IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000093

First-tier Tribunal No:
HU/55418/2022
LH/01200/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 30 December 2024

Before

MR JUSTICE JULIAN KNOWLES
UPPER TRIBUNAL JUDGE BLUNDELL

Between

DIOGO MONTEIRO SANCHES CUNGA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Sonia Ferguson of counsel, instructed by Freemans Law LLP
For the Respondent: Edward Terrell, Senior Presenting Officer

Heard at Field House on 31 October 2024

DECISION AND REASONS

1. We heard this appeal in the morning of 31 October 2024. We reserved our decision at the end of the hearing. We discussed the case after we had risen and decided that the appeal should be dismissed for the reasons below. It was agreed that UTJ Blundell would write the decision, which would then be considered and approved by Julian Knowles J in the usual way.

2. The draft decision was sent to Julian Knowles J the following day. Unfortunately, however, Julian Knowles J was indisposed and unable to consider the draft decision, and that is likely to be so for the foreseeable future. In the circumstances, the parties agreed at a case management hearing on 18 December 2024 that the Upper Tribunal should issue the decision of UTJ Blundell as its decision on the appeal.

Introduction

3. The appellant appeals with the permission of Upper Tribunal Judge Sheridan against the decision of First-tier Tribunal Judge Curtis. By his decision of 23 February 2023, Judge Curtis ("the judge") dismissed the appellant's appeal against the respondent's refusal of his human rights claim. As we shall come to explain, that human rights claim was made in response to the respondent's decision to make a deportation order against the appellant as a result of his offending in the UK between March 2016 and October 2020.

Background

4. The appellant is a Portuguese national who was born on 15 June 1998. He claims to have entered the United Kingdom with his mother in June 2001, when he was three years old.

5. The appellant's mother made an application for a permanent residence card on 23 August 2008. That application was refused because there was insufficient evidence of residence and because the appellant's mother had confirmed in correspondence with the Secretary of State that she had been in receipt of income support since 2002 but had not provided any evidence to show that she was unfit for work. The appellant and his mother did not appeal against that decision but they remained living in the UK.

6. The appellant committed various criminal offences from March 2016. The most significant offences were committed on 21 June 2016 and 18 June 2020.

7. On the former date, the appellant was in possession of class A drugs (cocaine) with intent to supply. On 22 September 2016, he was sentenced at Snaresbrook Crown Court to two years' detention in a young offenders' institution. On the latter date, the appellant was in possession of cannabis with intent to supply. On 18 October 2021, he was sentenced at Snaresbrook Crown Court to eighteen months' imprisonment for that offence.

8. Also on 18 October 2021, the respondent wrote to the appellant. She noted his most recent conviction. She stated that the appellant fell within the definition of a foreign criminal in the UK Borders Act 2007 because he had received a sentence of more than twelve months for that offence. She concluded that she was required to make a deportation order against the

appellant because none of the exceptions to deportation applied to him. She had therefore decided to make such an order. The letter continued, stating at Part 2 that the Secretary of State had deemed the appellant's deportation to be conducive to the public good. She stated that there was no right of appeal against this decision, but that the appellant was entitled to make representations against his deportation. Attached to that letter was a table setting out the types of reasons which might be advanced against deportation.

9. The appellant made representations against his deportation. He emphasised that he had been in the UK since the age of three and he said that he had fallen in with the wrong crowd whilst living in one of the poorest boroughs of London. He stated that he was remorseful. His mother also made representations against his deportation.

The Deportation Order

10. On 9 May 2022, the Secretary of State issued a deportation order against the appellant. The order stated that it was made under the Immigration Act 1971 and the UK Borders Act 2007. It was in these terms:

> Whereas Diogo Monteiro Sanches Cunga is a foreign criminal as defined by section 32(1) of the UK Borders Act 2007;
>
> The removal of Diogo Monteiro Sanches Cunga is, under section 32(4) of that Act, conducive to the public good for the purposes of section 3(5)(a) of the Immigration Act 1971;
>
> The Secretary of State must make a deportation order in respect of a foreign criminal under section 32(5) of the UK Borders Act 2007 (subject to section 33).
>
> Therefore in pursuance of section 5(1) of the Immigration Act 1971, once any right of appeal, that may be exercised from within the United Kingdom under section 82(1) of the Nationality, Immigration and Asylum Act 2002 is exhausted, and said appeal is dismissed, or if Diogo Monteiro Sanches Cunga does not have a right of appeal that may be exercised from within the United Kingdom, the Secretary of State, by this order, requires the said Diogo Monteiro Sanches Cunga to leave and prohibits him from entering the United Kingdom so long as this order is in force.

11. The order was accompanied by a letter of the same date, which stated that the appellant's human rights claim had been refused, as a result of which the respondent did not accept that the appellant fell within the exceptions to deportation in section 33 of the UK Borders Act 2007. Reasons were given for the refusal of the human rights claim. The letter stated that the appellant did not have a right of appeal against the decision to deport him but that he could appeal against the refusal of his human rights claim.

The Appeal to the First-tier Tribunal

12. The appellant appealed to the First-tier Tribunal. In the Appeal Skeleton Argument which was provided in support of the appeal, the appellant submitted that the appeal fell to be considered under the Immigration (EEA) Regulations 2016 ("the EEA Regulations") and, in the alternative, that his deportation would be unlawful under section 6 of the Human Rights Act 1998.

13. The respondent reviewed the decision in light of those submissions. In her Review of 5 December 2022, she did not accept that the appellant had any right to be considered under the EEA Regulations as he was not a relevant person who was lawfully resident in the UK before IP Completion Day. The respondent noted that the appellant's mother had been granted settled status under Appendix EU of the Immigration Rules on 16 September 2019; she had not been granted permanent residence under the EEA Regulations on that date, or at all. In any event, the appellant's continuity of residence had been broken by his imprisonment. The respondent maintained that the refusal of the human rights claim was a lawful decision.

14. The appeal came before the judge, sitting in Bradford on 2 February 2023. Ms Ferguson of counsel represented the appellant then, as she does before us. The respondent was represented by a Presenting Officer (not Mr Terrell). The judge heard oral evidence from the appellant and his mother and submissions from the representatives before reserving his decision.

15. The judge's reserved decision was issued on 23 February 2023. He did not accept the appellant's argument that the EEA Regulations applied. He noted that the appeal was against the refusal of a human rights claim and that the respondent had not taken a decision under the EEA Regulations. It was not correct, the judge concluded, to refer to the request to consider the case under the EEA Regulations as a new matter but the respondent had not given her consent for that argument to be considered in any event.

16. At [27], however, the judge reasoned that the EEA Regulations might be relevant to the Article 8 ECHR submissions which were before him in the event that the respondent should have considered the appellant's case with reference to the EEA Regulations and should have made a decision as to whether regulation 27 applied. It was for that reason that the judge considered, at [28]-[53], whether the respondent should have considered the appellant's removal with reference to the EEA Regulations. It suffices for present purposes to state that he did not accept that the regulations had any application to the appellant's case. He therefore proceeded, at [54]-[82], to consider the appellant's appeal with reference to Article 8 ECHR. He found that the appellant could not meet the statutory exceptions to deportation and that there were not very compelling reasons

which sufficed to outweigh the public interest in deportation, and he dismissed the appeal accordingly.

The Appeal to the Upper Tribunal

17. Permission to appeal was refused at first instance by Judge Hamilton. The appellant renewed his application for permission to appeal to the Upper Tribunal. It was submitted, in summary, that the FtT had misdirected itself in law in concluding that the EEA Regulations did not apply to the appellant and that, in the alternative, there were further errors involved in the dismissal of the appeal on human rights grounds. UTJ Sheridan was persuaded to grant permission with reference to the first argument, although he did not restrict the scope of the grant of permission. Judge Sheridan observed as follows:

> The judge arguably erred by finding that the EU Withdrawal Agreement was inapplicable, as arguably the appellant falls within the scope of article 20(1) despite not having applied for a residence document. Arguably, the judge misunderstood the relationship between articles 18 and 20. Even though there was no right of appeal under the 2020 Regs, this was arguably relevant to the proportionality assessment under article 8 ECHR (as the judge acknowledged in para. 27 of the decision).

18. The appeal came before Ritchie J and UTJ Rimington on 23 April 2024. It was adjourned for lack of court time. The Upper Tribunal gave directions for there to be a bundle of authorities filed.

Documents Before the Upper Tribunal

19. We have before us a consolidated bundle of documents of 211 pages which was filed by the appellant's solicitors on 8 April 2024. There is within that bundle an application which was purportedly made under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 on 5 April 2024 and concerns a GCID record from August 2017, after the appellant's first significant conviction, which notes (amongst other matters) that he had acquired permanent residence. The advocates agreed before us that this note had been before the FtT and that rule 15(2A) did not apply to it. They agreed that it was evidence to which we should have regard.

20. We also have skeleton arguments from Ms Ferguson and Mr Terrell, settled on 14 October 2024 and 25 October 2024 respectively. There are two bundles of authorities. The first was filed with the appellant's skeleton, the second was filed with the respondent's skeleton. The advocates were also aware of the Upper Tribunal's decision in SSHD v Vargova [2024] UKUT 336 (IAC), which was published as a reported decision on 25 October 2024 and was not included in the bundle of authorities as a result.

Submissions

21. In her skeleton argument and her oral submissions, Ms Ferguson argued that the appellant had acquired permanent residency under Directive 2004/38/EC ("the Directive") and that he accordingly had protected rights under Article 15 of the Withdrawal Agreement ("WA"). She noted that the respondent had accepted in the GCID note of 2017 that the appellant had acquired permanent residence. Article 15 protected his permanent residence after the UK's withdrawal from the European Union and a person such as him was in a special class which was not required to apply for a residence document under Article 18 in order for those rights to be preserved. It was impermissible under the Directive for there to be limitations imposed on those rights, which existed whether or not declaratory documentation had been issued. The continuation of the appellant's right of permanent residency meant that Article 20 applied to him, and his conduct could only justify deportation in accordance with the Directive.

22. We asked Ms Ferguson to address us on the appellant's right of appeal, since it was asserted in Mr Terrell's skeleton argument that his right of appeal was on human rights grounds alone. Ms Ferguson accepted that there was no right of appeal under the EEA Regulations, since there had been no EEA decision. She accepted that the right of appeal was on human rights grounds only but she submitted that the appellant was a person who fell within the seventh statutory exception to automatic deportation in s33(6)(b) of the UK Borders Act 2007. On considering the statutory definition of a "relevant person", however, Ms Ferguson accepted that the appellant could not satisfy that definition. She therefore submitted, if we understood her correctly, that the appellant's preserved right to permanent residence was relevant to the proportionality of the respondent's decision under Article 8(2) ECHR. Her final submission on the applicable framework was that it could not be right "to slice the salami in such a way that the appellant is left with nothing, although he had once upon a time enjoyed permanent residence".

23. Ms Ferguson submitted that the appellant was at the very least entitled to serious grounds protection against deportation as a result of his permanent residency, and the respondent and the FtT had been in error in concluding otherwise. The appellant was certainly entitled to 'serious grounds' protection against expulsion but he also contended that he was entitled to 'imperative grounds' protection because his imprisonment had not broken his integrative links with the UK. Whether the level of protection was at the serious or imperative grounds level, the respondent fell short of establishing any such grounds.

24. In relation to her other grounds of appeal, Ms Ferguson submitted that the judge's conclusion that there were no very significant obstacles to the appellant's re-integration to Portugal were inadequately reasoned and failed to take account of the GCID minute. The judge had also failed, despite having set out the leading authority, to consider the question posed by s117C(6) lawfully. The appellant was Portuguese but he enjoyed permanent residence, which was a status akin to British citizenship. The

judge had also erred in his consideration of rehabilitation. It was difficult for the appellant to show that he was positively rehabilitated because he was in immigration detention for some time. No OASys report had been prepared. He had made efforts to reform and the judge should have concluded that he was rehabilitated.

25. For the respondent, Mr Terrell submitted that the appellant is not a relevant person under the domestic legal framework because he had not been granted any relevant status. The respondent had been correct to consider his deportation under the domestic legal framework accordingly. Any transitional protections he had enjoyed as a person with permanent residence came to an end on 30 June 2021 and he had not applied for documentation under the residence scheme immigration rules, as defined in s17(1) of the European Union (Withdrawal Agreement) Act 2020. The decision against which the appellant had appealed was the refusal of his human rights claim, and the grounds of appeal which were available to him were limited by statute. There was no right of appeal under the EEA Regulations in this case for the same reason as there had not been in one of the linked cases in Abdullah & Ors (EEA; deportation appeals; procedure) [2024] UKUT 66 (IAC): [126] refers. The appellant was not able to raise his arguments in relation to the Withdrawal Agreement because they were not relevant to the substance of the decision and, in any event, the respondent had not given consent for those matters to be raised. The appellant's argument in relation to the Withdrawal Agreement lost sight of the constitutive nature of the scheme adopted in the UK, as permitted by Article 18(1) of that Agreement.

26. As explained by Lane J in R (The Independent Monitoring Authority for the Citizens' Rights Agreement v SSHD [2022] EWHC 3274 (Admin); [2023] 1 WLR 817, a new legal order had arisen post Brexit; the residence rights in Part 2 of the WA did not arise automatically upon the fulfilment of the conditions necessary for their existence; and EU citizens living in the UK were required to apply for leave to remain so that Part 2 residence rights could be conferred by the grant of such status. The appellant had made no such application, and had been granted no such status, as a result of which he did not fall within the protection of the WA. The FtT had reached the correct decision but potentially by an overly complicated route. Whilst Ms Ferguson submitted that the appellant fell within a special class, she could point to no provision or authority which established such a class. If her argument was carried to its logical conclusion, it would dismantle the constitutive scheme altogether.

27. Mr Terrell submitted that the remaining grounds were mere disagreement with a thorough decision from the FtT. Very little had been said about Article 8 ECHR by the appellant but the judge had undertaken a detailed analysis nevertheless. It was correct to suggest that there was no reference by the judge to the GCID minute from 2017 but it carried little weight in any event, relating as it did to a different time and different evidence. The judge had directed himself in accordance with SSHD v Kamara [2016] EWCA Civ 813; [2016] 4 WLR 152 and SSHD v HA (Iraq) &

Ors [2022] UKSC 22; [2022] 1 WLR 3784. The relevant principles had been considered and applied and the decision was sustainable in law.

28. In reply, Ms Ferguson submitted that it was not right that the appellant should be prejudiced by the respondent's failure to serve a deportation order on him before the end of the Grace Period on 30 June 2021. We observed that the appellant was only sentenced for the cannabis offence in October 2021. Ms Ferguson submitted that the course of events had been prejudicial for the appellant because he had served eighteen months on remand for that offence. The respondent had been "keen" to exclude the appellant from the protections afforded to him by the Directive and had acted accordingly. The GCID minute was relevant to the appellant's permanent residence and to his case under Article 8 ECHR but it had been ignored by the FtT.

29. We reserved our decision at the end of the submissions.

Analysis

Ground one – the applicable legal framework

30. The issue raised by the first ground of appeal is a question of law: whether the appellant is entitled to rely on the protections against expulsion conferred by the Directive. We will resolve that question without reference to the analysis undertaken by the judge but we intend him no discourtesy in doing so. We have had the benefit of considerably more fulsome argument, including reference to authorities which had not been decided at that time or which had been decided but were not drawn to his attention. As we shall explain, we have come to the same conclusion as the judge, albeit by a rather shorter route.

31. We can dispose of two issues quite briefly.

32. Firstly, it will be apparent from the summary of the earlier proceedings that the appellant has contended in the past that he had a right of appeal under the EEA Regulations. In fairness to Ms Ferguson, that argument was not pressed before us, and rightly so. It is clear from paragraph C of the judicial headnote to Abdullah that those regulations did not apply directly to the appellant and did not give rise to a right of appeal. The decision was not taken under the EEA Regulations, nor was it taken before the end of the Grace Period (on 30 June 2021), and the appellant has never made an application under the EUSS.

33. Secondly, there was some suggestion on Ms Ferguson's part that the appellant fell within the seventh exception to the automatic deportation provisions in the UK Borders Act 2007. By section 32 of that Act, the deportation of foreign criminals is in the public interest and the Secretary of State must make a deportation order in respect of such a person. Section 33 provides a number of exceptions to that course. The seventh exception, in s33(6B), applies 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

34. It is clear that all of the offending in this case occurred before IP Completion Day, and that the second of those conditions is met. As Ms Ferguson eventually accepted, however, it is equally clear that the appellant is not a 'relevant person'. That term is defined in statute, at s3(10) of the Immigration Act 1971. The definition is as follows:

> (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,
> (ba) 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 Article 23 of the Swiss citizens'' rights agreement,
> (c) if the person 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 EU 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; or
> (d) if the person may enter the United Kingdom by virtue of regulations made under section 8 of the European Union (Withdrawal Agreement Act 2020 (frontier workers), whether or not the person has entered by virtue of those regulations."

35. The appellant is plainly not a relevant person as defined. He has never been granted entry clearance or leave to remain and none of the provisions listed in s3(10)(c) and (d) conceivably apply to him. There was some suggestion on the part of Ms Ferguson that the definition was badly drafted or that we might read that definition down by reference to some unstated principle of statutory interpretation, but she did eventually accept that the appellant could not be brought within the definition, and therefore that the seventh exception could not apply to him.

36. The argument before us therefore focused on the provisions of the Withdrawal Agreement, with Ms Ferguson submitting (if we understood her

correctly) that the appellant's rights under that agreement were relevant to, and potentially determinative of, the FtT's consideration of proportionality under Article 8(2) ECHR, and that it had erred in concluding otherwise.

37. We have already set out the facts in some detail above. For the purposes of resolving this submission, we consider there to be three key facts. Firstly, as Ms Ferguson submitted and as Mr Terrell accepted, the appellant enjoyed permanent residence under the Directive before the UK's withdrawal from the European Union. Secondly, as is clear from the chronology, all of the appellant's offending occurred before the end of the transition period on 31 December 2020. Thirdly, the appellant has never made an application for residence documents under the Appendix EU of the Immigration Rules.

38. Ms Ferguson submitted that the appellant was a person to whom Article 15 of the Withdrawal Agreement applies because he enjoyed a right to permanent residence under the Directive. That article provides as follows:

> *Article 15*
> **Right of permanent residence**
>
> (1) Union citizens and United Kingdom nationals, and their respective family members, who have resided legally in the host State in accordance with Union law for a continuous period of 5 years or for the period specified in Article 17 of Directive 2004/38/EC, shall have the right to reside permanently in the host State under the conditions set out in Articles 16, 17 and 18 of Directive 2004/38/EC. Periods of legal residence or work in accordance with Union law before and after the end of the transition period shall be included in the calculation of the qualifying period necessary for acquisition of the right of permanent residence.
>
> (2) Continuity of residence for the purposes of acquisition of the right of permanent
> residence shall be determined in accordance with Article 16(3) and Article 21 of Directive 2004/38/EC.
>
> (3) Once acquired, the right of permanent residence shall be lost only through absence from the host State for a period exceeding 5 consecutive years.

39. It was accepted by the respondent before us that the appellant satisfies the requirements of Article 15(1). It is frankly difficult to see how that could not be the case, given that the appellant is an EEA national who arrived in the UK at the age of three and received his entire education in this country. As Ms Ferguson submitted, the requirement for a student to have Compulsory Sickness Insurance Cover was discharged by the availability of treatment on the NHS: VI v Revenue & Customs Commissioners (C-247/20); [2022] 3 CMLR 17, at [69].

40. Ms Ferguson then submits that the appellant has not lost the right of permanent residence by reference to Article 15(3). That is also correct, and was not contested by Mr Terrell; the appellant has evidently not left the UK for five years.

41. The next step in the argument is that the applicant is a person to whom Article 20(1) of the Withdrawal Agreement refers. That provision is in the following terms (we need not set out the remainder of the Article):

> 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.

42. That provision requires closer examination. It is necessary, in particular, to consider how a Union Citizen such as the appellant is deemed by the Withdrawal Agreement to be a person who exercises "rights under this Title". The answer is provided by Article 18. That is a lengthy provision but it suffices to set out only the first part of the Article 18(1), which is as follows:

> 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.

43. The significance of this provision was considered by Lane J, the previous President of this Tribunal, in the Independent Monitoring Authority case. At [45], Lane J explained that "Article 18 of the WA confers a power on the host state to require Union citizens and UK nationals and their family members to apply for a new residence status conferring the rights under Title II of Part Two." He continued as follows:

> This power enables the United Kingdom and Member States to give effect to the citizens' rights contained in Part Two by means of a "constitutive scheme", whereby the rights in question must be conferred by the grant of residence status. This contrasts with a "declaratory scheme", under which the rights under Title II arise automatically upon the fulfilment of the conditions necessary for their existence. Under a declaratory scheme, documentation confirming the right may be sought and provided. Such documentation, however, is not a prerequisite to the enjoyment of the right.

44. At [46], Lane J observed that the United Kingdom, in common with about half of the EU Member States, had chosen to adopt a constitutive scheme. At [130], he accepted the respondent's submission that a new legal order had arisen in the United Kingdom as a result of the country's withdrawal from the EU. In the following paragraph, [131], Lane J observed that "EU legal concepts such as free movement are not to be imported into, or

inferred from, the WA, except insofar as that may be necessary in order to comply with the general rule of interpretation in Article 31 of the Vienna Convention [on the Law of Treaties (1969)]."

45. Herein lies the fundamental problem with Ms Ferguson's argument. The appellant has never made an application for any form of status under the constitutive scheme established by the UK pursuant to Article 18. To recall the opening words of that article once more, the UK has opted to "require Union citizens … 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…" The appellant asserts that he is entitled to rely on the right to permanent residence under Article 15 but he has never applied for a new residence status which confers that right. As Mr Terrell submitted before us, the use of the verb 'confer' is all important, and underlines the constitutive nature of the scheme. The document which the applicant was required to apply for would not document an underlying and pre-existing right, as was previously the case with residence documentation under the Directive; it conferred the right. Without such a document, the appellant has never had conferred upon him the right upon which Ms Ferguson bases her submissions, and he is not a person who exercises a right under Title 2 of the WA. Article 20(1) does not apply to him as a result. The entire argument under ground one was premised on an assumption that a person who enjoyed permanent residence under the Directive could not simply lose that right post-Brexit but that argument loses sight of the new legal order to which Lane J referred in the Independent Monitoring Authority case.

46. Ms Ferguson submitted at one point that Lane J's judgment was positively of assistance to her, given that he held that it was contrary to the WA to require those who had been granted the residence rights created by Part 2 thereof to re-apply after five years if they wished to remain in the UK thereafter. That submission also fails to recognise the critical distinction between those who chose to make applications under the UK's constitutive scheme and those who did not. The central feature of this case is that the appellant falls into the latter category and has never had conferred upon him the right upon which he seeks to rely.

47. In an attempt to escape that difficulty, Ms Ferguson submitted that the appellant's was a special case or that he belonged to a special class of person to whom the obligation to apply for residence status did not apply. Mr Terell submitted that there was no principled basis for that submission. We agree with Mr Terrell. Ms Ferguson was unable to direct our attention to anything within the WA or elsewhere which created such a special class. Ultimately, the submission was that Union Citizens who had previously enjoyed permanent residence under the Directive should not lose that right in the event that they failed to make an application under the residence scheme immigration rules.

48. The acceptance of that submission would undermine the entire constitutive scheme implemented by the UK, however. As we suggested

to Ms Ferguson in the course of her submissions, it was not clear why such an exemption should only apply to those who previously enjoyed permanent residence; it might equally apply to those who enjoyed any form of EU law right to reside in the United Kingdom prior to Brexit, and anyone who asserted a right under Title 2 of Part 2 of the WA might simply suggest that they were exempted from the requirement to apply for documentation. The effect would be to extend, in perpetuity, the rights which previously existed under the Directive notwithstanding the new legal order to which Lane J referred.

49. The recent decision in SSHD v Vargova does not compel the contrary conclusion. That was a case which concerned criminal conduct after the end of the transition period and it was not necessary for the Upper Tribunal to consider the constitutive nature of the UK's scheme, or the clear way in which Article 18(1) refers to a requirement for individuals to apply for residence documentation to confer the rights in question. It is noteworthy that there is no reference in that decision to Lane J's judgment in the Independent Monitoring Authority case. That is no criticism of the senior panel of the Upper Tribunal which decided Vargova; it is merely to underline the fact that it was a different case in which different submissions were made.

50. Ms Ferguson also devoted some time to a submission that the appellant had been treated most unfairly by the Secretary of State, who had (she submitted) been 'very keen' to ensure that the appellant lost the protections to which he had previously been entitled under the Directive and which continued (by reference to The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, "the Grace Period Regulations") until 30 June 2021. As we put to Ms Ferguson at the hearing, however, that submission cannot withstand even the most cursory examination of the chronology. The appellant received his most recent sentence at Snaresbrook Crown Court on 18 October 2021, after the end of the grace period. It was at that point that he became a foreign criminal because that designation follows from a sentence of imprisonment of more than twelve months. As we think Ms Ferguson accepted, the respondent could not have acted before the appellant was sentenced by HHJ Del Fabbro.

51. Ms Ferguson then sought to submit that the appellant had been treated most unfairly by the justice system as a whole, since he had been held on remand for eighteen months or so before he was sentenced by HHJ Del Fabbro. Had he been sentenced more swiftly, she submitted, the respondent might have proceeded with deportation more swiftly, and the appellant might then have had the benefit of the grace period, during which his protection under the Directive would have continued to apply.

52. We accept that the appellant was arraigned on 22 October 2020 and that he pleaded guilty to the offence at that point. That is clear from the Trial Record Sheet in the respondent's original bundle. We do not know why there were twelve further hearings in the Crown Court between that date

and the date of the appellant's sentencing. We accept that the appellant was on remand during that period, and we accept Ms Ferguson's submission that he was deemed to have served the ultimate sentence as a result of the extended period on remand. It seems likely that matters were delayed by the pandemic and the exacerbation of backlogs in the criminal justice system as a result.

53. Whilst we understand the appellant's frustration in this respect, we cannot accept that these delays have any legal effect which benefits the appellant. IP Completion Day and then the end of the grace period marked, respectively, the introduction of the new legal order and the ending of the additional latitude extended by the Secretary of State to those in the appellant's position. Those are bright lines, adherence to which is important in terms of legal certainty.

54. Ms Ferguson submits, essentially, that those bright lines should be blurred and the protections further extended in cases where there has been some sort of delay. There is no support for that argument in any domestic or international instrument to which we referred and it is very difficult to see how such a rule would be formulated or would work in practice. The appellant was convicted in October 2020 but sentenced in October 2021. The gap between conviction and sentence was a year. Had it been eight months, then he would have been sentenced before the end of the grace period and the respondent might have proceeded with deportation action really swiftly, and the appellant might then have had the benefit of the Grace Period Regulations. If we were to accept the submission that he should continue to benefit from the protections previously provided by the Directive (and the grace period), what of a person who suffered from a slightly longer, or a slightly shorter delay? If such latitude were to be extended (despite the absence of any basis in law to do so), we cannot begin to understand the way in which Ms Ferguson attempts to define the cohort to which it applies.

55. There is perhaps some parallel to be drawn between the submissions made by Ms Ferguson in this case and those which were made to the Supreme Court in TN (Afghanistan) & Ors v SSHD [2015] UKSC 40; [2015] 1 WLR 3083. The appellants in those cases had arrived in the UK as unaccompanied minors and the respondent had failed to comply with her 'tracing' obligations (ie to trace the members of the asylum-seeking child's family as soon as possible, in compliance with Article 19 of the Reception Directive 2004/83/EC). It was submitted in the Supreme Court that those failures were somehow relevant to the determination of their claims for international protection. Lord Toulson (with whom the other Justices agreed) found no basis in law for such a departure from the principle in Ravichandran v SSHD [1996] Imm AR 97, that asylum appeals should be determined by reference to the position at the time of the appellate decision rather than by reference to the factual situation at the time of the Secretary of State's decision. He stated that the Court of Appeal's attempt, in SSHD v Rashid [2005] EWCA Civ 744; [2005] Imm AR 608, to create an exception to that principle lacked a satisfactory principle, and

that it was impossible to state its scope with any degree of clarity: [71]. Those observations apply equally here. There is no satisfactory principle which underpins Ms Ferguson's submission that protections which have ceased to exist should continue to apply because the appellant suffered delays in the criminal justice system, and it is impossible to state the scope of such a principle with any degree of clarity. We reject the submission as a result.

56. It is necessary to consider one final argument directed to ground one. Ms Ferguson noted in her submissions that the Home Office has guidance which permits officials to 'take a flexible and pragmatic approach to accepting late applications [under the residence scheme immigration rules] and will look for reasons to grant applications, not to refuse them." The reference is, as we understand it, to guidance entitled *Apply to the EU Settlement Scheme (settled and pre-settled status)*, although we have been unable to discern the date of the guidance from the hyperlink in Ms Ferguson's skeleton. It is in any event common ground that a person might be excused for making a late application under these rules if there are shown to be reasonable grounds for the lateness. As we suggested to Ms Ferguson at the hearing, however, the point is that a person might be excused *for* making a late application, not that a person might be excused *from* making a late application. It is one thing to submit that a person who has made a late application under the Rules should benefit from the old legal order. It is quite another to submit that a person who has made no such application, late or otherwise, should be excused from making the application altogether where he has reasonable grounds for doing so.

57. For all these reasons, we reach the same conclusion as the judge on the point of law in ground one. The respondent's decision was taken under the domestic legal regime and the judge was correct to conclude that EU law could play no role in the determination of the appeal. The appellant had failed to make an application under the residence scheme immigration rules. He was not a relevant person. The judge was obliged to consider the appeal with reference to the domestic legal regime alone, and nothing in the WA required him to do otherwise. It is not necessary in the circumstances to consider the extent of any protection which might have been available to the appellant under the Directive, since no such protection applies.

Grounds two, three and four – Article 8 ECHR

58. We agree with Mr Terrell that the remaining grounds are unmeritorious. The focus of the appeal before the FtT was on the submission that the EEA Regulations continued to apply. The judge evidently heard little evidence or argument directed to Article 8 ECHR. He nevertheless undertook an extremely detailed analysis of the appellant's case with reference to the statutory framework in Part 5A of the Nationality, Immigration and Asylum Act 2002. We are bound to observe, with respect to the judge, that the detail and structure of his analysis, and the citation of relevant authority, served to demonstrate that he was a judge in an expert tribunal charged

with administering a complex area of law in challenging circumstances (AH (Sudan) v SSHD [2007] UKHL 49; [2008] AC 678 refers, at [30]). We do not accept that he left material matters out of account in his analysis, or that he erred in law in any other way. Mr Terrell is correct to submit that the remaining grounds amount to nothing more than disagreement with a careful and fully reasoned analysis by a specialist judge.

59. By ground two, Ms Ferguson submitted that the judge had given inadequate reasons for concluding that the appellant would not face very significant obstacles to his reintegration into Portugal. There is no merit in that argument. The judge was clearly cognisant of the fact that the appellant has resided in the UK since he was three years old. He took careful account of that but he concluded that the elevated threshold was not met for a number of reasons, including the fact that the appellant speaks some Portuguese, has a GCSE in Spanish and that Portugal is a civilised European country with cultural mores not dissimilar to the UK. In reaching that conclusion, the judge was plainly aware of the broad evaluative approach he was required by the authorities to adopt, since he cited SSHD v Kamara.

60. Ms Ferguson augmented this ground at the hearing, contending that the judge had failed to consider the GCID note when he decided that there were no very significant obstacles. The note is a departmental minute which was created on 22 August 2017. It states, in full, as follows:

> Submission to [Criminal Casework] Director recommending that we do not pursue deportation action against Mr Diogo Cunga, a 19 year old Portuguese national who has been resident in the UK since 2002, from the age of three or four.
>
> The recommendation not to pursue deportation has been considered under the EEA Regulations, specifically that Mr Cunga has established a permanent right to reside in the UK due to his five year period of residence, but also having resided in the UK for over ten years, a decision to deport him would have to be made under the imperative grounds of public security to which it is considered Mr Cunga's offending (Possession/supplying Class A drugs) will not be viewed as an underlying threat to one of the fundamental interests of society.
>
> Mr Cunga is also availed by Paragraph 398 of the Immigration Rules, due to his lawful residence in the UK from a young age, social and cultural integration and significant obstacles to his return to Portugal.

61. As we understood Ms Ferguson's submission on this note, she did not suggest that the respondent was somehow bound to this stance, or estopped from contending otherwise. She did not submit that the appellant had a legitimate expectation that the respondent would never adopt a contrary stance, or that she had somehow made a concession in the course of litigation from which she should not have been permitted to resile. The submission was, instead, that the judge was bound to take

account of this note as part of the evidence before him and that he did not.

62. Mr Terrell accepted, as he had to, that there was no reference to the GCID note in the judge's decision, although he reminded us that it was not to be assumed that the judge had not considered the note because he had not referred expressly to it: Volpi v Volpi [2022] EWCA Civ 464; [2022] 4 WLR 48, at [2](ii). We accept that submission. It is inconceivable that the judge overlooked the note in reaching this well-reasoned decision. Evidentially, it was plainly of the most limited significance. The conclusion reached by the department in 2017 was sparsely reasoned. It is not clear what evidence was before the decision maker, and we note that the preceding minute notes that the appellant was shortly to be represented by solicitors. That note was made on 21 August 2017, so it would appear that the view reached on 22 August 2017 was reached without the benefit of any legal submissions. The judge, on the other hand, had the benefit of knowing that the appellant spoke some Portuguese, that he had also acquired GCSE Spanish, and that he had visited Portugal on a number of occasions. Given that information, it is scarcely surprising that he chose to make no reference to the GCID record of 22 August 2017.

63. In the event that we are wrong to assume that the judge considered the evidence without referring to it, we conclude that he would inevitably have reached the same decision even if he had taken that note into account. Given the limitations of that note, it could not conceivably have sufficed to persuade him to reach a different conclusion.

64. Mr Ferguson submitted by ground three that the judge had erred in his analysis of whether there were very compelling circumstances in this case. She submitted that although the judge had directed himself in accordance with the domestic and Strasbourg authorities, he had marginalised the fact that the appellant had acquired permanent residence by treating him as nothing more than a Portuguese citizen. That submission is misconceived for the reasons we have given in considering the first ground. By the date of the hearing, the appellant had not taken steps to regularise his status under the new legal order and his permanent residence under the Directive had ceased to exist. The judge took account of the appellant's length of residence and his links to the UK, and it was these factors that were plainly of significance, whereas the permanent residence status formerly enjoyed by the appellant was not. The judge did not err in the manner contended in this ground.

65. By ground four, Ms Ferguson contends that the judge should have concluded that the appellant was positively rehabilitated. The submission was made in those terms to us, and counsel's turn of phrase provides the clearest indication that this ground is nothing more than disagreement. The judge took account of the evidence before him, which included the fact that the appellant had moved from Newham to Bradford and had been making efforts to improve himself following his release from immigration detention. It is not said that the judge failed to take account of any

material evidence or that he took account of some immaterial matter. What is said is that the judge simply reached the wrong conclusion on all of that material. In our judgment, however, the judge's conclusion was plainly rational and one that was open to him on the evidence.

66. Ms Ferguson said nothing in her oral submissions about a point which she made at [17] of her grounds of appeal, which was that the judge had erred in his consideration of the best interests of the appellant's sixteen year old sister. There is nothing in this point. The judge was plainly entitled on the evidence before him to conclude that the appellant's deportation would not have a material impact on his sister, who would continue to live with and be raised by her mother. The judge was not focusing on physical care only, as contended in the grounds of appeal, and the conclusion was properly open to him on the evidence presented.

67. In conclusion, therefore, we find that the judge did not err in any of the manners contended in the four grounds and we dismiss the appellant's appeal to the Upper Tribunal.

Notice of Decision

The appellant's appeal is dismissed. The decision of the First-tier Tribunal stands.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 December 2024