IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002479

First-tier Tribunal No: HU/04951/2021
LE/00031/2023
EU/50882/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 30 December 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

TOMASZ LESINSKI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

REPRESENTATION

For the Appellant: Ms H Smith, instructed by Turpin Miller LLP
For the Respondent: Ms R Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 23 August 2024

DECISION AND REASONS

INTRODUCTION

1. The appellant is a national of Poland. He claims to have arrived in the UK on 27 September 2012. On 1 September 2021 a decision was made to make a deportation order in respect of the appellant by reference to the Immigration Act 1971 and section 32(5) of the UK Borders Act 2007, and a decision was made to refuse a human rights claim. A deportation Order

was signed on 31 August 2021. On 10 February 2023, a decision was also made to refuse an application for leave under the EU Settlement Scheme (EUSS).

2. The appellant's appeals against the respondent's decisions were dismissed by First-tier Tribunal Judge Khurram ("the judge") for reasons set out in a decision dated 26 March 2024.

THE GROUNDS OF APPEAL TO THE UPPER TRIBUNAL

3. The appellant advances two grounds of appeal. First, the judge erred in finding that the appellant has not accrued a continuous qualifying period of five years residence for the purposes of the EUSS. Second, the judge erred in concluding that the appellant did not fall within the personal scope of the Withdrawal Agreement.

4. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Seelhoff on 23 May 2024. Judge Seelhoff said:

> "2. Ground 1 asserts procedural unfairness arises from the judge finding that the Appellant was not resident in the UK between 2012 and 2015 when no issue was taken in respect of that period by the Respondent in cross examination.
>
> 3. It is arguable that procedural unfairness could have arisen in this situation and the tribunal is likely to need to review the hearing record if this is contentious.
>
> 4. Ground 2 argues that the judge erred in finding that the Appellant was not lawfully resident in the UK on the 31st December 2020 because he was in prison on that date.
>
> 5. This ground is arguable in law."

THE HEARING OF THE APPEAL BEFORE ME

5. I have been provided with a skeleton argument dated 16 August 2024 settled by Ms Smith and adopted by her. At the outset of the hearing before me, Ms Smith confirmed the focus of the appeal is upon the decision of the FtT to dismiss the EUSS appeal. There is no direct challenge to the decision of the judge to dismiss the appeal on Article 8 grounds, but Ms Smith submits that if the appeal is allowed and the decision of the FtT to dismiss the EUSS appeal is set aside, the effect of that will be that it impacts upon the decision of the judge to dismiss the appeal on human rights grounds.

6. In summary, as far as the first ground is concerned, there are three strands to the appellant's claim. First, Ms Smith submits the judge erred in his assessment of the evidence when making the finding that the appellant has not accrued a continuous qualifying period of five years residence between 2012 and 2020 for the purposes of the EUSS. She submits the judge accepted that that the appellant was resident for a continuous period between 2015 to 2017 but (i) failed to have proper regard to the consistent evidence before the Tribunal regarding the appellant's presence

in the UK between 2012 and 2014, and (ii) failed to consider any of the evidence of the appellant's residence from 2018 to 2020, including evidence of offences committed by the appellant in Bedford between 2018 and 2020, and of his arraignment in March and July 2020.

7. Second, it was unfair to reject the appellant's written evidence in respect of his residence in the UK between 2012 to 2014 and 2018 to 2020, when he was not cross-examined on, and no adverse credibility findings were made in respect of his evidence of residence during these two periods.

8. Third, the judge applied a "*generous definition of continuous residence"* when considering the appellant's presence in the UK between 2015 and 2017, but does not appear to have applied the *"generous definition"* when considering the appellant's residence in the UK between 2012 to 2014 and 2018 to 2020. The judge failed to consider whether the evidence in the round, establishes, on balance, 5 years continuous residence in the UK.

9. Turning to the second ground of appeal, Ms Smith submits the judge erred in interpreting Article 10(1)(a) of the Withdrawal Agreement ("WA") to require the appellant to be "exercising Union rights immediately before the end of the transition period" in order to fall within the personal scope of the WA and in finding that "continuity for the purposes of residence was broken by his imprisonment". She submits Article 10(1)(a) of the Withdrawal Agreement has two elements; (i) the Union citizen must exercise their right to reside in the United Kingdom in accordance with Union law before the end of the transition period; and (ii) they must continue to reside there thereafter. Ms Smith submits there is no requirement as to when the Union citizen must exercise a right to reside in accordance with Union law, other than requiring it to be at some point before the end of the transition period. There is no requirements as to the basis on which a person must continue to reside in the UK following a period of residence in accordance with Union law.

10. Ms Smith submits the judge's interpretation of Article 10(1)(a) of the WA strains the language of the provision and would require either reading in the word "*immediately"* before the end of the transition period (without providing any further clarification as to what exactly counts as "immediately") or "continue to reside there thereafter "on the basis of Union law" or "on an equivalent basis"".

11. Ms Smith expanded upon the ground of appeal and the matters set out in her skeleton argument in her oral submissions.

12. In reply, Ms Arif accepts the appellant was not cross examined regarding his residence in the UK since 2012 and that the cross-examination of the appellant at the hearing focused upon other areas. However, she submits the judge made findings that were open to him on the evidence before the Tribunal, including the evidence set out in the appellant's witness statement. Ms Arif submits the judge outlined, at paragraph [31] of the decision, several reasons for reaching the conclusion that the appellant has not discharged the burden that he has established 5 years continuous residence in the UK.

13. As for the second ground of appeal Ms Arif submits the judge referred to the reported decision of the Upper Tribunal in *Abdullah & Ors (EEA; deportation appeals; procedure)* [2024] UKUT 0066 in which the Upper Tribunal was concerned, inter alia, 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. Ms Arif submits the judge was correct to say the appellant does not come within personal scope of the WA, given that he was not exercising Union rights immediately before the end of the transition period and continuity for the purposes of residence was broken by his imprisonment. She submits it was open to the judge to dismiss the appeal for the reasons set out in the decision and invites me to dismiss the appeal.

DECISION

GROUND 1

14. The first ground of appeal is a challenge to the judge's conclusion at paragraph [31] of the decision that the appellant has not accrued a continuous qualifying period of five years residence in the UK.

15. In considering the first ground of appeal I have reminded myself of what was said by the House of Lords in *SSHD v AH (Sudan)* [2007] UKHL 49[2008] 1 AC 678 and by the Supreme Court in *Perry v Raleys Solicitors* [2019] UKSC 5; [2020] AC 352. The FtT is a specialist body, tasked with administering a complex area of law in challenging circumstances. It is likely that, in doing so, it will have understood and applied the law correctly. Appellate judges should not rush to find misdirection merely because the judge at first instance might have directed themselves more fully or given their reasons in greater detail. There is a real rationale for the deference which an appellate court will display towards a trial judge's findings of fact, and proper restraint must be exercised before deciding to interfere with such findings. I have borne those principles firmly in mind.

16. The length of the appellant's presence in the UK was an issue that had been identified in each of the respondent's decisions. In the decision dated 1 September 2021 to refuse the appellant's human rights claim, the respondent said:

> "3. In considering your case the Secretary of State has concluded that you are not a person to whom the aforesaid regulations apply, in that there is no evidence before the Secretary of State that immediately prior to 23:00 GMT on 31 December 2020, you were lawfully resident in the United Kingdom by virtue of those regulations, or that you are otherwise a relevant person within the meaning of regulation 3 of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020."

In the decision dated 10 February 2023 to refuse the appellant's application for leave under the EU Settlement Scheme, the respondent said:

> "8. To be eligible for limited leave to remain under condition 1 of EU14 of Appendix EU you must have completed a continuous qualifying period of

> residence in the UK which began before 2300 GMT on 31 December 2020 and is continuing at the date of application. That period of residence must not have included any period of time serving a sentence of imprisonment, unless that conviction which led to that imprisonment has been overturned. On 27 January 2020 you were held on remand at HMP Bedford. You were convicted on 16 September 2020 ….
>
> 9. Our records confirm that you remained in prison until 24 December 2021 serving your custodial sentence. For this reason, you cannot be eligible for limited leave to remain in line with the conditions set out in EU14.
>
> …
>
> 14. To be eligible for indefinite leave to remain under condition 3 of EU11, condition 1 of EU11A or condition 3 of EU12, you must have completed a continuous qualifying period of 5 years. You have not provided sufficient evidence that proves a continuous qualifying period of 5 years."

17. At paragraph [29] of the decision the judge confirms that his findings are based on all the evidence, taken in the round and without compartmentalising one or the other. In paragraph [31] of the decision, the judge rejected the appellant's claim that he has established five years continuous residence in the UK. The judge set out what are described as "the main points of concern" at sub-paragraphs (a) to (f). The judge accepted the appellant was in the UK between 2015 and 2017, noting that an absence of 6 months is permitted in any 12-month period.

18. There is in my judgement no merit to any of the criticisms made by Ms Smith. Paragraph [31] of the decision must be read as a whole.

19. At paragraphs [31(b)] and [31(c)] the judge referred to the appellant's claim that he entered the UK in 2012 and that he had lived with Janusz following his arrival in the UK, until 2017. The judge noted the evidence of Janusz was that the appellant had moved out on various occasions and there was a loss of regular contact during that period. I pause to note that the judge records that the inconsistency in the evidence was not put to the appellant and so the judge attached limited weight to the inconsistency.

20. The appellant's offending between May 2018 and January 2020 is summarised in section 2.1 of the OASys Assessment. The appellant was convicted of 2 counts of the theft of a pedal cycle. The first of those offences occurred on 12 May 2018 and the second occurred on 14 January 2019. The appellant was also convicted for six counts of burglary where he entered a range of properties between 22 August 2019 and 29 November 2019. There is also evidence that he was arrested for possession of a Class B drug – Amphetamine on 20 January 2020.

21. There was therefore evidence of the appellant's presence in the UK in May 2018, but a "lacuna of evidence" as the judge describes it, of evidence regarding the appellant's presence in the UK between May 2018 and January 2019, a period of over 6 months. There was then a gap of over six months before the appellant's next offence of burglary that occurred on 22 August 2019. The fact that the sentencing judge referred to the appellant having come to the UK looking for work, having settled down, and to the appellant having started offending in 2018 adds nothing.

The sentencing judge was not making any findings as to the appellant's continuous residence in the UK during any particular period. He was simply summarising the appellant's immigration history insofar as it was relevant to the task he was performing of sentencing the appellant for the offences for which he had been convicted. The difficulty in reading the sentencing remarks in the way contended for by the appellant and in the abstract is that on one reading, it might be said that the sentencing remarks indicate the appellant arrived in the UK in 2018 and just started offending, undermining the appellant's claim that he was in the UK between 2012 and 2015.

22. Similarly, the fact that the appellant might have maintained in his discussions with the probation service for the purposes of the OASys Assessment and with Lisa Davies, the Consultant Forensic Psychologist that he was invited to come to the UK by friends and that he lived with friends completing cash in hand work, adds nothing. The account given by the appellant to the expert is a very broad account and the expert was not probing the appellant's residence in the UK.

23. Questions of procedural unfairness depend upon the context and are fact-sensitive and case-specific. As I have said, the length of the appellant's presence in the UK was an issue that had been identified in each of the respondent's decisions. To that end, the judge was not introducing a point that had not been taken by the respondent at all. The judge had set out at paragraph [18] of the decision that one of the issues in the appeal was whether the appellant had completed a continuous qualifying period of 5 years. Ms Arif acknowledges the appellant was not cross-examined during the hearing regarding his presence in the UK between 2012 and 2010, but the burden rested on the appellant to establish his claims. The judge was not bound to shut his mind to obvious points of concern when considering all the evidence before the Tribunal in the round.

24. Contrary to what is said by Ms Smith, the judge considered the appellant's evidence as a whole and did make an adverse credibility finding. The judge found, at [31(d)], that the appellant's oral evidence regarding his presence in the UK was evasive and inconsistent, and that although the appellant initially claimed he had not been in touch with family in Poland for the last 17 years, he ultimately accepted he had visited his mother in 2015 and that he had been to Poland in 2016 when he was issued with a Polish ID card. It is plain that the appellant had not been entirely forthcoming in his evidence regarding his visits to Poland, and the judge was entitled to conclude that the appellant's vague and contradictory evidence damages his credibility. In reaching the decision, the judge quite properly said that little weight can be attached to the statements provided by 'Janusz' and 'Frank'. Their statements were unsigned, undated and as the judge said "Importantly, neither of the witnesses attended the hearing to give evidence on behalf of the appellant."

25. I also reject the claim the judge applied a "*generous definition of continuous residence"* when considering the appellant's presence in the UK between 2015 and 2017, but failed to apply that generous definition when considering the appellant's presence in the UK during other periods. The judge quite properly directed himself that 'continuous residence' allows for a 6 month absence in any 12-month period. Having acknowledged that, the judge was not required to repeat that self direction throughout the decision in each of the subparagraphs that followed. It was a factor that when the decision is read as a whole, the judge plainly had in mind in reaching his decision.

26. Finally, I reject the submission made by Ms Smith that it is not clear that the judge applied the correct standard of proof in reaching his decision. At paragraph [29], the judge confirms that he has applied "the relevant burdens and standards of proof". There is nothing in the decision that Ms Smith can point to which even begins to suggest that the judge applied anything other than the 'balance of probabilities'.

27. It is not necessary for a judge to deal expressly with every point that is raised by a party. The appellant simply disagrees with the findings and conclusions reached by the judge, but the findings are not irrational or unreasonable in the *Wednesbury* sense, or findings that are wholly unsupported by the evidence. The judge did not consider irrelevant factors, and the weight that he attached to the evidence either individually or cumulatively, was a matter for him. Reading the decision as a whole it is clear that the judge has said enough in his decision to show that care has been taken and that the evidence as a whole has been properly considered.

28. It follows that in my judgement it was open to the judge to find that the appellant has not demonstrated five years continuous residence for the reasons set out in his decision.

GROUND 2

THE WITHDRAWAL AGREEMENT

29. Ms Smith submits the judge's conclusion at paragraph [36] of the decision that the appellant does not come within the personal scope of the WA given that he was not exercising Union rights immediately before the end of the transition period and continuity for the purposes of residence was broken by his imprisonment, is against the natural textual of Article 10 of the WA. She submits that on any view, the appellant was a union citizen who had exercised his right to reside in the UK before the end of the transition period and that he had continued to reside in the UK thereafter. She refers to the decision of the Supreme Court in *Secretary of State for Work and Pensions v Gubeladze* [2019] UKSC 31. There, the Court said that Article 17(1) of Directive 2004/38/EC referred to "factual residence" rather than "legal residence" as required under art.16(1). Ms Smith submits Article 17(1) of the Directive adopts similar wording to Article 10 of the WA and therefore all that is required is residence *simpliciter*. She

submits the sentence of imprisonment did not break continuity of residence.

30. In my judgement the appellant gains little assistance from the decision of the Supreme Court that is relied upon by Ms Smith. The central issue in that case was whether Ms Gubeladze, a Latvian national living in the United Kingdom, was entitled to receive state pension credit, a means tested benefit. Although not necessary for the resolution of the appeal before the Supreme Court, the Court considered the purpose of Article 17 of the Directive in light of the recitals relevant to Article 16 and 17 and concluded that residence in Article 17(1) refers to factual residence rather than "legal residence" as required under Article 16(1).

31. The decision of the Supreme Court in *Gubeladze* pre-dates the WA. The judge referred to the decision of the Upper Tribunal in *Abdullah & Ors (EEA; deportation appeals; procedure)* [2024] UKUT 00066 (IAC) where in three joined appeals, the Upper Tribunal gave comprehensive guidance and resolved a number of issues of law concerning the respondent's power to deport EEA nationals who had resided in the UK and have done so since before the UK left the European Union.

32. The judge said at paragraph [35] of his decision:

> "…The UT decision of Abdullah notes, the WA was intended to "ensure an orderly withdrawal of the United Kingdom from the Union". It was recognised that it was "necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this Agreement" [§19]. Furthermore, cases such as Celik at the Court of Appeal reinforce the position, that the WA's purpose was broadly to preserve existing rights not to create new ones, this would be counterintuitive given the reasoning for withdrawal in the first instance. The EEA Regulations and EUSS, which in some respects is more generous than the WA, both interpret continuity of residence to be broken when a person serves a sentence of imprisonment."

33. In *Abdullah*, the Upper Tribunal said:

> "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."

34. Here, applying the relevant questions set out in the headnote in *Abdullah* the appellant was an EEA citizen (on the findings of the judge) whose conduct had occurred prior to 31 December 2020, which had given rise to a decision to deport him. However, the judge found that the appellant had not established five years continuing qualifying residence in the UK and that he was not exercising Union rights immediately before the end of the transition period because 'continuity' was broken by the appellant's imprisonment.

35. The judge, in effect, followed the reported decision of the Upper Tribunal in *Abdullah* and it was undoubtedly open to the judge to conclude that the appellant does not come within the personal scope of the WA for the reasons he gave.

36. It follows that in my judgement, the second ground of appeal too, is without merit and discloses no material error of law.

37. I reject the claim that the decision of the judge is vitiated by material errors of law and I therefore dismiss the appellant's appeal to the Upper Tribunal.

NOTICE OF DECISION

38. The appeal to the Upper Tribunal is dismissed.

39. The decision of First-tier Tribunal Judge Khurram stands.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 December 2024