right of appeal is granted to those refused leave under Appendix EU. The permissible grounds of appeal are set out in reg. 8 and provide, so far as is relevant:

> **Reg. 8 - Grounds of appeal**
>
> (1) An appeal under these Regulations must be brought on one or both of the following two grounds.
>
> (2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of-"
>
> (a) [Chapter 1, or Article 24(2), 24(3), 25(2) or 25(3) of Chapter 2] , of Title II [, or Article 32(1)(b) of Title III,] of Part 2 of the withdrawal Agreement,
>
> (3) The second ground of appeal is that-
>
> (a) where the decision is mentioned in regulation 3(1)(a) or (b) or 5, it is not in accordance with the provision of the immigration rules by virtue of which it was made; …

56. Finally, a decision refusing a human rights claim can be appealed under sections 82 (1)(b) and 84 (2) of the 2002 Act on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

Discussion

The position prior to 31 December 2020

57. Prior to the United Kingdom leaving the EU, citizens of the member states (and their families as defined) were entitled to move to and reside in the United Kingdom under article 20 of the TFEU, so long as they did so within the limitations provided for in articles 21, 45 and 49 TFEU. Those rights were set out primarily in the Citizens' Rights Directive[3].

58. We observe that the right of free movement was not absolute; it is tied primarily to economic activity, that is, the exercise of Treaty Rights. That can be seen from Dano v Jobcentre Leipzig [2014] EUECJ C-333/13 at [71] and in article 7 (1) of the Citizens' Rights Directive. It is also evident from article 14 of that Directive that those who cease to meet the requirements can be removed, although not automatically. The position is different for those who had acquired the permanent right of residence.

59. A distinction is drawn in the Citizens' Rights Directive between expulsion per se and an exclusion order (or ban on entry – see article 15 (1) of the Citizens' Rights Directive); on an analogy, in domestic law terms, that is

[3] But not "derivative rights" based on interpretation of the TFEU by the ECJ in cases such as Zambrano [2011] EUECJ C- 34/09

the distinction between removing an individual and the imposition of a deportation order.

60. It follows from this that EU nationals may have been living in the United Kingdom prior to 31 December 2020 but may not have had a right of residence under EU law. That was the situation in Dano where Ms Dano, a Romanian national, had no right of residence in Germany.

61. We pause at this point to note that, as Ms Smyth explained, EU nationals who had simply resided in the United Kingdom, without not necessarily exercising Treaty rights, are entitled to status under the EUSS.

The Withdrawal Agreement

62. We accept that, as Ms Sabic and Mr Buley submitted, the WA has effect in domestic law by operation of section 7A (2) of EUWA 2018.

63. The SSHD submits that the WA in terms of personal scope is confined to those who had resided "in accordance with Union Law". As a result, and consistent with the sixth recital, not all EU nationals fall within the scope of the Withdrawal Agreement and the rights it confers, in particular the protection conferred by Article 20.

64. Ms Sabic for Mr Abdullah and Mr Buley for the AIRE centre submitted that it was not necessary for an individual to have been exercising Treaty Rights in order to qualify for the protection given by Article 20.

65. We are not persuaded that the creation of the EUSS, a scheme that covers those not within the scope of article 10 of the WA, alters the provisions of the WA. We do not accept that is the effect of article 13 (4), following Celik.

66. We do not accept either Mr Buley's submission that article 10 can be construed such that "exercised their right to reside in the United Kingdom in accordance with Union Law…" includes a person who had an enforceable right not to be removed. That is simply inconsistent with the Union law as set out above.

67. We are not persuaded either that the safeguards set out in articles 20 and 21 of the WA are applicable to those not within the scope of article 10. That submission is contrary to the express wording of article 10.1, the limitation in article 20.1 and the express reference to article 10 in article 21.

68. It is sufficiently clear from the structure of the WA that it continues the rights of those who fall within scope prior to them acquiring status pursuant to article 18, pending a decision on a timely application. 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. But, we do not accept that this interpretation or the Secretary of State's practice and guidance means that those who do not come within the scope of article 10 are, if they make an application, brought within scope of the WA. To do so would be to ignore the purpose of the procedure as set out in article 1 (a) which is to verify an entitlement to the residence rights set out in Title II which, as we have seen, is limited to those who had residence rights immediately before 31 December 2020.

69. Despite the submissions made, we do not consider that article 18.3 has the effect of applying articles 20 and 21 to all those who have made an application for a new residence status. First, this article comes within the ambit of article 10.1. Second, it is permissive; it allows a member state to require those who reside in accordance with the conditions set out in that title to apply. It does not state that any scheme put in place must apply only to those meeting the scope of article 10 (and the EUSS is wider). Further, it would make no sense for those out of scope of article 10 due to a lack of prior exercise of Treaty Rights to be granted rights in those states which do have a constitutive scheme like the EUSS but not in those states which do not have such a scheme. That it is open to a member state to operate a scheme more generous than that provided for in the Withdrawal Agreement does not operate to alter the wording of that agreement, whatever the position may be in domestic law. As was noted in R (Independent Monitoring Authority) v SSHD [2022] EWHC 3274 ("IMA") at [134]

> 134. I have mentioned that the defendant, in framing the EUSS, has adopted a policy which is more generous than what is required by the WA, in that leave may be granted under the EUSS by reference to "mere" residence in the United Kingdom at the relevant point in time, rather than residence in accordance with EU free movement rights. This policy, however, sheds no light on the interpretative task for this court.

70. Thus, the rights conferred by article 20 and 21 of the WA apply only to those within the scope of article 10 and those to whom article 18 extends those rights. In any event, we are not persuaded that any practice of the Secretary of State or the Immigration Rules is capable of altering the effect of the WA.

Domestic law

71. We turn next to the position under domestic law. At the outset, we observe that the EUSS is a constitutive scheme; the rights under it flow from the grant of status, unlike EU law rights of free movement where the documents issued only confirmed rights conferred by operation of law. That being so, it was necessary to provide protection of those free movement rights for those moving from EU free movement rights which ended on 31 December 2020 to rights granted under EUSS, hence the Grace Period Regulations which are necessary to comply with article 18 of the WA.

72. It follows also, as a matter of logic, that in the context of deportations, convictions in respect of conduct up until 31 December 2020 may not occur until well after that date, and in respect of persons who either had or did not have rights under the WA, and who may have been granted leave under the EUSS prior to conviction, or have a pending application at that point; or, may simply not have applied at that point.

73. We accept that, as Ms Smyth submitted, the effect of the EUSS as it is structured is that reg 27 of the EEA Regulations is applied by operation of the definition of "deportation order" as set out in Annex 1 to Appendix EU. We accept also that whether that test is met is a matter to be considered on appeal.

When do the EEA Regulations apply?

74. As noted above at [21] to [25] the EEA Regulations continued to apply, subject to modifications, to a "relevant person" during the "grace period", the latter being from 31 December 2020 to 30 June 2021. That is by operation of reg.3 of the Grace Period Regulations. They also apply (reg 4) to a person who made an application within the grace period and apply while that application is pending, that period extending until a final decision on appeal is made.

75. It is thus necessary to consider whether the residence relied upon, be that residence immediately before 31 December 2020, or the residence necessary to acquire permanent residence, falls within these provisions. If that is not the case, then the individual is not a "relevant person" for the purposes of the Grace Period Regulations, or possibly section 3 (5A) of the 1971 Act. In doing so, attention must be paid to the definition of continuous residence – see [25] above.

76. In addition, as noted above at [27] to [29], the EEA Regulations may apply by operation of the CRRE.

The domestic deportation regime

77. Ms Sabic and Mr Buley submitted that the Secretary of State was wrong to apply the automatic deportation regime to ZA, given the effect of article 18.3 and section 3(5A) of the 1971 Act.

78. Ms Sabic submitted that s3(5A)(b) applies article 18.3 to all those who have made applications, and that this supports her argument as to the scope of article 18, given that it is part of domestic law. In interpreting the effect of section 3(5A)(a), it is necessary to step back and consider what article 20 says. It sets out broad principles, but it is article 21 that applies those principles to an individual and it is that structure which is replicated in section 3(5A)(a) and (b). Section (5A)(b) cannot be interpreted as covering those who are not relevant persons either within section 3(10) or by operation of the Grace Period Regulations, relevant persons being those who were lawfully resident and who made timely applications. In effect,

section 3(5A) (a) gives force to article 20 and section 3(5A)(b) gives force to article 21.

79. There is an apparent tension between the automatic deportation regime under the 2007 Act and the provisions of the 1971 Act. Under section 3(5)(a) of the 1971 Act the SSHD has a discretion to deport someone if he considers it conducive to the public good. That requires an evaluation of that issue first. Section 3(5A) of that Act prevents the SSHD from deeming a deportation to be conducive to the public good if it would be contrary to articles 20 and 21 of the WA, that is, the EU deportation provisions.

80. In contrast, the regime under the 2007 Act imposes a duty on the SSHD to deport foreign criminals (see [34] above). Section 32(4) of the 2007 Act deems the deportation of a foreign criminal to be conducive to the public good. Not all EU nationals convicted of offences would meet the definition of foreign criminal, although in practice it is unlikely that the Secretary of State would seek to deport such persons. Section 32(4) is, however disapplied if Exception 7 applies. But, the application of that exception does not prevent the making of a deportation order.

81. The effect of this scheme is that once the Secretary of State has considered whether an exception applies, and concludes that it does not, he does not need to consider whether deportation is conducive to the public good and is then under a duty to make a deportation order.

82. In the cases of ZA and AS, a two-stage process was operated. A decision to make a deportation order was made, and submissions invited as to why a deportation order should not be made. The SSHD then made an order, having concluded that none of the exceptions were met. Implicit in that is a finding that deportation was justified by reference to the EU deportation regime as set out in the EEA Regulations as preserved and as provided for in article 20 and 21 of the WA.

83. We do not accept the argument that the making of a deportation order against an EEA national is contrary to the WA or for that matter the Citizens' Rights Directive. It is evident from the scheme enacted in Chapter VI of the Directive (and in particular article 31.4) that an expulsion decision can be taken before an appeal. If the appeal is successful, then the deportation order is revoked whereas if the decision under appeal was simply a decision to make a deportation order, then the order is not made.

84. In our experience, it was formerly the SSHD's practice to make a decision to deport an EEA national giving rise to a right of appeal but more recently, the SSHD has followed the process under the 2007 Act whereby a deportation order is issued and then the appeal follows.

85. Further, where there is no deportation decision taken under the EEA Regulations as preserved, and there is consideration under the EUSS rules, the means by which "deportation order" as defined in the EUSS has the effect of requiring the SSHD to consider whether the deportation is justified by reference to reg. 27 of the EEA Regulations has to be applied in

respect of pre-31 December 2020 conduct of EEA nationals. That applies also to those not within the scope of the WA but within scope of the EUSS. We are satisfied also, that the ground of appeal under the CRA Regulations permits that issue to be considered by a Tribunal and a finding reached as to whether an appellant's deportation is justified by reference to reg 27 of the EEA Regulations.

86. We do not accept Mr Buley's submission that there is in substance, any breach of the principle of equality in how the Secretary of State has dealt with cases either under the EEA Regulations or under the EUSS; in both cases the relevant tests under the EEA Regulations were applied.

87. The arguments he advances come down to sequencing. We accept that there will be cases where an application under EUSS is made late and after a deportation order was made. But, if such a person was at the time of the deportation decision out of scope of the WA, that cannot be faulted. The making of an application under the EUSS cannot retroactively make such a decision unlawful, and the EUSS as properly understood requires an evaluation of the deportation order in question by reference to the Chapter VI of the Citizens' Rights Directive.

Scope of the rights of appeal

88. As stated above at [53], paragraph 6(1)(cc) sets out the rights of appeal applicable to different categories. Thus, in an appeal against a decision taken under the EEA Regulations after 31 December 2020, the ground of appeal under section 84 of the Nationality, Immigration and Asylum Act 2002 (as inserted by the EEA Regulations) is whether an appellant's rights under the EEA Regulations as continued in force either by the Transitional Provisions Regulations or by the WA are breached.

89. As noted above at [55] a decision under the EUSS can be appealed on two grounds: that the decision is not in accordance with the EUSS rules or is contrary to the WA.

Appeals where human rights grounds apply

90. The ground of appeal in the case of a human rights decision is as set out in section 84 of the 2002 Act.

91. It is not in dispute that in an appeal raising article 8 of the Human Rights Convention a judge must adopt the five-step approach set out in Razgar [2004] UKHL 27 The focus of the submissions we heard was on the fourth question: is the decision in accordance with the law? As noted above at [9] this is an issue on which we received further submissions.

92. In her skeleton argument and in oral submissions before us, Ms Smyth for the Secretary of State submitted that whether a decision was "in accordance with the law" is to be decided in line with R(Bridges) v Chief Constable of South Wales [2020] EWCA Civ 1058 where the Court of Appeal set out [55] a statement of the principles:

55. The Divisional Court set out the general principles on this issue at [80]:

> "The general principles applicable to the 'in accordance with the law' standard are well-established: see generally per Lord Sumption in *Catt*, above, [11]-[14]; and in *Re Gallagher* [2019] 2 WLR 509 at [16] – [31]. In summary, the following points apply.
>
> (1) The measure in question (a) must have 'some basis in domestic law' and (b) must be 'compatible with the rule of law', which means that it should comply with the twin requirements of 'accessibility' and 'foreseeability' (*Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Sliver v United Kingdom* (1983) 5 EHRR 347; and *Malone v United Kingdom* (1985) 7 EHRR 14).
>
> (2) The legal basis must be 'accessible' to the person concerned, meaning that it must be published and comprehensible, and it must be possible to discover what its provisions are. The measure must also be 'foreseeable' meaning that it must be possible for a person to foresee its consequences for them and it should not 'confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself' (Lord Sumption in *Re Gallagher, ibid*, at [17]).
>
> (3) Related to (2), the law must 'afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise' (*S v United Kingdom*, above, at [95] and [99]).
>
> (4) Where the impugned measure is a discretionary power, (a) what is not required is 'an over-rigid regime which does not contain the flexibility which is needed to avoid an unjustified interference with a fundamental right' and (b) what is required is that 'safeguards should be present in order to guard against overbroad discretion resulting in arbitrary, and thus disproportionate, interference with Convention rights' (per Lord Hughes in *Beghal v Director of Public Prosecutions* [2016] AC 88 at [31] and [32]). Any exercise of power that is unrestrained by law is not 'in accordance with the law'.
>
> (5) The rules governing the scope and application of measures need not be statutory, provided that they operate within a framework of law and that there are effective means of enforcing them (*per* Lord Sumption in *Catt* at [11]).
>
> (6) The requirement for reasonable predictability does not mean that the law has to codify answers to every possible issue (*per* Lord Sumption in *Catt* at [11])."

93. We pause here to note that it does not appear from the judgment in AA(Poland) that this case or indeed any others on this issue were cited, nor does there appear to have been argument on the point.

94. In her oral submissions to us, Ms Smyth submitted that, applying those principles, and as Charles (Human Rights Appeal; scope) [2018] UKUT 00089 confirmed that the principles of United Kingdom deportation law met the relevant test, on no proper view could it be argued that the

deportation decisions in the cases of either ZA or AS were not in accordance with the law.

95. In her initial submissions, Ms Sabic submitted that the question of whether the decision to deport him was “in accordance with the law” required consideration not just of whether there is adequately accessible and sufficiently precise domestic law but that the test encompasses the requirement for a public authority to act in compliance with domestic law.

96. Mr Buley submitted that the WA is part of domestic law by operation of section 7A EUWA 2018, and that a deportation order will only be in accordance with the law if it does not breach the rights granted by the WA.

97. Since we heard these submissions the Court of Appeal has handed down AA (Poland) where Warby LJ held [67]:

> 67. The SSHD accepts that the Judge was right to find that removal would represent an interference with AA’s Article 8 rights. The Judge considered it followed from his finding that removal was contrary to the 2016 Regulations that the interference was “incapable of justification”. In one sense he was right. An interference can only be justified under Article 8(2) if it is “in accordance with the law”. If deportation could not be justified under the 2016 Regulations it could not have been justified by reference to s 32 of the 2002 Act either, and it would have had no lawful basis. That would be the end of the human rights argument. But that is not how the Judge approached the matter. It is clear from paragraphs [20] and [55] that he went on to consider the public interest question and concluded that it was answered by the proportionality assessment he had already conducted for the purposes of the 2016 Regulations.

98. And, at [71] to [72]:

> 71. In my judgement, the correct approach is as indicated in *Badewa.* The application of the 2016 Regulations is a legally distinct exercise from the assessment of a human rights claim. Where both arise, they should be addressed separately and in turn. The 2016 Regulations should be addressed first, including the assessment required by Regulation 27(5)(a) of whether deportation would comply with the EU principle of proportionality. The provisions of Part 5A of the 2002 Act have no part to play at that stage. But they must be addressed as part of the human rights assessment, if the public interest question arises.
>
> 72. The public interest question will not necessarily arise. Although deportation will commonly interfere with Article 8 rights that will not invariably be the case. If it is, the second question arises: whether deportation would be in accordance with the law. That will not be so if deportation would be contrary to the 2016 Regulations. In such a case the human rights analysis need go no further. But if deportation would be consistent with the 2016 Regulations and otherwise lawful the tribunal should address the public interest question in the way that Parliament has prescribed in Part 5A of the 2002 Act. Where, as here, the appellant is a "serious offender" the tribunal will have to apply s 117C(6).

99. It is submitted by ZA, AS and the AIRE centre, that a finding that a deportation decision is contrary to the EEA Regulations, and by extension the WA, will result in a finding that it is "not accordance with the law" and thus any article 8 appeal will succeed on that basis, it being unnecessary to consider proportionality within article 8. It is further submitted that this will also be the case where there is a finding in an appeal under the CRA Regulations that the decision was not in accordance with the relevant Immigration Rules.

100. While the Court of Appeal in AA (Poland) did not make express reference to the principles set out in Bridges we have no hesitation in concluding that they must have borne them in mind. We accept, also that the Court of Appeal did not consider the position where there is no appeal under the EEA Regulations. It does not decide what the position would be if there had been an appeal under the CRA Regulations.

101. In that context, we pause here to remind ourselves of the consequences of the finding that a decision to deport is contrary to the EEA Regulations, the WA or the EUSS. In doing so, we note Ms Smyth's acceptance before us that the consequence would be that the person who was successful in such an appeal would be that the deportation order would be revoked, and leave granted under the EUSS at which point the person in question would be a relevant person for the purposes of Exception 7 under section 33 of the 2007 Act and section 3(5A) of the 1971 Act. The effect of Exception 7 differs significantly from Exception 1[4] in the effect it has on section 3(5)(a) of the 1971 Act and whether a deportation is conducive.

102. We remind ourselves also of the difficulty posed by sections 117A to 117D, and in particular, 117C of the 2002 Act, as identified in AA (Poland). Unlike the situation in TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109, where a foreign criminal is involved, the policy as set out in the statute, is that they should be deported. Even were that overcome, an anomalous situation arises whereby, if the appeal is allowed on EEA Regulations Grounds (or under the CRA Regulations when leave is granted) Exception 7 would apply and all that flows from that, but if Exception 1 applies, as a result of allowing the appeal on human rights grounds, with a different result as to the conduciveness of deportation. This situation would be all the more anomalous were the EEA Regulations test to be considered as part of an assessment of proportionality in considering the fifth Razgar question that it is necessary to consider whether the requirements of the immigration rules are met.

103. Taking all of these factors into account and applying the principles set out in Bridges, we consider that because of the particular nature of the two deportation regimes, that it flows from a finding that a deportation decision is contrary to the EUSS rules because it is not justified by reference to reg. 27 will result in a finding that it is "not in accordance with the law" and thus any article 8 appeal would succeed on that basis. This

[4] See section 33 (1) of the 2007 Act

should not, however, be understood as applying to those situations where other provisions of the Immigration Rules are met; that still requires an assessment of proportionality in line with TZ (Tanzania).

104. In the light of this, there is all the more reason why any appeal under section 82 should be stayed pending a decision on any EUSS claim then under consideration.

105. Pausing there to take stock, we consider that the following principles apply:

(A) In an appeal where conduct prior to 11pm on 31 December 2020 give rise to a decision to deport an EEA citizen is in issue, it is necessary to determine whether, as at 31 December 2020 (and at the point a decision is taken):

(1) Was the EEA citizen resident in the United Kingdom?

(2) If so, for what continuous period (as defined in reg 3 of the EEA Regulations) before that?

(3) Was the EEA citizen's residence lawful, that is, in accordance with the EEA Regulations?

(4) Had the EEA citizen acquired permanent residence under the EEA Regulations?

(5) Had the EEA citizen made an application under the EUSS before the end of the Grace Period, that is 30 June 2021, and

(6) If so, is it pending?

(B) The answers to these questions will determine whether the EEA citizen came within the scope of the Withdrawal Agreement, the Grace Period Regulations or the EUSS. They will also determine whether that individual is a "relevant person" for the purposes of section 3 (5A) and (10) of the Immigration Act 1971 and section 33(6B) and (6C) of the UK Borders Act 2007, as expanded by regs 3(4) and 12(1)(b) of the Grace Period Regulations.

(C) In respect of conduct carried out prior to 31 December 2020, the EEA Regulations only apply directly to an individual (and thus gave rise to an appeal under those regulations) if:

(1) The decision was taken under the EEA Regulations prior to 31 December 2020 or in connection with an application pending under the regulations; or,

(2) The individual was an EEA citizen (or a family member of such a person) lawfully resident under the EEA Regs (including those who had acquired permanent residence under reg 3 the EEA Regulations) and either:

(i) The decision was taken by 30 June 2021; or

(ii) Was taken after that date but when a valid application under the EUSS had been made before 30 June 2021 and was still pending (but not if they had been granted leave under the EUSS); or

(3) Is a person who falls within the scope of the CRRE Regulations

(D) With the passage of time, the class of individuals falling under the EEA Regulations and entitled to a right of appeal under those provisions will diminish to very small numbers.

(E) If a decision to deport was not made under the EEA Regulations, then there is no right of appeal under those regulations.

(F) In an appeal under the CRA Regulations, it will be necessary to consider the application of reg. 27 of the EEA Regulations. This can arise under either ground of appeal as:

(1) if the EEA citizen is within the scope of the WA, then articles 20 and 21 of the WA apply;

(2) if not in scope of the WA, the definition of deportation order is such that only one which is justified by reference to reg. 27 of the EEA Regulations makes the EEA citizen ineligible for a grant of status under the EUSS.

(G) There is a distinction between (1) and (2) because under the definition of deportation order under the EUSS, only 5 years continuous residence (as opposed to lawful residence under the EEA Regulations) is needed to acquire enhanced protection.

(H) The effect of a finding that the deportation is not justified by reference to reg 27 of the EEA Regulations is that Exception 7 under section 33 of the United Kingdom Borders Act 2007 is met, and the Secretary of State's policy is then to revoke any deportation order, at which point leave to remain under the EUSS can be granted.

(I) 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.

(J) Where an appeal has been allowed under the EEA Regulations; or, in an appeal under the CRA Regulations on the basis the deportation decision is not justified by reference to reg 27 of the EEA Regulations, it follows that any linked appeal against the same decision under section 82 of the 2002 Act will be allowed on the basis that the decision under appeal was not in accordance with the law.

106. We then turn to the specific cases.

ZA

107. As noted in the Error of Law decision, ZA's case is that he had acquired permanent residence in accordance with the EEA regulations, prior to 31 December 2020, and that he had applied under the EUSS on 30 June 2021, and thus within the time limit. He was asked to provide evidence of his status, his solicitors replying to that request on 15 November 2021. On 3 May 2022, the Secretary of State signed a deportation order pursuant to section 32(5) of the 2007 Act, refused his human rights claim and refused his application under the EUSS, having not accepted that he had been resident in the United Kingdom for a continuous period of five years and had so not acquired permanent residence, nor was he satisfied that he had been lawfully resident immediately prior to 31 December 2020. He was not satisfied either that ZA met the suitability requirements as he was subject to a deportation order, concluding also by reference to reg 27 of the EEA Regulations that this was justified.

108. The judge found that ZA had not acquired permanent residence; that the decision to refuse the EUSS application was correct; and, nonetheless, deportation was disproportionate in article 8 terms.

109. Judge Kebede set that decision aside in its entirety, observing at [22] that the legal position was unclear.

110. In this case there were two rights of appeal: one under the 2002 Act against the decision to refuse the Human Rights claim consequent on the deportation order; and, the other under the CRA Regulations against the decision under the EUSS.

111. Applying the reasoning set out above, the correct sequence should have been to consider, in the context of the EUSS decision, whether ZA's conduct was such that his deportation was justified by reference to reg 27 of the EEA Regulations. That will require first a consideration of when or if he was exercising Treaty Rights (and whether he had acquired permanent residence) prior to 31 December 2020. If either of those were made out, then he would come within the scope of the Withdrawal Agreement. If he does not meet either of those conditions it is necessary to ask whether he was resident prior to 31 December 2020 and if that is so, was it for a continuous period of 5 years. If either of those is correct, then he falls within the EUSS. And, if he had acquired 5 years continuous residence, he benefits from enhanced protection.

112. Once those facts have been established, and decision made on the deportation issue, and thus on the EUSS appeal, then the section 82 appeal will need to be considered as ZA has rights of appeal under both.

113. While we accept that it may follow from the findings as to exercise of Treaty Rights that ZA fell within the scope of the WA, and that a decision should have been made under the EEA Regulations, that makes no material difference to the conduct of the appeal as the test would be the same.

114. We accept that the section 82 appeal will involve a consideration of whether the decision was "in accordance with the law" as part of the five-step process set out in Razgar [2004] UKHL 27. In the light of our findings, the appeal under section 82 would fall to be allowed on that basis, if ZA succeeds under the EEA Regulations.

115. Turning then to the list of issues in this appeal, we answer them as follows:

(i) ZA has a right of appeal under the CRA Regulations on both available grounds and a right of appeal under section 82 of the 2002 Act.

(ii) ZA does not have a right of appeal under the EEA Regulations as there is no decision under those regulations made. That would have been the case had he fallen within the scope of the WA at the relevant time, due to exercise of Treaty Rights as at 31 December 2020, a matter that needs to be resolved. But, in any event, the issue on appeal under the CRA Regulations is whether the test in reg 27 of the EEA Regulations is met, and thus the result is the same.

(iii) Whether ZA benefits from the imperative grounds test, or serious grounds level of protection turns on findings of fact to be made as to his residence in the United Kingdom, and whether during that period he was exercising Treaty Rights.

(iv) Whether the decision to deport ZA ought to have been done under the EEA Regulations turns on the answers to (iii) above

(v) For the reasons set out at (ii) above, it makes no difference whether ZA's deportation was regulated by the EEA Regulations or not, given the same test applies under the CRA Regulations. Nor would there be any material difference between the two appeals.

(vi) ZA's appeal should be allowed under section 82 on the basis that it was not in accordance with the law if he succeeds in demonstrating that the decision to deport him is not justified by reference to reg. 27.

116. The following issues therefore need still to be determined:

(i) whether ZA had acquired permanent residence prior to 31 December 2020

(ii) Or, alternatively whether he was exercising Treaty rights as at that date

117. The directions as to how the appeal will proceed are set out below.

AS (Szuba)

118. On 14 October 2020, Mr Szuba was convicted on a guilty plea of possession with intent to supply Class A drugs for which on 28 January 2021 he was sentenced to 5 years and 3 months' imprisonment. On 23 October 2021, the Secretary of State took a decision to deport him pursuant to the Immigration Act 1971 as he was a foreign criminal and

none of the exceptions set out in section 33 of the 2007 Act applied. His then solicitors wrote to the Secretary of State on 9 November 2021, submitting that the decision should have been taken pursuant to the EEA Regulations, not domestic law. The Secretary of State replied on 7 March 2022, seeking evidence that he had made an EUSS application in February 2020 as claimed.

119. On 23 May 2022, the Secretary of State, having treated AS's representations as a human rights claim, refused it, giving rise to a right of appeal, and serving on him a deportation order dated 23 May 2022.

120. On appeal, the judge noted at [8] that AS appealed on the basis that his case is governed by the EEA Regulations, recording at [10] that he had confirmed with the representatives that the appeal is governed by those regulations.

121. The judge directed himself at [16] that by operation of the CRA regulations at reg. 7 the substantive law governing the appeal is the EEA Regulations. Having heard evidence and submissions, the judge went on to find:

    (i) AS had made an application under the EUSS in February 2020 [27];

    (ii) AS had acquired permanent residence under the EEA Regulations [28], [29];

    (iii) AS qualifies for the highest level of protection – imperative grounds of public policy [30];

    (iv) AS did not present a sufficiently serious current threat [31];

    (v) Removal would not be proportionate [32].

122. The Secretary of State sought permission to appeal on the grounds that the judge had erred as he:

    (i) had no jurisdiction to consider the appeal under the EEA Regulations, the appeal being solely an appeal on human rights grounds under section 82 of the 2002 Act, the Grace Period Regulations not applying;

    (ii) had given inadequate reasons for finding that AS had made an EUSS application in February 2020;

123. Permission to appeal was granted on 24 February 2023.

124. In his response pursuant to rule 24, AS avers that the judge did not err in his approach to the law, and that if he did, it was immaterial, observing at [13] that the Secretary of State had not challenged many relevant findings. It is also averred that the judge had, having had regard to all the evidence, given sufficient reasons for concluding that AS had made an application under the EUSS in February 2020.

125. The relevant issues in this appeal were agreed.

126. The decision under appeal was a human rights decision and thus the right of appeal was under section 82 of the 2002 Act. There was no decision under the EEA Regulations or under the EUSS and so there was no appeal under the CRA or the EEA Regulations. On that basis, the FtT made a significant error [16] in concluding that the substantive law governing the appeal was the EEA Regulations, an error compounded at [17]. Even had AS made an application under the EUSS in February 2020, there was no decision under those regulations which gave rise to an appeal.

127. In the circumstances, we agree with Ms Smyth that the judge should have considered the appeal under section 82 (1) of the 2002 Act. He did not do so. Had he applied the five-step Razgar analysis, then he would have had to consider whether the decision was in accordance with the law, before considering whether it was proportionate. He did neither.

128. Whether that error was material turns primarily on whether the judge erred in finding that AS had made an application under the EUSS in February 2020. It is to that issue that we turn next.

129. With regard to the finding that AS had made an EUSS application in February 2020, we remind ourselves that as an appellate tribunal we should be reluctant to overturn a finding of fact made by a lower tribunal.

130. AS's evidence is that he had made an application for settlement at the same time as his mother and stepfather in February 2020, a point put to the Secretary of State in representations made on 9 November 2021. On 7 March 2022, he wrote to AS's solicitors seeking further information about that application. There is no indication in the bundle that there was a response to that letter, and in its Notice of Decision dated 23 May 2022, the Home Office stated [2] that AS had not provided documentary evidence of his application, nor that he had an outstanding application to the EUSS. There is, however, an email dated 7 June 2022 from AS's stepfather, stating that they do not have the confirmation email as Yahoo mail deletes the account after 12 months' inactivity. That email address is not specified. There is, further, an email from UK Visas sent Wednesday 15 June (presumably 2022), stating that they had closed a UK Visas and Immigration account registered to that address as a result of a phone call and that as a result, any applications linked to that account were deleted.

131. It appears from the Certificate of Application dated 11 July 2022 that AS had made an application under the EUSS on 30 June 2022.

132. There is no mention in AS's Witness statement of having made any application. The judge summarised his evidence as follows:

> 12. In summary, having adopted his witness statement, the appellant confirmed that he has made an application under the EUSS together with his mother and stepfather in February 2020 and that it had been indicated that that application had been pending but he did not receive a reference in respect of it. He contacted the Home Office from prison to enquire about the status of that application and was advised that the pending application would be

deleted and that he should resend the application by paper which he has done. The outcome of that application is pending.

133. Here, there was no documentary evidence that an application under the EUSS had been made. The email from the Home Office states simply that any application that had been made would be deleted which is not confirmation than an application had been made. On a proper analysis, it is the oral evidence, not the documents that indicate an application had been made then deleted.

134. Further, as Ms Smyth submitted, the judge does not engage with the letters from the Secretary of State which concluded that there was no evidence of an application being made. We accept that the Secretary of State's representative did not suggest that AS was not a credible witness (see decision at [28]) but it was still for AS to prove on the balance of probabilities that he had made an application in February 2020.

135. We do not consider that the reasoning in this case is adequate in the circumstances of the case, given the lack of any documentary evidence that an application was made and we note this is a case in which it is said that it was received but can no longer be found. AS's solicitors wrote to the Home Office on 9 November asking them to check their records. But the judge did not engage with this, or why the Home Office could find no record of the application.

136. Accordingly, we find that ground 2 is made out, and the finding that AS had made an application under the EUSS in February 2020 is unsustainable.

137. We accept that, in considering a human rights appeal under section 82 of the 2002 Act, it will be necessary, following Razgar to consider whether the decision was in accordance with the law, and whether the requirements of the Immigration Rules (including EUSS) had been met, that being relevant to proportionality. Here, having directed himself wrongly according to the law, and having reached an unsustainable finding of fact as to the making of an EUSS application, the judge did not address the issue of proportionality with reference to the law applicable to human rights appeals. Taking these factors together, we conclude that the error was material, given the fundamental error in approach to the relevant law.

138. For these reasons, we answer the issues raised in AS's appeal as follows:

(i) The scope of the appeal is confined to section 82 of the 2002 Act, a human rights appeal.

(ii) The judge erred in applying the EEA Regulations as they were not directly applicable, there being no decision under those Regulations.

(iii) The error in doing so is material for the reasons set out above.

(iv) The FtT did err in concluding that AS had made an application under the EUSS.

(v) The reasons for doing so were inadequate.

(vi) The FtT was entitled to consider the EEA Regulations but only indirectly in considering Appendix EU , given how deportation order is defined under that by reference to reg. 27 of the EEA Regulations. Whether AS fell within the scope of the WA depends on whether he had made an EUSS application before 30 June 2021, an issue to be determined.

139. We have given directions for the remaking of this appeal below.

Rudas Rudokas ("RR")

140. RR did not attend the hearing, nor was he represented. The panel is still unaware of any explanation for this. We are, however, satisfied that he was given due notice of the time, date and venue of the appeal and in all the circumstances of the case, we were satisfied that, bearing in mind the overriding objective, it would be fair and in the interests of justice to proceed to determine the appeal.

141. On 21 January 2020, RR was granted indefinite leave to remain under the EUSS. On 13 July 2022 he was sentenced to 2 years imprisonment in respect of acquiring, using, or possessing criminal property an offence with a start date of 12 October 2021. He was at the same time sentenced to a month's imprisonment in respect of each of two counts of possession of a prohibited weapon, all three sentences to be served concurrently.

142. On 9 August 2022, the Secretary of State wrote to RR, informing him that she had decided to make a deportation decision against him as a foreign criminal, pursuant to the 1971 Act and the 2007 Act as he had not shown that any of the exceptions set out in section 33 of that Act applied to him. He was also informed of his right of appeal under reg. 6 of the CRA and of the possible grounds of appeal.

143. In his grounds of appeal, RR, said that the deportation order breached his right to private and family life under article 8 of the Human Rights Convention, and that his deportation is not conducive to the public good.

144. On 17 October 2022, RR was served with a section 120 notice. On 25 October 2022, his solicitors wrote to the Secretary of State, explaining that he has lived in the United Kingdom since 2005, has a subsisting relationship with his partner who has ILR and that they have two British Citizen children.

145. RR's appeal was heard on 8 February 2023. In a decision dated 14 February 2023, the judge set out reg 27 and parts of Schedule 1 to the EEA Regulations and gave a self-direction with respect to article 8 of the Human Rights Convention. At [16] and [17], the judge wrote this:

> 16. Mr McBride and Mr Hussain both made helpful submissions that the test for proportionality in this case is to be found in Regulation 27 of the EEA Regulations 2016. Mr McBride accepted that the evidence in the Appellant's bundle showed that he was working in the UK back to April 2005, that he had

attained permanent residence under the EEA Regulations 2016 and was resident in the UK for more than ten years before his offence. On this basis, the Respondent must show imperative grounds of public security, the highest level, in order to deport the Appellant.

17. In considering the factors that weigh for and against the Appellant, I take into account Regulation 27(5)-(6) and Schedule 1 of the EEA Regulations 2016.

146. The judge concluded at [22]:

> There is no indication that the Appellant represents a significant future threat to the fundamental interests of society. I find that deportation in these circumstances is a disproportionate interference with his right to a private and family life, and the rights to a family life of Ms Paredinyte and their children. It follows from my findings that I allow the appeal.

147. The Secretary of State sought, and was granted permission to appeal on the grounds that the judge had erred by :

(i) Misdirecting himself in law as to the basis of the appeal which was under reg 6 of the CRA, the EEA Regulations having no relevance and exception 7 with section 33 of the 2007 Act not being applicable;

(ii) Failing properly to apply section 117C of the 2002 Act in assessing article 8 of the Human Rights Act.

148. Permission to appeal was granted on 29 March 2023.

149. As with any appeal, the starting point for any consideration is the decision made. In this case, it is a decision to make a deportation order pursuant to section 5 (1) of the 1971 Act which, by operation of reg. 6 of the CRA Regulations grants a right of appeal on the grounds set out in reg. 8 of those regulations.

150. The decision is manifestly not a decision under the EEA Regulations, and it is not a refusal of a human rights claim. Although, arguably, the grounds of appeal do raise such a claim, there is no decision on that issue. That said, the human rights issue was raised in response to a section 120 notice, and is thus potentially a new matter. The decision under appeal is not, however, a human rights decision for the purposes of section 113 of the 2002 Act.

151. Mr Buley had nothing to say about whether the decision in this case involved the making of an error of law but relied on his skeleton argument, arguing that by operation of section 7(1) of the Human Rights Act, the First-tier Tribunal had the jurisdiction to consider the compatibility of the Secretary of State's actions, and to consider if the actions were unlawful in terms of section 6 of that Act.

152. Regrettably, we conclude that the judge's decision in this appeal was fundamentally misconceived. There is no reference to the CRA Regulations, nor any indication why, wrongly, it was thought that the EEA Regulations were relevant given that they had been revoked. Given that

the criminal conduct that gave rise to the decision post-dated 31 December 2020, RR could not benefit from the protections offered by article 20 of the WA. Similarly, at best, the raising of human rights issues was a new matter, an issue not addressed, and the correct procedure was not followed; there was no written consent to the issue being raised and so as a matter of law, it could not be considered.

153. We turn next to section 7 of the Human Rights Act which, materially provides:

> **7 Proceedings**
>
> (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act.
>
> (2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.
>
> […]
>
> (6) In subsection (1)(b) "legal proceedings" includes—
>
> (a) proceedings brought by or at the instigation of a public authority; and
>
> (b) an appeal against the decision of a court or tribunal.

154. RR cannot rely on sub-section (1)(a) because it is restricted to the "appropriate court or tribunal", defined in subsection (2) to mean "such court or tribunal as may be determined in accordance with rules…". The only tribunals upon which section 7(1)(a) jurisdiction has been conferred by rules are the Special Immigration Appeals Commission and the Proscribed Organisations Appeals Commission. No provision has been made for the First-tier Tribunal.

155. In R (A) v B [2009] UKSC 12 the Supreme Court addressed that subsection, and how it differs from sub-section 1 (a). Lord Brown held [45]:

> In *R v Kansal (No 2) [2002] 2 AC 69* , 105-106 I said that section 7(1)(a) and section 7(1)(b) are designed to provide two quite different remedies. Section 7(1)(a) enables the victim of the unlawful act to bring proceedings under the Act against the authority. It is intended to cater for free-standing claims made under the Act where there are no other proceedings in which the claim can be made. It does not apply where the victim wishes to rely on his Convention rights in existing proceedings which have been brought against him by a public authority. His remedy in those proceedings is that provided by section 7(1)(b) , which is not subject to the time limit on proceedings under section 7(1)

(a) prescribed by section 7(5) ; see also *Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816* , para 90. *The purpose of section 7(1)(b) is to enable persons against whom proceedings have been brought by a public authority to rely on the Convention rights for their protection* [our emphasis added].

156. It is perhaps surprising that the AIRE Centre's submissions on section 7 simply do not engage with this decision or R v Kansal, let alone seek to distinguish Supreme Court authority. Section 7(i)(b) operates as a shield, not a sword. There is thus no question of any rights under section 7 being infringed by the CRA.

157. It follows from this that the decision of the First-tier Tribunal involved the making of an error of law, as the judge applied the wrong law, and failed to identify the relevant legislation under which the appeal could be brought, nor did he identify the relevant ground of appeal. On that basis alone, it must be set aside. Further, there is no arguable basis on which he could have considered whether the deportation decision was a disproportionate interference with Mr RR's article 8 rights.

158. Accordingly, we answer the issues raised in RR's appeal as follows:

(i) The right of appeal was under the CRA Regulations, the grounds being set out in reg 8, subject to reg. 9.

(ii) The FtT did not have jurisdiction to decide the appeal by reference to the EEA Regulations, as they did not apply.

(iii) There being no human rights decision, the permissible grounds of appeal did not allow the FtT to reach a decision on article 8 grounds.

159. We therefore set it aside, and remit the appeal to the FtT as it will be necessary to remake the decision. In doing so, we note Ms Smyth's request that the human rights claim raised under the section 120 notice should be considered by the First-tier Tribunal.

Signed Date: 20 February 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal

DIRECTIONS

1 The three appeals are to be de-linked and will be remade in separate hearings. We therefore set out below separate directions in respect of each appeal.

ZA

2 The appeal will be listed to be remade in the Upper Tribunal on a date to be fixed.

3 The Upper Tribunal will need to determine whether ZA had been residing in the United Kingdom as at 31 December 2020, if so for what continuous period; whether he had acquired permanent residence prior to then; and, the extent to which he had been exercising Treaty Rights prior to 31 December 2020. It may also need to determine whether ZA was continuously resident after 31 December 2020, and on what basis.

4 The parties are therefore directed to prepare and serve 10 working days before the next hearing in electronic form:

a. An agreed bundle including any further witness statements in respect of any witness including the appellant, it is intended to call in respect of ZA

b. a bundle of authorities

5 Skeleton arguments are to be exchanged 5 working days before the hearing

SA

1 The appeal will be listed to be remade in the Upper Tribunal on a date to be fixed.

2 A CMR will be held prior to that to determine what findings made by the FtT can be preserved, and to determine whether the appeal should be stayed pending a decision on AS' EUSS application.

RR

1 The Secretary of State has stated in his email of 14 February 2024 that: "*Mr Rudokas' human rights appeal can be dealt with by the FTT as a new matter in his existing appeal under the CRA Regulations as provided for in regulation 9.*

2 In the circumstances, we remit RR's appeal to the First-tier Tribunal for a fresh decision on all issues.

Annex 1 List of issues in Abdullah

CHRONOLOGY & LIST OF ISSUES

CHRONOLOGY

References (e.g., **[327]***) are to page numbers in the FTT Hearing Bundle unless otherwise specified*

8 Sept 1992: Abdullah ('A') born in Saudi Arabia. Family – parents (originally from Iraq) and siblings - later relocated to Netherlands as refugees and obtained citizenship there.

2008: A claims to have moved with his family move to the United Kingdom.
A claims to have studied and worked in the United Kingdom between 2008 to 2017.
His parents and siblings have settled status in the United Kingdom under the EU Settlement Scheme ('EUSS').

4 Jan 2010: A reprimanded for possession of Class B drug (cannabis) **[327]**

29 June 2010: A convicted of assault with intent to rob **[328]**
Sentenced to 12 months Community Rehabilitation Order ('CRO'), 60 hours Community Punishment Order ('CPO') [NB revised to 70 hours]

22 Sept 2010: A convicted of failing to comply with CRO/CPO (unpaid work requirement imposed) **[328]**

5 Jan 2011: A convicted of failing to comply with CRO/CPO (order revoked) **[328]**

5 May 2011: A's application for EEA residence card refused **[338]**

16 March 2014: A's daughter born (a British National)

3 Oct 2017: A convicted of restraining/obstructing PC (12-month conditional discharge) **[328]**

25 Oct 2017: A convicted of battery **[328]**
Restraining order, 15 days rehabilitation and 120 hours unpaid work imposed

28 Nov 2019: A involved in incident where he is alleged to have assaulted a third-party during a traffic dispute

30 June 2021: A made a EUSS application **[320]**

30 July 2021: A convicted of offence (inflicting GBH without intent) in connection with the 28 Nov 2019 incident and is sentenced to 18 months imprisonment (reduced on appeal to 12 months) **[343]**
A is described in sentencing remarks as having a previous conviction for assaulting his girlfriend in the United Kingdom [NB This is presumably the 25 Oct 2017 incident.]
A is also described as having a conviction for assault in the Netherlands.

A had pleaded not guilty to the offence.

9 Sept 2021: A begins prison sentence

11 Oct 2021: SSHD notify A of intention to deport due to his conviction **[348] [360]**

Decision stated to be made in accordance with the Immigration (European Economic Area) Regulations 2016 (the "2016 Regs") or the Immigration Act 1971 / United Kingdom Borders Act 2007 (s.32) (i.e., on the basis A was a foreign criminal).

15 Nov 2021: A's solicitors submit representations resisting deportation **[361]**

A argued that:

- He is an EU citizen in the United Kingdom with a right to permanent residence under the 2016 Regs acquired pre-31 December 2020.
- He does not meet the threshold for deportation having acquired a right to permanent residence in the United Kingdom
- He is an EU national who does not meet the threshold for deportation because he has lived and exercised treaty rights in the United Kingdom for a continuous period of at least 10-years and there are no imperative public security reasons for deportation.
- It would be disproportionate interference with A's Article 8 rights (family/private life in the United Kingdom).

31 Jan 2022: SSHD issues decision to detain A

25 March 2022: A released from prison **[207]**

3 May 2022: SSHD notifies A of decision to:

- Refuse A's EUSS application on the basis of (i) suitability (Appendix EU Immigration Rules, Rule 15), because A was subject to a deportation order of even date in connection with his criminal conviction(s) and (ii) inability to show continuous qualifying period of residence because he cannot include time spent in prison (Rule 14) and could not show any other conditions for ILR applied **[309]**. Letter notifies A of a right of appeal (at para 43).
- Refuse A's human rights claim and make a deportation order **[481].** Letter notifies A of right of appeal against decision to refuse his human rights claim pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act").
  - Deportation order stated to be made under the United Kingdom Borders Act 2007 and Immigration Act 1971 on the basis that the SSHD was not satisfied that A was a person to whom the 2016 Regs applied (no evidence lawfully resident in United Kingdom pre-31 December 2020): see paras. 10 and 11 of letter.

9 May 2022: A served with deportation decision/order

9 May 2022: A files appeal on basis that the SSHD's decision **[15]**:

- In respect of his human right's claim was unlawful because it breached his Art. 8 rights (private/family life).
- In respect of his EUSS application was (i) not in accordance with Appendix EU to the Immigration Rules (Rules 11 – 15) or the Withdrawal Agreement (the "WA") and (ii) breached A's rights under the 2016 Regs (regs. 23(6)(b) and 27)

2 Nov 2022: Appeal heard by FTT (Judge Coutts) against both the human rights and EUSS decisions

- Appellant's case set out at paras 7-12 and 19 of the FTT judgment: (i) acquired permanent right of residence in the United Kingdom by reason of being a national of the Netherlands and by exercising treaty rights since he arrived in the United Kingdom in or about 2008; (ii) this continued uninterrupted until he was convicted for assault on 30 July 2021 and sentenced to prison term; (iii) the SSHD was wrong to consider his deportation on conducive grounds and should have applied a test of public policy, public security or public health grounds which were relevant to his status as an EEA citizen; (iv) the decision breached his Article 8 rights (genuine and subsisting relationship with daughter).

20 Dec 2022: FTT decision handed down

- Human rights appeal succeeds (breach of Art.8 rights because of relationship with daughter meaning exception to deportation applied / deportation would be unduly harsh (paras 37-39))
- EUSS appeal does not succeed. FTT not satisfied that A had been exercising treaty rights for a continuous period of five years and concluded he had not acquired permanent right of residence in the United Kingdom. the SSHD therefore entitled to take forward deportation on conducive grounds. FTT not entitled to look behind the deportation order (paras 28-31).

23 Dec 2022: The SSHD seeks permission to appeal the human rights decision on basis of (i) material error of law in and (ii) failure to give adequate reasons for finding that deportation would be unduly harsh

11 Jan 2023: Permission to appeal granted by FTT in respect of both human rights and EUSS decisions but on alternative ground:
Did judge err in failing to consider whether deportation capable of being justified in accordance with the 2016 Regs rather than considering deportation solely under domestic deportation regime given criminal conduct took place pre-31 December 2020?

- Judge's explanation for this set out at paras 4-11 of the PTA Decision. In summary: (i) the SSHD had conceded in her human rights' decision letter that A's proposed deportation falls to be considered under 2016 Regs; (ii) additionally Article 20.1 of the WA and [7.3] of the Explanatory Memorandum to the 2020 Regulations both confirm in broad terms that the 2016 Regs will continue to apply to EEA Citizens in respect of conduct predating end of the transition period (the "TP"); (iii) A's conduct pre-dated the TP; (iv) the 2016 Regs therefore apply, not the domestic deportation regime. The FTT therefore arguably erred in failing to consider whether A's proposed deportation was capable of being justified under the 2016 Regs. Permission to appeal granted against both decisions because FTT's consideration of the human rights appeal was arguably tainted consideration of the conjoined EUSS appeal (para 11).
- A raised this issue in Rule 24 response (citing *Smith* [2019] UKUT 00216 (IAC)) and agreed permission to appeal should be granted ("*the* [FTTJ] *failed to properly consider the relevant provisions under* [regs 23(6)(b) and 27 of the 2016 Regs] *and Article 20.1 of the* [WA] *and 7.3 of the Explanatory Memorandum to the Citizens Rights (Applicant Deadline and Temporary Protection) (EU Exit) Regulations 2020*").
- SSHD agreed that this argument could be raised on appeal.

4 May 2023: UT (Judge Kebede) grants SSHD's appeal on basis that:

- Judge's decision on the human rights appeal was devoid of proper reasoning (para 21)
- UT considered it had not been able to resolve the issue of whether the 2016 Regs or domestic deportation regime should have been applied because parties unable to clarify applicable law (paras 20 and 22). Judge Coutts did not deal with this issue.

FTT's decision set aside in its entirety (para 23)
Directed that the decision be remade in the UT (including possible further oral evidence) and that legal position *vis* what deportation regime applied needed to be determined as part of this process (para 24)
UT identified what it considers to be the issues in dispute (para 27)

LIST OF ISSUES

1. For the Home Office (pursuant to para. 27(a)(i) of the UT's decision): the SSHD to provide "*confirmation of the relevant decision made in relation to*

the appellant's deportation, given the apparent inconsistency between the documents at Annex K and M of the Home Office bundle, both dated 3 May 2022."

2. What are the relevant rights of appeal arising from the SSHD's decision?

3. In respect of A's appeal under s.82 of the 2002 Act:

    a. Should A's human rights claim be allowed, and if so, on what basis?

4. In respect of A's appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the Appeals Regs"):

    a. What were the available grounds of appeal?

    b. Did A's deportation have to be considered by reference to the EU law test in Chapter VI of the Directive pursuant to the WA, and if so, why?

    c. In order to answer that question, does it need to be determined whether or not A was exercising Treaty rights before the end of the transition period, and if so, was A exercising such rights?

    d. If the EU law test applied:

        i. What level of protection did A enjoy against deportation under that test (which includes consideration of whether A enjoyed a right of permanent residence)?; and

        ii. Is his deportation justified by reference to the EU law test?

    e. As to the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regs"):

        i. Is it relevant to consider whether A's deportation was regulated by the 2016 Regs, and if so, why?

        ii. If it is relevant, was A's deportation regulated by the 2016 Regs (including the relevant statutory provisions which apply the 2016 Regs notwithstanding their revocation)?

iii. What are the consequences, if any, of the 2016 Regs applying in A’s case?

Annex 2 - List of issues and Chronology in SSHD v Szuba

CHRONOLOGY & LIST OF ISSUES

CHRONOLOGY

References in the form **[A/pg.no]** *(e.g.,* **[A/78]***) are to page numbers in the Appellant's FTT Hearing Bundle unless otherwise specified*

References in the form **[R/pg.no]** *(e.g.,* **[R/78]***) are to page numbers in the Respondent's FTT Hearing Bundle unless otherwise specified*

1 Feb 1996:	Szuba (Polish national) ('S') born
Aug 2007:	S moved to the United Kingdom aged 11 and has lived continuously in United Kingdom since
2007 – 2014:	S was in education and acquired permanent residence as a student
17 Sept 2013:	S convicted of intimidating witness/juror with intent to obstruct/pervert/interfere with justice (9 months referral order) **[A/78]**
10 Jan 2014:	S convicted on 3 counts of resisting/obstructing a PC (offence committed while on bail) (one month added to existing referral order)
13 Aug 2014:	S convicted of Class A drug possession (12-month community order)
11 Sept 2014:	S cautioned for Class B drug possession
5 Feb 2015:	S convicted of assault occasioning ABH (3 months imprisonment suspended for 18 months, 60 hours unpaid work and 12-month supervision requirement)
7 Sept 2017:	S convicted on 2 counts of driving under the influence (fine and 15-month driving disqualification ('DQ'))
26 Jan 2018:	S's daughter born (British national as S's partner is a British national) **[A/489]**
2 Aug 2018:	S convicted of driving while DQ (fine and 8-month DQ)
24 Sept 2018:	S convicted on two counts of driving under the influence and while DQ (1-year Community Order ('CO'), unpaid work requirement, 3-year DQ)
19 Dec 2018:	S convicted of failing to comply with CO (CO continued and fine)
17 May 2019:	S convicted of failing to comply with CO (CO continued and fine)
13 Sept 2019:	S convicted of failing to comply with CO (CO continued and fine)
10 Oct 2019:	S arrested in connection with drug dealing (Class A and B drugs)
Feb 2020:	S made application under EU Settlement Scheme ('EUSS') [NB This was a finding of fact in the FTT but is challenged by the SSHD (see below)]

2 Aug 2020: S again arrested in connection with drug dealing (Class A) while released under investigation in connection with 10 Oct 2019 arrest

3 Aug 2020: S detained in prison(?) **[A/22]**

14 Oct 2020: S convicted on 3 counts of intent to supply Class A, 2 counts of intent to supply Class B drugs and acquiring/using criminal property **[A/79] [R/8]**

28 Jan 2021: S sentenced to prison (five years and three months imprisonment) **[A/529] [R/14]**

4 May 2021: S sentenced to three months imprisonment in default of fine **[A/529]**

24 Oct 2021: S served notice of decision to deport **[R/57]**

- Decision made under the United Kingdom Borders Act 2007/Immigration Act 1971

9 Nov 2021: S's sols provide submissions in response to deportation decision, including raising human rights claim **[A/39]**

7 March 2022: S asked to provide evidence of EUSS application / documents in support of status **[R/481]**

24 March 2022: S makes SAR request to HMRC **[R/487]**

6 April 2022: S responds to 7 March 2022 request but not considered to have provided sufficient evidence of EUSS application

23 May 2022: SSHD decision to:

- Make a deportation order, including because of convictions. SSHD made decision under domestic regime (United Kingdom Borders Act 2007/Immigration Act 1971) **[A/97]**
- Refuse A's human rights claim **[A/75]**.
- Letter notes that while S claims to have submitted an online application for the EUSS, the relevant evidence had not been provided to show that this had been done. Therefore, there was no evidence that S had an outstanding application to the EUSS.

30 May 2022: S appealed against (i) human rights claim refusal and (ii) deportation order on the basis that **[A/67]**:

- It breached his rights under EU law. S claimed he benefitted from protection under the Immigration (European Economic Area) Regulations 2016 (the "2016 Regs") on the basis he had exercised treaty rights for at least five years and had been continuously resident for at least ten years, with the date of the offence being pre-31 Dec 2020.
- It would breach his Article 8 rights (relationship with daughter and partner)

30 June 2022: S applies under EUSS again allegedly on SSHD advice (previous application deleted)

21 Dec 2022: Appeal heard (Judge Dixon)

- Proceeded on the basis that the 2016 Regs applied (para 10)

20 Jan 2023: Appeal allowed on basis imperative grounds for deportation not shown and deportation to Poland would not be proportionate

3 Feb 2023: SSHD appeals on basis that:

- The FTT erred in disposing of the appeal under the 2016 Regs when the only appeal brought was against the SSHD's refusal of S's human rights claim
- The FTT gave inadequate reasons for finding that S had made a EUSS application in Feb 2020

24 Feb 2023: PTA granted on both grounds (Judge Curtis)

- S has filed Rule 24 Response opposing appeal, including on the basis that (i) even if the judge erred in disposing of the appeal under the 2016 Regs, that error made no material difference to the outcome of the hearing because of the findings of fact made by the FTT and (ii) the FTT gave adequate reasons for its decision vis the Feb 2020 EUSS application

18 March 2023: S released from prison(?) **[A/22]**

LIST OF ISSUES

1. What is the source and scope of S's right of appeal to the FTT?

2. In light of the above, did the FTT err in deciding, for the reasons it gave at [16]-[17], that the substantive law governing S's appeal was the Immigration (European Economic Area) Regulations 2016 ("2016 Regs"), as saved?

3. If so, is the error material such that the FTT decision is required to be set aside and re-made?

4. Did the FTT materially err in deciding that S had made an application under the EUSS in February 2020?

5. Did the FTT give adequate reasons for its finding of fact that S made an EUSS application in February 2020?

6. Without prejudice to the above, in deciding the appeal additional potential issues are:

    a. Was the FTT entitled to apply the 2016 Regs when determining an appeal on human rights grounds, and if so, why?

b. Even if the FTT did not err in respect of its decision that S had made an application under the EUSS in February 2020, would that have entitled the FTT to decide the appeal by reference to the 2016 Regs absent a relevant decision from the SSHD giving rise to a right of appeal in which those 2016 Regs (or the underpinning requirements in the Withdrawal Agreement) fell to be considered?

c. Was the FTT entitled to consider S's appeal and deportation by reference to the EU law test in Chapter VI of the Directive 2004/38EC pursuant to the Withdrawal Agreement or otherwise, and if so, on what basis? In particular, what is the scope and relevance of Article 20 and 21 of the Withdrawal Agreement?

d. Whether the position under the Withdrawal Agreement, including appeal rights, is reflected in relevant domestic legislation?

e. Was S required to have taken any steps, such as making an EUSS application, to benefit from the Withdrawal Agreement?

Annex 3 - List of issues and Chronology in SSHD v Rudokas

CHRONOLOGY & LIST OF ISSUES

CHRONOLOGY

References (e.g., **[65]***) are to page numbers in the SSHD Appeal Bundle unless otherwise specified*

16 Dec 1985:	Rudokas ('R') born (Lithuanian national)
2005:	R moves to United Kingdom
26 Feb 2013:	R's son (British citizen) born to R and his partner, also a Lithuanian national who has EU settled status **[65]**
26 Nov 2016:	R's daughter (British citizen) born
21 Jan 2020:	R granted indefinite leave to remain under EU Settlement Scheme ('EUSS')
13 July 2022:	R convicted of money laundering/weapons possession offences (2-year prison sentence and POC (£384,120.19)) **[8]** R pleaded guilty to the offences of which he was convicted, on one occasion only doing so after the jury had been sworn in.
9 Aug 2022:	SSHD gives notice of Stage 1 decision to deport under United Kingdom Borders Act 2007 / Immigration Act 1971 **[11]**
23 Aug 2022:	R appeals 9 August 2022 Stage 1 decision to deport on (i) human rights grounds (Art. 8) and (ii) that his deportation is not conducive to the public good (Immigration Act 1971 and United Kingdom Borders Act 2007) **[47]** Also stated that his EU right to free movement is being restricted. R does not provide substantive representations in support
13 Oct 2022:	R placed in immigration detention **[71]**
18 Oct 2022:	SSHD confirms decision to deport in Stage 2 decision and makes deportation order under s.32(5) United Kingdom Borders Act 2007 **[27]** [NB R did not seek to appeal Stage 2 decision]
25 Oct 2022:	R provides representations in support of Stage 1 decision appeal **[63]** These are not received by SSHD until 4 Jan 2023 **[4]**
11 Nov 2022:	Service of Stage 2 decision and deportation order on R confirmed **[71]**
25 Jan 2023:	R granted immigration bail
27 Jan 2023:	R released from immigration detention
8 Feb 2023:	R's appeal against the Stage 1 decision heard by FTT (Judge Ficklin) Dealt with on the basis of EEA Regulations 2016
12 Feb 2023:	Appeal allowed

Held that deportation would be a disproportionate interference with Article 8 rights (para 22)

Feb 2023: SSHD applies for permission to appeal on two grounds:

- The FTT erred in law in determining the appeal on the basis of EEA Regulations 2016. It should have been dealt with under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 since the decision was made under the United Kingdom Borders Act 2007/Immigration Act 1971 because R was convicted post-31 December 2020.
- The decision on the human rights issue was inadequately reasoned/infected by a misdirection in law, including failure to consider/apply the unduly harsh test.

29 March 2023: Permission to appeal granted (Judge Sills)

Considered that the decision appears confused as to whether the appeal was under the EEA Regulations 2016 or on human rights grounds.

LIST OF ISSUES – *TO BE DETERMINED AT ERROR OF LAW HEARING UNLESS PARTIES AGREE THERE WAS AN ERROR OF LAW*

1. What was the scope of R's right of appeal against the decision of 9 August 2022?

2. In light of the above, did the FTT have jurisdiction to decide the appeal by reference to the test for removal on public policy grounds under the Immigration (European Economic Area) Regulations 2016? If so, on what basis?

3. If, which is unclear, the FTT decided the appeal on Article 8 grounds, did the FTT have jurisdiction to determine the appeal on that basis, and if so, why?

4. If the answer to that question is yes, did the FTT nonetheless materially err in its approach to Article 8, in particular because:

   a. It misdirected itself in relation to the facts, or failed to have proper regard to all relevant factors (para. 10 of SSHD's grounds)? and/or

   b. It erred in its approach to s.117A of Nationality, Immigration and Asylum Act 2002 (para. 11 of SSHD's grounds)? and/or

   c. It failed correctly to direct itself, or to apply, the "unduly harsh" test (paras. 12 to 14 of SSHD's grounds)?

2. Did the FTT give proper reasons for its decision?