Human rights appeal against the deportation of an EEA national who had grown up in the UK (MS (British citizenship—EEA appeals) Belgium)

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Immigration analysis: MS concerns a human rights appeal against the deportation of a European Economic Area (EEA) national who had grown up in the UK. The Upper Tribunal gives guidance on (i) the relevance in human rights appeals of a previous unexercised entitlement to apply to register as a British citizen—and (ii) whether EU nationals who have spent their childhoods in the UK should be considered to have been 'lawfully resident' for human rights purposes, notwithstanding a failure to comply with free movement rules. The second point is likely to become relevant to EU child rights in the event of a no-deal Brexit. Ben Amunwa, barrister at The 36 Group, considers the background to the judgment and its practical implications.

MS (British citizenship—EEA appeals) Belgium [2019] UKUT 356 (IAC), [2019] All ER (D) 130 (Nov)

What are the practical implications of this case?

When advising settled migrants subject to deportation or removal action, advisers should avoid arguments based on previous, unexercised entitlements to apply to register as a British citizen under section 3(1) of the British Nationality Act 1981 (BNA 1981).

Focus instead on the nature and extent of the settled migrant's ties to the UK. This may include matters such as the length of their residence, where they spent their 'formative years', their relationship with relatives and friends, and their broader private life in the UK.

This is different to the position of those who had a previous, unexercised absolute right to register as a British citizen under BNA 1981, s 1(3) or (4). Such persons may argue more easily that they should not be regarded as 'unlawful' during the time that they had enjoyed such a right (relying on the approach of the Court of Appeal in *Akinyemi v Secretary of State for the Home Department* [2017] EWCA Civ 236), [2017] All ER (D) 55 (Apr).

In human rights applications or appeals by EEA nationals who have spent their childhood in the UK but who have not been resident in accordance with the EEA regulations, it may be appropriate to argue that they have not been 'unlawfully' resident in the UK while they were minors. This will be relevant to the public interest factors under section 117B(4) of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002) (which requires judges in human rights appeals to attach 'little weight' to the private life acquired when a person is in the UK 'unlawfully'). Such arguments may assist EEA nationals who were under the control of their parent/s or carer/s at the time and where no Home Office enforcement action had been considered against the child or their parent/s or carer/s.

In the event of the UK withdrawing from the EU, at the time of writing, EEA nationals residing in the UK who do not have a Home Office document under the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) or who otherwise lack immigration status will be liable to enforcement action as unlawful migrants. The guidance in *MS* may prove useful for those categories of EEA nationals who wish to argue that their childhood ties to the UK should not fall foul of NIAA 2002, s 117B(4).

What was the background?

In *MS*, the Upper Tribunal re-made the appellant's appeal against the refusal of his human rights claim. The claimant was an EEA national. Following conviction for several offences, the Secretary of State made a deportation order against him under the [EEA Regulations 2016]. He failed to appeal. Subsequently, he made representations seeking revocation of the deportation order on EU law and human rights grounds.

The Secretary of State refused the representations but, contrary to the terms of the EEA Regulations 2016, granted MS an in-country right of appeal. MS appealed to the First-tier Tribunal (FTT) who allowed his appeal on EU law grounds but failed to address his human rights appeal. The Secretary of State appealed to the Upper Tribunal who concluded that the FTT had no jurisdiction to consider the EU law appeal (due to the effect of reg 37 of the EEA Regulations 2016).

As the FTT had failed to address MS' human right appeal, the Upper Tribunal set aside the FTT's determination and re-made the decision on MS' human rights appeal. Although MS was an EEA national, in the unusual circumstances, he could only resist deportation on human rights grounds. As the Upper Tribunal decision discusses, the domestic deportation regime is not entirely coherent in its application to EEA nationals.

What did the court decide?

The Upper Tribunal held that adult EEA nationals who are not exercising Treaty rights and who have no other form of immigration status in the UK will be in the UK 'unlawfully'. However, the Upper Tribunal recognised that for some EEA nationals, it may be appropriate to take into account the fact that they may face serious difficulties in proving their status under the EEA Regulations as a minor.

Applying *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58, [2019] 1 All ER 1007, the Upper Tribunal concluded that, when deciding human rights appeals, judges should use the limited flexibility afforded to them by NIAA 2002, Pt 5A when considering whether to find that EEA nationals who had grown up in the UK and who had not complied with the EEA Regulations 2006 or 2016 were nevertheless not in the UK 'unlawfully' for the purposes of NIAA 2002, s 117B(4).

While the Upper Tribunal's decision is clear as it applies to a person's years as a dependent minor, its reasoning is less clear on how and when the presence of such EEA nationals in the UK becomes 'unlawful' as they enter their adult years. It remains arguable, in the author's view, that there is no bright line separating a lawful childhood from an unlawful adulthood.

Lastly, the Upper Tribunal found that while the tribunal can decide on claims to British nationality, it should avoid considering the chances that a person may have been able to successfully apply to register as a British citizen under BNA 1981, s 3(1), as opposed to whether a person had an absolute entitlement to register under BNA 1981, s 1(3) or (4). The tribunal should focus instead on the nature and extent of the person's ties to the UK.

Interviewed by Alex Heshmaty.

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