IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006326
First-tier Tribunal No:
DA/00061/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 9th October 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARIAN GKOTSIS
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Toby Lindsey, a Senior Home Office Presenting Officer
For the Respondent: Mr Jay Gajjar of Counsel, instructed by Briton Solicitors

Heard at Field House on 30 August 2023

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 7 April 2022 to refuse his application for indefinite leave to remain under the EU Settlement Scheme (the EUSS). The claimant is a citizen of Greece and a foreign national offender.

2. The reason given for refusal of EUSS status was that at the date of decision, the claimant was the subject of an active deportation order as defined in Annex 1 of Appendix EU.

3. On 23 March 2022 the Secretary of State notified the claimant that he was liable to deportation pursuant to section 32(5) of the UK Borders Act 2007, and on 28 March 2022, she made a deportation order thereunder.

4. A separate Article 8 ECHR claim was made on 29 June 2022, but refused on 19 July 2022 and certified clearly unfounded pursuant to section 94(1) of the Nationality, Immigration and Asylum Act 2002 (as amended). I am not concerned with that decision in this appeal. This appeal lies against the EUSS decision refused on 7 April 2022.

5. For the reasons set out in this decision, I have come to the conclusion that the Secretary of State's appeal should be allowed. I will remake the decision by dismissing the claimant's appeal.

Procedural matters

6. **Mode of hearing.** The hearing today took place face to face. There was no oral evidence.

Criminal history

7. The claimant has been in the UK for an unknown period of time, but on his account began visiting and staying in the UK in 2013, when he would have been 23 years old. The Secretary of State's records show 44 exits and entries from the UK, over the period 14 July 2015 to 16 December 2019. The claimant's own account was that he arrived in 2013 but travelled back to Greece fairly regularly between 2013 and 2019, though he was not prepared to say how often he did so.

8. The claimant is a persistent offender with multiple convictions for drugs offences and associated motoring offences, his known history beginning with a drugs conviction in Greece in 2011, when he was 25 years old. His father died on 28 June 2019 and the claimant ascribed his UK criminality to the extremely serious effect on him of his father's death, which led him to begin using cocaine heavily. Between 2020 and 2021, he accrued seven arrests and convictions in the UK, three for conduct before the specified date of 11 p.m. on 31 December 2020, and four for conduct which occurred after that date.

9. The claimant's offending history may be summarised thus:

    (i) **15 December 2011**, convicted in Greece of drug offences, sentenced to 6 years' imprisonment and a fine of €5000;
    (ii) **7 July 2020,** convicted of possession of Class A controlled drugs and sentenced to a community order, an unpaid work requirement, a victim surcharge and a drug rehabilitation requirement.
    (iii) **21 July 2020,** following another drugs arrest, the claimant was referred to the Foreign Conviction Team within the Secretary of State's Foreign National Offender Command. He was assessed

as meeting the EEA deportation threshold but not deported because he had pending criminal proceedings;

(iv) **16 January 2021**, convicted of drug-driving, fined £200, disqualified from driving for 24 months (until 16 January 2023), and ordered to pay costs and a victim surcharge;

10. In late May 2021, the claimant returned to Greece to visit his son. He spent two weeks there and arrived back on 13 June 2021. On arrival, he was refused entry, due to his criminality in both Greece and the UK, but given immigration bail pending the outcome of cases in the Magistrates' Court. He absconded, and continued his criminality:

(i) **5 August 2021,** convicted of drug driving, driving whilst disqualified (in February 2021), driving without insurance and with no driving licence. He was sentenced to a community order, unpaid work, a drug rehabilitation requirement, costs and a victim surcharge. The claimant absconded;

(ii) **9 September 2021,** arrest warrant issued for failure to appear in Sussex (Central) Magistrates' Court. The claimant was given immigration bail and required to appear on 28 September 2021. He absconded again and the Secretary of State initiated absconder action;

(iii) **16 December 2021**, the claimant was arrested for driving offences, and an outstanding arrest warrant following his having absconded again. A large amount of susd Class A drugs, a sizeable amount of cash, and a quantity of SIM cards were found. At the date of hearing, no charges had been brought regarding this discovery;

(iv) **17 December 2021**, following a breach of the community order, the claimant was sent to prison for 6 weeks concurrent, and the community order revoked. He was also was convicted of driving whilst disqualified and sentenced to 12 weeks' imprisonment consecutive, and the driving disqualification increased to 4 years. His driving licence was endorsed. There was no separate penalty for driving whilst uninsured. The claimant would be disqualified from driving until an extended test was passed, and he was ordered to pay costs and a victim surcharge;

Deportation decision

11. The claimant was given a stage 1 deportation letter in February 2022, to which he did not respond. On 10 March 2022, having completed his custodial sentence, the claimant remained in immigration detention. On 21 April 2022, he was released, but required to wear a tag. The claimant did not engage with Probation, and missed two appointments, for reasons which the First-tier Judge considered. He was not living at his notified address, but elsewhere with his UK partner. The claimant asserts that despite having lived in the UK for 10 years, his English is not good and he needs his partner to help him deal with authorities.

12. On 29 March 2022, an EEA Stage 2 deportation decision was made and the deportation order and decision were served the same day. The Secretary of State's EEA deportation decision was made under section 5(1) of the Immigration Act 1971 with reference to section 3(5) and/or 3(6) of that Act. There was no right of appeal.

13. The claimant was notified that if he was lawfully resident under the Immigration (European Economic Area) Regulations 2016 (as saved) at 23:00 GMT on 31 December 2020, and had an outstanding in-time EUSS application or outstanding EUSS appeal rights, any deportation order under the 2016 Regulations would carry a right of appeal. Under the heading 'Relevant person protected by the Withdrawal Agreements', the Secretary of State referred to deportation being pursued 'by way of the UK Borders Act 2007/Immigration Act 1971'.

14. On 31 March 2022, the claimant made an EUSS application. On 7 April 2022, the Secretary of State refused that application and served her refusal on him at HMP Lewes. Removal directions were requested the following day. On 16 May 2022, the claimant still failing to engage with Probation, another arrest warrant was issued. On 7 June 2022, the claimant attended Coventry Police Station and was arrested.

15. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

16. First-tier Judge Malone set out at [13]-[14] a self-direction that the claimant was required to show that the Secretary of State's decision was not in accordance with Appendix EU and/or with Regulation 27 of the Immigration (European Economic Area) Regulations 2016 (as saved). He heard argument on the Article 8 issues also. His understanding of Appendix EU was that all matters relied upon by both parties at date of hearing required consideration.

17. At [62], the First-tier Judge recognised that the claimant's offences were very serious, although he had not received a custodial sentence in the UK until 17 December 2021, for 24 weeks' imprisonment.

18. The First-tier Judge considered the claimant to be an impressive and credible witness who gave his evidence 'without guile'. The judge accepted the claimant's account of his arrival in 2013 and subsequent employment history, working as a painter and decorator from 2013-2015, and from 2015, as a trainee as a chef, for which he received very little pay. He was only earning enough to pay tax from 2017. It was unclear whether his painting and decorating work continued alongside the chef training.

19. The First-tier Judge accepted the Secretary of State's assessment that the claimant was a worker with effect from 14 July 2015, and she did not dispute that at the end of 2019 he was still a worker. In March 2020, the claimant's employment became frustrated by the Covid-19 pandemic lockdown. From the beginning of May 2020 until at least July 2020, the

claimant was unable to work by reason of illness, because he had a heart attack and had to take time to recover.

20. The First-tier Judge found that the claimant had acquired permanent residence, since he had been in the UK exercising Treaty rights from 14 July 2015 to 14 July 2020. There followed a lengthy consideration of Regulation 27(5) and 27(6) of the Immigration (European Economic Area) Regulations 2016.

21. The First-tier Judge considered it probable that following his heart attack, the claimant would have refrained from using cocaine, though he had clearly been using some drugs given his recurrent arrests. Rehabilitation counselling was said to have been 'very helpful'. The First-tier Judge found that the claimant was not now working. He had no family here but he did have a relationship with his UK partner, albeit she gave no evidence at the hearing. Removal to Greece would render nugatory the limited rehabilitation he had been able to achieve.

22. The First-tier Judge was not satisfied that the Secretary of State had demonstrated that the claimant's removal was justified on serious grounds of public policy, nor that he presented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society as set out in Paragraph 7 of Schedule 1 of the 2016 Regulations. The judge did not accept that the claimant was a 'persistent offender'.

23. The decision concluded:

> "110. ...In the particular circumstances of this case, the [claimant's] deportation would not be in the public interest and would not be conducive to the public good.
>
> 111. I find the [Secretary of State's] decision to refuse the [claimant] settlement s not in accordance with Appendix EU and/or the Regulations. The decision is disproportionate. It is unlawful. In the result, this appeal must be allowed."

24. The Secretary of State appealed to the Upper Tribunal.

Grounds of appeal

25. The Secretary of State challenged the First-tier Tribunal's decision primarily on the basis that, applying paragraph EU15 of Appendix EU, she was required to refuse EUSS status to any applicant who was the subject of a deportation order as defined in Appendix EU and that this claimant was such a person. The Secretary of State contended that there was no reference to this suitability requirement in the First-tier Judge's decision.

26. The Secretary of State's second ground of appeal complained of the First-tier Judge's reasoning in concluding, in the alternative, that the deportation requirements of the 2016 Regulations were not met.

Rule 35

27. On 23 December 2022, Resident Judge Froom proposed to set aside the First-tier Tribunal decision pursuant to Rule 35 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, because he considered that the First-tier Tribunal's decision and reasons contained a material error of law:

> "…4. The Judge allowed the appeal because he was satisfied the appellant's deportation was not in accordance with the Immigration (European Economic Area) Regulations 2016. The decision under appeal however was a decision to refuse an European Union Settlement Scheme (EUSS) application made on 7 March 2022. The grounds for appealing such a decision are provided in the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020 and are that the decision was not in accordance with the Immigration Rules and that the decision was not in accordance with the Withdrawal Agreement. An appeal cannot be brought on the grounds that the decision was not in accordance with the 2016 Regulations, which had been revoked when the appellant made his EUSS application. Although the Judge says that the decision can be allowed if he is satisfied that the decision is not in accordance with the Rules (Appendix EU) he does not make any finding that those Rules have not been followed and no assessment of those Rules."

Judge Froom's order invited representations from the parties if they objected.

28. On 9 January 2023, the claimant filed objections, settled by Mr Gajjar who appears today, contending that there was no material error of law in the First-tier Tribunal's decision. He argued that:

> "8.1 The sole live issue in this appeal was whether the [claimant] fell for refusal on the grounds of suitability under Appendix EU.
> 8.2 EU 15 simply requires a refusal on suitability grounds if a deportation order exists, or an applicant's presence is not conducive to the public good.
> 8.3 EU16(C)(ii)(aa) refers back to Regulation 27.
> 8.4 The entirety of the Home Secretary's refusal is <u>expressly</u> centred around the Regulation 27 assessment; see, example, paragraphs [12]-[15] dealing with the assessment of the [claimant] posing a threat, paragraphs [16]-[18] dealing with risk of harm/reoffending, paragraphs [19]-[23] on proportionality, [24]-[32] on rehabilitation and [33] on public policy, security, and health. The Secretary of State herself focuses on the 2016 Regulations and does no more than mention Appendix EU, given the latter links back to the former.
> 8.5 There were no other findings that needed to be made under Appendix EU. The structure of Appendix EU is such that, if the [claimant] could show that Regulation 27 did not apply, and his presence was not inconducive to the public good, the appeal had to be allowed under Appendix EU."

Permission to appeal

29. Judge Froom decided not to set aside the decision under rule 35 of the First-tier Tribunal Rules. He proceeded to grant permission on the following basis:

> "…3. The first ground asserts that the Judge materially erred when allowing the appeal "on EUSS grounds" (i.e. that the decision was not in accordance with Appendix EU) because paragraph EU15 of Appendix EU provides that an EUSS application will be refused on grounds of suitability where the application is subject to a deportation order and the appellant was subject to such an order.
>
> 4. The Judge recognises at [6] that the EUSS application has been refused on the basis that the appellant was subject to a deportation order. At [13] the Judge refers to the suitability criteria of Appendix EU and says that this is the particular provision he must apply. The Judge does not however refer anywhere in his decision to the suitability requirement contained in paragraph EU15 of Appendix EU and its apparently mandatory requirement that an EUSS application such as the appellant's be refused on the grounds of suitability where the applicant is subject to a deportation order (as defined in Appendix EU).
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> 5. Instead the Judge conducts a very careful and considered assessment of whether the respondent has justified deportation in accordance with Regulation 27 of the EEA Regulations 2016 giving cogent reasons for his conclusion that the deportation would not be justified under those Regulations, before concluding at [111] that
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> > "I find the Respondent's decision to refuse the Appellant settlement is not in accordance Appendix EU and/or the Regulations. The decision is disproportionate. It is unlawful. In the result the appeal must be allowed."
>
> 6. It is arguable therefore that the Judge has failed to provide adequate reasons for deciding that the decision to refuse the EUSS application was not in accordance with Appendix EU and for why the respondent's argument - that the appellant failed on the grounds of suitability because he was subject to a deportation order - was rejected and that this was a material error of law.
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> 7. The second ground makes a number of complaints about the Judge's reasoning when concluding that the respondent had not established that the requirements of the 2016 Regulations for deportation had not been met. These are in reality little more than disagreements with the Judge's reasoned assessment of the facts and appear to me to have little merit. *However all grounds may be argued.*" [*Emphasis added*]

30. No Rule 24 Reply was filed on behalf of the claimant.

31. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

32. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal.

33. For the Secretary of State, Mr Lindsey maintained both of the Secretary of State's grounds of appeal. The First-tier Judge had failed overall to give adequate findings on the material conclusions.

34. Ground 1 was made out: Appendix EU 15.1A applied and required a mandatory refusal of EUSS on suitability grounds. Regulation 27 of the 2016 Regulations was irrelevant. The Secretary of State was entitled to succeed on that ground.

35. The claimant's accrual of permanent residence was interrupted in 2020 by the pandemic and his heart attack. Mr Lindsey accepted that the Secretary of State had the burden of proof on this issue.

36. As regards ground 2, the First-tier Judge's self-direction at [104] was incompatible with his reasons at [71]-[77]. The Secretary of State considered that the claimant was a foreign national offender but the judge had made no finding of fact concerning that status, under section 117C or 117D. Mr Lindsey relied on section 117D(2) and on the guidance given by the Upper Tribunal in *Zulfiqar* [2020] UKUT 312 (IAC). Section 117D was not expressly restricted to offences in the UK and the Tribunal should not read such a requirement into it.

37. Section 32 of the UK Borders Act 2007 was not in the same language and arguably could be read as linking the conviction and sentence together in a forward looking approach, whereas section 117D of the 2002 Act looked back to past convictions. Mr Lindsey also relied on the Secretary of State's June 2023 guidance on foreign national offenders.

38. Mr Gajjar adopted his Rule 35 representations. He argued that the Secretary of State's refusal letter was based both on the deportation order and on eligibility under Regulation 27. Judge Malone had been entitled to consider the lawfulness of the deportation order, as well as its subsistence.

39. Mr Gajjar did not dispute that ground 1 was made out.

40. As regards ground 2, the detailed findings made by the First-tier Judge were open to him and the reasons challenge could not succeed. Although the claimant had ceased activity twice, first during the Covid-19 lockdown in 2020, and again following his heart attack that year, he fell to be treated as temporarily inactive pursuant to Regulation 5(7) of the 2016 Regulations and therefore his residence in accordance with the Regulations was not interrupted. The First-tier Judge had taken proper account of the conviction in Greece and of section 117C and D of the Nationality, Immigration and Asylum Act 2002 (as amended).

41. I reserved my decision, which I now give.

Conclusions

42. I deal first with the challenge in ground 1. The EUSS decision, as Mr Gajjar rightly identified in his rule 35 response, turns on the suitability provisions in Appendix EU at paragraph 15(1)(a) and the definition of deportation order in Annex 1 thereto.

43. I remind myself that the claimant has a conviction for drug offences in Greece in 2011, and in the UK, three further offences relating to conduct which fell before the specified date of 11 p.m. on 31 December 2020, and four convictions in 2021 which were based on conduct which occurred after the specified date.

44. The definition of 'deportation order' for the purposes of Appendix EU is to be found in Annex 1 and draws a sharp distinction between whether a deportation order as there defined is based on conduct before or after the specified date:

> "**Deportation order -** as the case may be:
>
> (a) an order made under section 5(1) of the Immigration Act 1971 by virtue of regulation 32(3) of the EEA Regulations; or
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> (b) an order made under section 5(1) of the Immigration Act 1971 by virtue of section 3(5) or section 3(6) of that Act in respect of:
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> (i) conduct committed *after the specified date*;
> (ii) conduct committed by the person *before the specified date*, where the Secretary of State has decided that the deportation order is justified on the grounds of public policy, public security or public health in accordance with regulation 27 of the EEA Regulations, irrespective of whether the EEA Regulations apply to the person (except that in regulation 27 for "with a right of permanent residence under regulation 15" and "has a right of permanent residence under regulation 15" read "who, but for the making of the deportation order, meets the requirements of paragraph EU11, EU11A or EU12 of Appendix EU to the Immigration Rules"; and for "an EEA decision" read "a deportation decision"); …
>
> In addition, for the avoidance of doubt, (b) includes a deportation order made under the Immigration Act 1971 in accordance with section 32 of the UK Borders Act 2007."
>
> [*Emphasis added*]

45. The deportation decision affecting this claimant was made pursuant to section 5(1) and 3(5) of the Immigration Act 1971. Whilst this claimant did have four pre-specified date offences, those were not the offences which gave rise to the deportation order. Regulation 27 is not relevant to offences where the conduct was committed *after* the specified date, but only to conduct which was committed *before* the specified date.

46. The 29 March 2022 decision to deport him is unarguably a deportation order for the purpose of Appendix EU. I turn therefore to the suitability provisions at EU15(1), which is in mandatory terms:

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

(a) The applicant is subject to a deportation order or to a decision to make a deportation order; …"
[*Emphasis added*]

47. Rule EU16(c)(ii), on which Mr Gajjar also relied, provides for a discretionary refusal on grounds of suitability in certain circumstances, but that is not relevant here, as the mandatory provision of rule EU15(1) applies. It is also the case that none of the reasons triggering the discretionary consideration of refusal applies to this claimant.

48. In conclusion, the claimant is caught by paragraph EU15(1)(a): he is a person subject to what Appendix EU defines as a deportation order and was so subject on the date of decision. The Secretary of State was required to refuse the EUSS application on suitability grounds. The 2016 Regulations were not engaged, as by the time the decision to deport the claimant was made, the UK had left the EU and the only route open to the claimant was to show that he qualified under Appendix EU and/or the Withdrawal Agreement for EUSS status.

49. The First-tier Judge therefore erred in law in allowing the appeal both under Appendix EU and under the 2016 Regulations.

50. The Secretary of State's appeal is allowed and I remake the decision by dismissing the appeal.

Notice of Decision

51. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.
I set aside the previous decision. I remake the decision by dismissing the appeal.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 3 October 2023