IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2022-001933
UI-2022-001934
First-tier Tribunal Nos: EA/12198/2021
EA/12683/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 12 March 2023

Before

UPPER TRIBUNAL JUDGE FRANCES
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) FMM
(2) RSMB
(ANONYMITY ORDER MADE)

Respondents

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondents: Mr G Lee, Counsel instructed by M. Reale Solicitors

Heard at Field House on 17 February 2023

Although is an appeal by the Secretary of State, we shall refer to the parties as they were in the First-tier Tribunal.

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellants are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellants, likely to lead members of the public to identify

the appellants. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Secretary of State appeals from the decision of First-tier Tribunal Judge Bagral promulgated on 5 February 2022 ("the Decision"). By the Decision, Judge Bagral allowed the appellants' appeals against the decisions of the Secretary of State dated 8 and 22 July 2021 respectively to refuse to grant them leave to remain in the United Kingdom under the EU Settlement Scheme ("EUSS").

Relevant Background

2. The first appellant is a dual Brazilian and Italian national who was born in Brazil on 27 October 1979, and who was subsequently recognised by the Italian authorities in December 2018 as an Italian national by descent. The second appellant, who was born in Brazil on 8 April 2010, is the youngest of the first appellant's three children. As the sole issue in the appeal before the First-tier Tribunal was whether the appellants' applications were justifiably refused on the ground that the first appellant came within the scope of Rule EU15, and so did not meet the suitability requirement, we will hereafter refer to the first appellant as "the appellant", save where the context otherwise requires.

3. In December 2009 the appellant was encountered by the authorities when he used a false Portuguese identity document whilst attempting to enter the United Kingdom at Gatwick Airport. As evidenced by the appellant's PNC record which Mr Tufan produced in the course of the hearing, the appellant was convicted at Lewes Crown Court on 11 January 2010 of an offence contrary to section 25(1) of the Identity Card Act 2006 and he was sentenced to a term of imprisonment of 9 months. He undertook a voluntary return to Brazil in March 2010.

4. The appellant re-entered the UK on 5 January 2019 on the Italian passport that had been issued to him in December 2018. He was joined in the UK by his wife and three children in 2020. The appellant's wife is a Brazilian national. The two older children entered on Italian passports, whereas the appellant's wife and their youngest child, the second appellant, entered on Brazilian passports.

5. The family applied for a grant of pre-settled status under the EUSS. As his wife and youngest child did not hold Italian passports, they were sponsored by the appellant. The application of the appellant's wife was also refused, but her appeal was not linked to that of the appellants in this appeal.

6. The sole ground of refusal was that on 29 April 2010 an exclusion order had been made against the appellant under the Immigration (European Economic Area) Regulations 2016 or the equivalent provision in the preceding 2006 Regulations ("the EEA Regulations"). That decision had

not been set aside and remained in effect. Therefore, neither appellant met the requirements for settled or pre-settled status under the EUSS. The first appellant's application was refused on suitability grounds because he was the subject of an exclusion order. The second appellant's application was refused on eligibility grounds in line with the refusal of his EEA Citizen Sponsor's application.

The Grounds of Appeal to the First-tier Tribunal

7. The grounds of appeal to the First-tier Tribunal were settled by the appellants' solicitors. They said that the refusal decision was finally made after they had sent a letter before action dated 19 May 2021. In her response to the pre-action protocol letter, the Secretary of State said that the reason behind the delay in making the decision on the application was that suitability checks had identified that the appellant was removed from the UK under an exclusion order issued on the basis of his criminality in April 2010. It appeared that he had since re-entered the UK in breach of this exclusion order, and consideration of these matters was ongoing in order to determine the appellant's suitability for status under the EUSS.

8. The solicitors pleaded that the refusal decision was not in accordance with the law, and also not in accordance with Home Office Guidance, which stated that spent convictions did not need to be declared when applying for pre-settled status in the UK. The appellant was removed from the UK more than 10 years ago as a Brazilian national. The exclusion order was not made under the EU Directives. The appellant had since obtained Italian citizenship by descent and had entered the UK lawfully via the Republic of Ireland. The appellant's conviction had become spent and he had not re-offended. Home Office Guidance stated that spent convictions did not have to disclosed when applying under the EUSS. It was therefore disproportionate to refuse the application on suitability grounds.

The Hearing Before, and the Decision of, the First-Tier Tribunal

9. The appeal was heard remotely by Judge Bagral sitting at Taylor House on 4 January 2022. Mr Lee of Counsel appeared on behalf of the appellants, and Mr Eaton of Counsel appeared on behalf of the Secretary of State

10. The evidence before the Judge included a signed witness statement from the appellant dated 30 November 2021. The appellant explained that he had married his wife in Brazil on 17 August 2009. He had previously lived in the UK between 2003 and 2007. He had tried to enter the UK in December 2009 as he was desperate for a better life for himself and for the children. At the time, he did not have evidence of his Italian nationality and he tried to enter using a Portuguese ID card. He sincerely regretted this decision. He was stopped by the Immigration authorities at Gatwick Airport, detained, convicted and removed from the UK, and an exclusion order was issued against him. He could not recall the precise date, but he was removed from the UK in either March or April 2010, more than 11 years ago. He had lived in Brazil until 2018.

11. It is recorded by the Judge at paragraph [9] of the Decision that he indicated to the representatives that the exclusion order was not before him. Mr Lee confirmed that the appellant's solicitors did not have a copy of it. Mr Eaton confirmed that he had not seen it either. However, they were in agreement that the Tribunal could proceed without it. Mr Eaton indicated that there was no application for an adjournment on behalf of the respondent to produce it, and he expressly stated that there was no prejudice to the respondent in proceeding without sight of it.

12. It is recorded at paragraph [10] that the Judge considered that it was in the interests of justice to proceed, and that, given the narrow issue raised in the appeal, both representatives agreed that there was no need for the Tribunal to hear oral evidence from the appellant. He heard brief submissions from the representatives. Mr Eaton was not able to assist beyond the refusal letters. Mr Lee submitted that the respondent had wrongly equated a deportation order with an exclusion order.

13. In the Decision, the Judge's discussion began at paragraph [11]. At paragraph [13], he said that it was agreed that paragraph EU15 was central to the appeal. The Judge set out the paragraph as follows:

> "(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**."

14. At paragraph [14], the Judge said that the representatives were in agreement that there was no other issue between the parties other than whether the Secretary of State's decision was correct in law.

15. At paragraph [16], the Judge said that the appellant did not dispute that he was subject to a deportation order in 2010. But it was not the Secretary of State's case before him that at the date of the decision the appellant remained subject to that order. The Judge continued in paragraph [17]:

> "It is apparent that the first appellant can only be subject to an Exclusion Order if an order was made under the EEA Regulations. The respondent has failed to place before the Tribunal any evidence that the first appellant was subject to such an order. I am satisfied that she cannot do so because it is appreciably clear from the evidence that at the date of deportation (2010), the first appellant was a Brazilian national and not an EEA citizen. He was not recognised as an Italian national until 2018, i.e. after he was deported, and so could not have been removed under the EEA Regulations. I agree with Mr Lee, therefore, that the respondent has erroneously equated deportation with that of exclusion."

16. At paragraph [18], the Judge said that he was thus satisfied that the appellant's application was wrongly refused on grounds of suitability. On the evidence before him, he found that the appellant met the suitability requirements of Appendix EU because he was not subject to an exclusion order. It was not argued that his application fell for refusal on any other ground. As for his son, there was no dispute that he had resided in the UK for a continuous period of five years, and that he was refused on eligibility grounds because he could not qualify for settled or pre-settled status as his father was subject to an exclusion order. As he had found that to be wrong in law, it followed - there being no other reason why his application was refused - that the appellant's son also qualified for leave to remain under Appendix EU.

17. At paragraph [19], the Judge held that the Secretary of State's decision was contrary to the residence scheme immigration rules.

The Reasons for the Eventual Grant of Permission to Appeal

18. A member of the Specialist Appeals Team settled grounds of appeal on behalf of the Secretary of State. Initially, only one ground of appeal was raised, which was that the decision of the First-tier Tribunal should be set aside on the grounds of a mistake of fact which had led to material unfairness. The mistake was that the appellant had been subject to an exclusion decision, not an exclusion order. The evidence of this was contained in a letter dated 29 April 2010 issued to the appellant by the Criminal Casework Directorate. The letter stated as follows:

> "The purpose of this letter is to inform you that on 16 April 2010 after the most careful consideration, the Home Secretary personally directed that you should be excluded from the United Kingdom on the ground that your presence here would not be conducive to the public good for reasons of criminality, specifically your criminal conviction for Motoring Offences other [sic].
>
> As a consequence of this decision, you should not attempt to enter the United Kingdom."

19. After permission to appeal on this ground was refused by the First-tier Tribunal, the Secretary of State relied on an additional ground of appeal, which was that the First-tier Tribunal Judge had made a decision which no reasonable judge could have made on the facts before them.

20. On 9 December 2022, Upper Tribunal Judge Macleman granted the Secretary of State permission to appeal for the following reasons:

> "Judge Bagral at [13] set out the rule requiring refusal on suitability where *any* of deportation order, exclusion order or an exclusion decision applies. At [16] the Judge said that it was "not the respondent's case" that the appellant "remains subject to that order*";* but it is not clear that such was the respondent's position, and there was no evidence of revocation.

> It is generally unattractive that permission is given to enable parties to correct their mistakes. Most of the grounds seek no more than that. However, I think that the grounds as now developed disclose a possible error of law (not fact) in resolving the case as it was put, if the exclusion decision (produced for the grounds) had the effect stated in the respondent's decisions under appeal, even if it was misdescribed by both parties."

The Rule 24 Response

21. Mr Lee settled a Rule 24 response on behalf of the appellants opposing the appeal on two grounds.

22. His first ground was that the Secretary of State had put her case in a particular way, both in the decision letters that were served on the appellant and his family, and before the Judge, and on any view the grounds of appeal sought to depart from that case and that was impermissible. It was not the Secretary of State's case that the appellant was subject to a deportation order at the date of decision [15] and it is clear that the appellant was under the misapprehension that he was subject to a deportation order in 2010 [16]. But it was never argued by the Secretary of State that there was some extant bar (other than an exclusion order) that prevented the appeal from succeeding. The grounds of appeal clearly sought to put the case in a new way - and sought to introduce new evidence - in order to remedy the errors in the refusal letter that were later adopted by the Secretary of State's representative at the appeal.

23. Secondly, the proposition that a domestic exclusion decision made 12 years ago should preclude the appellant and his family from the EUSS was unlawful because it breached the Withdrawal Agreement and it contravened the principle of proportionality in EU Law.

The Hearing in the Upper Tribunal

24. In oral submissions, Mr Lee relied on the Rule 24 response and submitted that no error of law was made out, because Mr Eaton had declined the opportunity to clarify the nature of the decision relied upon, and had confined himself to putting forward a positive case that the appellant was subject to an exclusion order under the EEA Regulations, and on that basis the appellant fell outside the requirements of the Rules. He had not put forward an alternative case that the appellant was subject to a deportation order.

25. On behalf of the Secretary of State, Mr Tufan agreed that the appellant had wrongly accepted before the First-tier Tribunal that he was subject to a deportation order. But this did not matter, as the appellant came within the scope of Rule EU15 as a result of the exclusion decision of 26 April 2010. Mr Tufan produced a copy of the appellant's PNC record which showed that the appellant had given an accurate account in his witness statement of the criminal offending that had led to the exclusion decision.

26. However, Mr Tufan volunteered that the refusal decision was not in accordance with the law, as the Secretary of State had failed to follow her own guidance with regard to exclusion decisions made in respect of persons who subsequently became EEA citizens, and he handed up a copy of the relevant guidance.

27. Nonetheless, he submitted that the Judge had clearly erred in law, as the appellant accepted that he had been excluded in 2010, and he needed to make an application to revoke the exclusion decision. Mr Tufan invited us to find that an error of law was made out such that the Decision should be set aside, and the matter remitted to the Secretary of State "*to be remade*".

28. In reply, Mr Lee submitted that paragraphs [16] and [17] of the Decision needed to be read together. Although the appellant had accepted that he was subject to a deportation order, this was factually incorrect. In any event, it was not the Secretary of State's case that he was still subject to a deportation order at the date of decision. Mr Tufan had agreed that this was the case. The Secretary of State's case was solely that the appellant had been excluded under the EEA Regulations. At the outset of the hearing, he had raised a clear point of law on behalf of the appellant, which was that the appellant could not be subject to an exclusion order, as he was not an EEA citizen at the time. Mr Eaton had declined to change the Secretary of State's position in response to this point of law. In the circumstances, it could not be an error of law for the Judge to consider this point of law, and to resolve it correctly in the appellant's favour. The exclusion decision of 2010 was not before the First-tier Tribunal, and it had not been relied upon in the refusal letter or in response to the appellant's appeal.

Conclusions and Reasons

29. Ground 1 is that there was a mistake of fact in the Decision which has led to material unfairness. We find there was no material error of fact as alleged in ground 1 for the following reasons.

30. The appellant mistakenly believed he was subject to a deportation order. However, it was not the Secretary of State's case before the First-tier Tribunal that the appellant was still subject to a deportation order at the date of decision and the Judge proceeded on that basis.

31. Before the First-tier Tribunal the Secretary of State argued that the appellant was subject to an exclusion order under the EEA Regulations. The Judge found that was not the case because the appellant was a national of Brazil in 2010 when the alleged exclusion order was made. The appellant did not acquire Italian citizenship until 2018.

32. The appellant was not the subject of a deportation order or an exclusion order. We find there was no material error of fact in the Decision.

33. The appellant was issued with an exclusion decision after he left the UK in 2010. This exclusion decision was not before the Judge and he cannot be criticised for failing to take into account evidence which was not before him.

34. The Secretary of State seeks to introduce new evidence, the exclusion decision dated 29 April 2010, which in our view could, with reasonable diligence, have been produced at the hearing before the First-tier Tribunal. There was no material unfairness and the Decision was one which was reasonably open to the Judge on the evidence before him.

35. In any event, Mr Tufan accepts that the Secretary of State's decisions of 8 and 22 July 2021 refusing leave to remain under the EUSS were unlawful because the Secretary of State failed to follow published guidance: "*Exclusion from the UK*" (version 5.0) dated 26 November 2021, which states at page 11:

> "Where an application has been made for leave under the EU Settlement Scheme (EUSS) or for an EUSS family permit or travel permit under Appendix EU or Appendix EU (Family permit) (FP) to the Immigration Rules for a person who is outside of the UK and the case meets the criteria for referral to Immigration Enforcement as set out in the EUSS Suitability Guidance, consideration must be given as to whether to exclude the person from the UK.
>
> If the applicant has already been excluded their application will fall to be refused under paragraph EU15(1) of Appendix EU or FP7(1) of Appendix EU (FP). If the applicant is subject to an exclusion decision and has since acquired an EEA right, consideration must be given to making an exclusion order on grounds of public policy, public security or public health."

36. As the Guidance goes on to state at page 13, exclusion will not usually be necessary unless the level of criminality, or the threat posed by the person, is so serious that it warrants exclusion. Exclusion on the grounds of public policy, public security or public health may be justified on the basis of serious or persistent criminality. Consideration must be conducted on a case-by-case basis and be based on a person's conduct and circumstances, including whether they have any prior criminal convictions, the nature and seriousness of any previous offending, and whether it is proportionate to exclude the person from the UK.

37. The PNC record that was produced by Mr Tufan shows that the appellant has no convictions for motoring offences (contrary to what was alleged in the exclusion decision of 29 April 2010), and that he has a clean record apart from the single offence under the Identity Card Act 2006 for which he was convicted on 11 January 2010 and sentenced to a term of imprisonment of 9 months.

38. The Judge's finding that the Secretary of State's decision to refuse leave to remain was contrary to the EUSS was not irrational, as alleged in ground 2.

39. We find there was no error of law in the decision promulgated on 22 February 2022 and we dismiss the Secretary of State's appeal.

Notice of Decision

Appeal dismissed

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
4 March 2023