

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT



CO/2344/2021

B E T W E E N :

THE QUEEN on the application of
Mr. Bradley Joaquim Morais DOS SANTOS E SILVA

Claimant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

REASONS FOR MAKING ORDER IN AGREED TERMS

1. Regulation 23(9) of the Immigration (European Economic Area) Regulations 2016 ("**EEA Regs**") states that "A decision taken under paragraph 6(b) or (c) has the effect of terminating any right to reside otherwise enjoyed by the individual concerned."
2. The EEA Regs were revoked with effect from 31 December 2020 by Immigration & Social Security Co-ordination Act 2020, Schedule 1 paragraph 2(2). However, regulations 3, 4 and 7(1) of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 ("**Transitional Protection Regs**") provided that regulation 23 of the EEA Regs continued to have effect, in relation to persons lawfully resident under the EEA Regs on 31 December 2020, until 30 June 2021 (unless they are granted leave to remain under the EU Settlement Scheme) and further continued to have effect, for any such person who made an application by 30 June 2021 to the Defendant ("**SSHD**") under the EU Settlement Scheme, until that application is granted or, if refused, any appeal rights are exhausted.
3. The Claimant is a 19 year-old Portuguese citizen, who has lived in the UK since birth. SSHD accepts that he acquired the permanent right of residence in the UK under the EEA Regs.

4. On 26 June 2018, the Claimant was sentenced to an extended determinate sentence of 4 years' imprisonment, with an extension licence period of 1 year.
5. On 19 September 2019, SSHD notified the Claimant that she was considering making a decision to remove the Claimant from the UK on grounds of public policy or public security under regulation 23(6)(h) of the EEA Regs.
6. On 19 April 2021, when the Parole Board was considering whether to authorise the Claimant's release on parole, the Defendant advised the Parole Board that "even in the event of an appeal against any future Deportation Order [the Claimant] would not be able to have recourse to public funds while that appeal was heard". The basis of this advice was that regulation 23(9) of the EEA Regs would be effective to terminate any right to reside that the Claimant had.
7. On 25 June 2021, the Claimant made an application to SSHD for settled status under the EU Settlement Scheme. SSHD refused this application on 5 August 2021. On 16 August 2021, the Claimant provided Notice of Appeal from that decision to the First-Tier Tribunal (Immigration and Asylum Chamber) ("FTT"). That appeal is pending.
8. On 6 July 2021, the Claimant filed this claim contending that regulation 23(9) of the EEA Regs is invalid and of no effect.
9. On 5 August 2021, SSHD made a decision to remove the Claimant under regulation 23(6)(h) of the EEA Regs. On 16 August 2021, the Claimant provided Notice of Appeal from that decision to the FTT. That appeal is also pending.
10. SSHD now accepts that regulation 23(9) of the EEA Regs is of no effect in the case of a person like the Claimant to whom Title II of Part 2 of the UK-EU Withdrawal Agreement¹ ("**Withdrawal Agreement**"), as given effect by section 7A of the European Union (Withdrawal) Act 2018, applies. This is because the Claimant has been accepted to have a right of residence (in his case a right of permanent residence) under EU Law at the end of the transition period,

¹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

and is pursuing an appeal against the refusal of “the new residence status” referred to in Article 18(1) of the Withdrawal Agreement. Pursuant to Article 18(3) of the Withdrawal Agreement, the Claimant enjoys the rights in the Withdrawal Agreement, including the procedural safeguards set out in Chapter VI of Directive 2004/38/EC, pending a final judgment on his appeal against refusal of his EUSS application. In those circumstances, the SSHD agrees that reg. 23(9) – which operates automatically to terminate the Claimant’s right to reside – is of no effect in his case, pending a final judgment on his appeal against the refusal of his EUSS application.

11. For the same reasons, SSHD agrees that reg. 23(9) will fall to be disapplied in the case of any person who both falls within scope of Title II of Part 2 of the Withdrawal Agreement and who enjoys the protection of Article 18(3). (To be clear, it is SSHD’s position that a person who merely falls within scope of the Withdrawal Agreement (Article 10) but who has not made an application pursuant to Article 18(1) (or who has not appealed against a refusal of such application) will not enjoy the protections of the Withdrawal Agreement, because Article 18(1) makes clear that it is grant of the residence status which confers the rights under Title II. That issue does not arise on the facts of this case.)
12. The Claimant does not accept that this is the only legal basis rendering regulation 23(9) of no effect, but does agree that SSHD’s acceptance resolves the issues between them in this case.
13. The parties consider that a declaration of the Court is desirable in the interests of legal certainty.
14. For completeness, so far as other potential affected cases are concerned, SSHD has been unable, in the time available, to ascertain precisely how many relevant cases are affected, but the parties are agreed that:
 - a. there are likely to be a significant number; and
 - b. like the Claimant, such persons may need to show that they enjoy a right to work, or a right to reside for the purposes of a claim to certain

means-tested benefits, or for other purposes such as opening a bank account or obtaining a driving licence.

15. For the reasons set out above the parties consider that the following declaration is appropriate:

"Regulation 23(9) of the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) is of no effect in the case of the Claimant because he is a person to whom Title II of Part 2 of the Agreement on the Withdrawal of the United Kingdom and Northern Ireland from the European Union and the European Atomic Energy Community applies, and who enjoys the protection of Article 18(3) of the Withdrawal Agreement. These provisions of the Withdrawal Agreement have direct effect by virtue of section 7A of the European Union (Withdrawal) Act 2018."

Signed on10 November 2021

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BY THE COURT

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SECRETARY OF STATE FOR THE HOME DEPARTMENT

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AGREED TERMS OF PROPOSED ORDER

WHEREAS the parties propose the terms of this order in accordance with Practice Direction (Administrative Court: Uncontested Proceedings) (QBD) [2008] 1WLR

UPON the Court considering the Reasons for Making Order in Agreed Terms filed by the Claimant on 10 November 2021

AND UPON the Court being satisfied that this order should be made

IT IS DECLARED THAT

Regulation 23(9) of the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) is of no effect in the case of the Claimant because he is a person to whom Title II of Part 2 of the Agreement on the Withdrawal of the United Kingdom and Northern Ireland from the European Union and the European Atomic Energy Community applies, and who enjoys the protection of Article 18(3) of the Withdrawal Agreement. These provisions of the Withdrawal Agreement have direct effect by virtue of section 7A of the European Union (Withdrawal) Act 2018.

AND IT IS ORDERED THAT

1. The hearing listed on 11 November 2021 is vacated.

2. The Secretary of State is to pay the Claimant's reasonable costs to be subject to detailed assessment on the standard basis if not agreed.
3. Pursuant to CPR 44.2(8) the Secretary of State shall, within 28 days of the final order of the Court, make a payment on account of the Claimant's costs in the sum of £10,914.02, representing 50% of the Claimant's provisional bill of costs.
4. There be a detailed assessment for public funding purposes of the Claimant's costs.

Signed on 10 November 2021

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