



**Upper Tribunal
(Immigration and Asylum Chamber)**

Geci (EEA Regs: transitional provisions; appeal rights) [2021] UKUT 00285 (IAC)

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons Promulgated

On 27 August 2021

Extempore

.....

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR LIRIM GECI

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr M S Muquit, Counsel instructed by Malik & Malik Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

(1) The Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”) were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020.

(2) Many of the provisions of the EEA Regulations are preserved (although subject to amendment) for the purpose of appeals pending as at 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309), (“the EEA Transitional Regulations”). The preserved provisions and amendments made are set out in paragraphs 5 and 6 of Schedule 3 to the EEA Transitional Regulations.

(3) The effect of the amendments is that the sole ground of appeal is now, in effect, whether the decision under appeal breaches the appellant’s rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.

(4) The issue of a residence card is an administrative matter. Although the Secretary of State does have power under the EEA Regulations to refuse to issue a residence card on grounds of public policy, public security or public health, she does not have the right to do so under Directive 2004/38/EC or the EU Treaties.

DECISION AND REASONS

1.

The appellant appeals against a decision of the Secretary of State to refuse to issue him with a residence card under the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”). His appeal against that decision was dismissed by the First-tier Tribunal in a decision promulgated on 6 February 2020 but, for the reasons set out in my decision of 22 March 2021 (a copy of which is annexed), that decision was set aside.

2.

As noted in my earlier decision, the factual basis of this appeal is unusual. The appellant has a poor immigration history and it is accepted that he entered the United Kingdom twice in breach of a deportation order. There is no purpose in setting out the full details of that history, but it is sufficient to note that he has a history of offending in this country. It is not in dispute either that it would have been open to the Secretary of State to take steps to remove the appellant under her powers under the EEA Regulations but instead in this case she chose simply not to issue a residence card and expressly stated, one might think somewhat surprisingly, that the appellant’s rights of free movement as a family member of an EEA national were not being restricted.

3.

It is common ground that the EEA Regulations have been revoked but that certain parts of those regulations are preserved for the purpose of this appeal. What those are is an issue to which I turn first.

The Law

4.

I consider it necessary to set out in some detail the law as it now exists in respect of the EEA Regulations and the right of appeal. The position is unfortunately complex and requires the consideration of several different pieces of legislation. I am indebted to Mr Muquit’s comprehensive skeleton argument for setting out the legal position.

5.

The EEA Regulations were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020. They are, however, preserved for certain purposes by three separate instruments:

(a)

The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309), (“the EEA Transitional Regulations”),

(b)

The Citizens’ Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020; and,

(c)

The Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020 ("Citizens' Rights Restriction Regulations").

6.

This appeal is concerned only with the effect of the EEA Transitional Regulations but some observations about the other instruments are helpful.

7.

The Citizens' Rights (Application Deadline and Temporary Protection) Regulations regulate the position of EEA nationals who had lived in the UK but who had not, as at 31 December 2020, been given leave under Appendix EU of the Immigration Rules. There is a "grace period" until 21 June 2021 during which these people were able to apply for leave, but until that date, some of the provisions of the 2016 EEA Regulations continued to apply to that group and also apply while a valid application is pending, and while a valid appeal against such a decision is pending.

8.

The Citizens' Rights Restriction Regulations are designed to apply the "old" law in relation to deportation of those previously covered by the 2016 EEA Regulations where the conduct complained of took place prior to 31 December 2020.

9.

The instruments do not preserve all of the EEA Regulations; each instrument preserves a different subset which apply for the purposes covered by that instrument. If that were not complex enough, different subsets of the EEA Regulations are preserved for Immigration purposes and social security purposes; and, those regulations that are preserved are subject in some cases to amendments.

10.

This appeal is concerned only with the EEA Transitional Provisions.

11.

Reg 82 of the EEA Transitional Regulations provides for the savings set out in Schedule 3 to apply. It is not necessary to set those out in full.

12.

Paragraph 5 of Schedule 3 to the EEA Transitional Regulations makes provision for the appeal rights and appeals pending as at the date of revocation of the EEA Regulations as follows:

5.— Existing appeal rights and appeals

(1) Subject to sub-paragraph (4), the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply—

(a) to any appeal which has been brought under the Immigration (European Economic Area) Regulations 2006 and has not been finally determined before commencement day,

(b) to any appeal which has been brought under the EEA Regulations 2016 and has not been finally determined before commencement day,

(c) in respect of an EEA decision, within the meaning of the EEA Regulations 2016, taken before commencement day, or

(d) in respect of an EEA decision, within the meaning of the EEA Regulations 2016 as they continue in effect by virtue of these Regulations or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 , which is taken on or after commencement day.

(2) For the purposes of paragraph (1)—

(a) an appeal is not to be treated as finally determined while a further appeal may be brought and, if such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned; and

(b) an appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom.

(3) The revocation of the EEA Regulations 2016 does not affect the application of the Immigration (European Economic Area) Regulations 2006 to an appeal that falls within paragraph 3(1) of Schedule 4 to the EEA Regulations 2016 .

(4) The provisions specified in paragraph 6 do not apply to the extent that the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply to an appeal or EEA decision by virtue of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 .

13.

It is clear from the above that this is an appeal which falls within subparagraph (1)(b) or for that matter (1)(c).

14.

Paragraph 6 of Schedule 3 to the EEA Transitional Regulations sets out those provisions which are preserved and also any amendments made. Those relevant here are as follows:

(1) The specified provisions of the EEA Regulations 2016 are—

(a) regulation 2 (general interpretation) with the following modifications—

(i) as if all instances of the words "or any other right conferred by the EU Treaties"—

(aa) in so far as they relate to things done on or after exit day but before commencement day, were a reference to a right conferred by the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;

(bb) in so far as they relate to things done on or after commencement day, were omitted;

(ii) as if all instances of the words "or the EU Treaties"—

(aa) in so far as they relate to things done on or after exit day but before commencement day, were a reference to the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;

(bb) in so far as they relate to things done on or after commencement day, were omitted;

...

(cc) Schedule 2 (appeals to the First-tier Tribunal) with the modification that—
(aa) in relation to an appeal within paragraph 5(1)(a) to (c), in each of paragraphs 1 and 2(4), the words "under the EU Treaties", in so far as they relate to things done on or after exit day but before commencement day, were a reference to the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;

15.

"EU Treaties" is defined in paragraph 1 of Schedule 1 to the Interpretation Act 1978¹ to include the Treaty on the Formation of the European Union as was in force on 31 December 2020

16.

Part 4 of the EU Withdrawal Agreement maintains in effect the law of the European Union which is in addition defined to include the EU Treaties subject to certain exceptions which are not applicable here.

17.

The effect of this is that the provisions of the TFEU including the legislation done under that which includes Directive 2004/38/EC ("the Directive") are preserved by the Withdrawal Agreement and thus are applicable. It is also clear from the wording of the Directive although it refers to the Treaty on the European Economic Area that that is made under the TFEU, which was renamed as that by the Treaty of Lisbon.

18.

As this is an appeal lodged on 26 November 2019 in respect of a decision made on 8 November 2019 it falls within paragraph 5(1)(b) of Schedule 3 and on that basis, there is a right of appeal.

19.

The first issue for consideration is what now is the ground of appeal. Prior to the revocation of the EEA Regulations that was set out in Schedule 2 of the Regulations which provided as follows:

The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal)—

section 84 (grounds of appeal) 1, as though the sole permitted grounds of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom ("an EU ground of appeal")

20.

The effect of the amendments as set out above is that the sole ground of appeal is, in effect, whether the decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.

21.

The decision made in this case was to refuse to issue a residence card pursuant to reg 24 (1) on the basis that this was justified on grounds of public policy, public security, or public health (reg. 27). Both regs 24 and 27 are preserved.

22.

I now turn to the Directive. Articles 9 and 10 provide:

Article 9

Administrative formalities for family members who are not nationals of a Member State

1. Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months.
2. The deadline for submitting the residence card application may not be less than three months from the date of arrival.
3. Failure to comply with the requirement to apply for a residence card may make the person concerned liable to proportionate and non-discriminatory sanctions .

Article 10

Issue of residence cards

1.
The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2.
For the residence card to be issued, Member States shall require presentation of the following documents:

(omitted)

23.
There is little dispute about the effect of the Directive in this case. Both Articles 9 and 10 of the Directive require that somebody must be issued a card as confirmation of a right of residence. It is not in dispute that this appellant has a right of residence conferred on him by the Directive as he is the spouse and therefore family member of an EU national exercising treaty rights in the United Kingdom nor does the respondent contend that the appellant has not provided the correct documents.

24.
In the refusal letter it is not expressly confirmed (or denied) that the appellant has a right of residence, merely referring to it as "claimed". At [16] the letter states that the decision made "does not attach any requirement for him to imminently leave the United Kingdom and does not place any restrictions on your claimed right of residence".

25.
Before me, it was not in dispute that the appellant has a right of residence as his wife was exercising her right to work in the United Kingdom as an Italian citizen.

26.
I accept, as indeed does the appellant, that his rights of free movement could be restricted were a decision made, for example to remove him on the basis that his removal was conducive to the public good justified by reference to the factors set out in the Directive subject to the procedural considerations set out in Articles 27, 28 and 31 of the Directive.

- 27.

The Directive does not permit a refusal to issue a residence card on public policy, public security or public health grounds. The Directive is expressed unambiguously in mandatory terms. It is also of note that the Directive places strict time limits on how long can be taken to issue a residence card. The issue of a residence card is an administrative matter.

28.

Refusal to issue a residence card is not therefore a restriction on the right of free movement although I accept that in practice it may make exercise of that right difficult in practical terms.

29.

While I accept that the Directive gives a right to Member States to restrict rights of free movement, and to remove people on grounds of public policy, public security or public health, I am not satisfied that it grants Member States the power to dispense with complying with the requirement to issue a residence card so long as the documentary evidential requirements are met.

30.

I accept that the Secretary of State does have power under the EEA Regulations to refuse to issue a residence card on grounds of public policy, public security or public health, but what is in issue here is the rights under the EU Treaties and the Directive.

31.

Accordingly, I am not satisfied that there is any proper basis on which under the Directive or for that matter the EU Treaties that the Secretary of State has the right to refuse to issue a card as confirmation of the rights that a person holds. That is entirely different from the situation where someone's rights of residence have been restricted, curtailed or cancelled on grounds of public policy, public security and so on, set out in Article 27(2). But the Secretary of State has not done this although she would appear to have the power to expel or remove the appellant, subject to any right of appeal.

32.

Further, and in any event, such a decision would need to be proportionate and no proper basis appears is put forward as to why, if the Secretary of State accepts that an individual has the right of free movement, the means of them being able to vindicate that or confirmation of that should be denied them. While it may well be that, given the appellant's convictions, his removal could be justified, the respondent had not sought to do so despite having the power to do so.

33.

Accordingly, for these reasons I am satisfied that the decision made in this case was contrary to the appellant's rights pursuant to the EU Treaties and I allow the appeal on that basis.

Notice of Decision

34.

The decision of the First-tier Tribunal involved the making of an error of law and I set it aside

35.

I remake the decision by allowing the appeal on EU grounds.

No anonymity direction is made.

Signed Date 7 September 2021

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul

ANNEX - ERROR OF LAW DECISION



IAC-AH-DN-V1

Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: EA/06505/2019

THE IMMIGRATION ACTS

Heard at Field House

On 10 March 2021

Extempore

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR LIRIM GECI

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr P Georget (Counsel)

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

36. The appellant appeals with permission against the decision of First-tier Tribunal Judge Sharma dismissing his appeal against a decision of the respondent made on 14 January 2020 to refuse to issue him with a residence card on public policy grounds.

37. The factual basis of this appeal is, as both parties accept, highly unusual. The decision by the Secretary of State was not to remove the appellant or to seek to enforce the deportation order, but

rather to refuse to issue a residence card pursuant to Regulation 24 of the Immigration (European Economic Area) Regulations 2016 by reference to Regulation 27 and Schedule 1 of the Regulations.

38. The appellant has a poor immigration history and, as is accepted, has entered the United Kingdom twice in breach of a deportation order. It is unnecessary to set out the details of his history, but it is sufficient for these purposes to record that the appellant also has a criminal history in this country.

39. As the Secretary of State accepted in the refusal letter, this was not a decision that he was not entitled to the rights which accrue to a non-EEA partner of an EU national exercising treaty rights in the United Kingdom.

40. The judge was understandably confused by the unusual nature of the decision made and also by lack of evidence relating to the appellant's criminal behaviour. But what the judge did not do is set out properly the relevant ground of appeal as set out in Schedule 1 to the 2016 Regulations, that is whether the decision was contrary to the appellant's rights pursuant to the Treaties which includes the relevant Directive. The right of appeal is not that the decision is not in accordance with the 2016 Regulations.

41. The judge considered that the appellant's offending in the supply of cannabis and drugs were not sufficient to represent a genuine present and sufficiently serious threat but did conclude that the appellant's attitude and specifically his view to driving whilst disqualified at paragraph 24 indicated a continuing disregard to driving laws at 25 and posed a genuine, present and sufficiently serious threat to one of the fundamental interests of society. The judge also considered that the re-entry into the United Kingdom in breach of a deportation order was relevant and there was a genuine and sufficiently serious threat to the fundamental interests of society in preventing unlawful immigration and maintaining the integrity and effectiveness of immigration control in the common travel area. The judge then equivocates at [27] and [28] understandably about the issue of proportionality bearing in mind that there is no decision to remove, observing that the appellant could leave the United Kingdom and work elsewhere and that his wife could accompany him. Yet this was of course not the effect of the decision, and it is not clear that proper regard was made to the rights of the spouse to establish herself and work in the United Kingdom as an EEA national. It is accepted, however, that the appellant could work without the residence card as could his wife and that there was no decision to remove him.

42. The appellant sought permission to appeal on a number of grounds and permission was granted by First-tier Tribunal Judge Foudy on 3 May 2020 the judge noting that the First-tier Tribunal Judge was facing a very unusual appeal in which a previously deported man had married an EEA national and re-entered the United Kingdom and applied for a residence card. She also noted it was likely that the judge ought to have required the evidence that is relating to the convictions had been put before him so that he could determine all issues that arose.

43. Subsequent to that, directions have been issued and submissions made by both representatives, the Secretary of State maintaining their place, the appellant maintaining the case that this was an entirely artificial exercise.

44. I have been assisted by both representatives today, both of them agreeing that this is a difficult situation and one which Mr Tufan observed should perhaps not have arisen.

45. The difficulty is that the decision under appeal does not put into effect the deportation order nor does it enforce removal. It is difficult to see how a decision which has little if any practical effect is easily considered as one which protects a fundamental interest of society. The decision has little or no effect on the protection of the public as it does not enforce removal.

46. More fundamentally there is, I consider, a significant issue bearing in mind the ground of appeal in this case which is whether the decision is contrary to the appellant's rights under the EU Treaties. The judge did not focus on that issue and appears also to have failed to consider that in the Directive there does not appear to be any power to refuse to issue a residence card.

47. While it is beyond doubt that Article 27 of the Directive permits a member state to introduce restrictions on freedom of movement and to take decisions to remove people or revoke rights, there is little or no indication that they can refuse to issue a residence card which is simply a confirmation of an existing right.

48. In the circumstances I consider that the judge erred in not considering properly the basis of the ground of appeal and failed properly to consider whether what the Secretary of State has done was permissible under the Directive. A failure to resolve those issues amounts to an error of law. For these reasons I set aside the decision to be remade in the Upper Tribunal.

49. Having reached that decision, I observe also that since the decision of the First-tier Tribunal, changes to the law applicable to both nationals of the EU and their partners have come into force, and these matters will need to be addressed and resolved at any future hearing.

50. It is of course open to the Secretary of State now to withdraw the decision and to proceed with enforcing the deportation order and it would appear to me to be a sensible course of action to do so.

Notice of Decision & Directions

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I direct that the decision will be remade in the Upper Tribunal on a date to be fixed.
3. The appellant and the respondent are directed to produce skeleton arguments addressing what legal provisions now apply to the appellant, given the revocation of the Immigration (European Economic Area) Regulations and the other changes to legislation which have come into force since 31 December 2020.

Signed Date: 18 March 2021

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul

¹ As amended by the European Union (Withdrawal Agreement) Act 2020 Sch.5(2) para.12(d)(ii)