30 January 2020

ILPA Briefing on the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020

The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("Appeals Regs") provide for the right of appeal against decisions under the EU settlement scheme ("EUSS") as required by the Withdrawal Agreement.

When does it apply

Appeal rights only accrue in relation to refusals to grant entry clearance, pre-settled status or settled status where the application was made on or after exit day.

The Appeals Regs come into force "on exit day" (reg.1(2)). "Exit day" is defined in law as "31 January 2020 at 11.00 p.m.": European Union (Withdrawal) Act 2018 (EU(W)A 2018 s20(1). However, "references to before, after or on exit day, or to beginning with exit day, are to be read as references to before, after or at 11.00 p.m. on 31 January 2020 or (as the case may be) to beginning with 11.00 p.m. on that day": EU(W)A 2018, s20(2).

This suggests any decision relating to an application made before 11pm on 31 January 2020 will not attract a right of appeal. If any individual wishes to appeal an application submitted before this time, they will have to make a fresh application under the EUSS.

What decisions can be appealed

The following types of decisions are appealable:

1. Where a valid application for leave under the EUSS, or for an EUSS family or travel permit, has been made, a decision to:
    a. refuse the application; or
    b. grant limited leave to enter or remain (pre-settled status) where they believe they should have been granted indefinite leave to enter or remain (settled status under the scheme).
2. Vary leave so that they have no leave.
3. Revoke indefinite leave.
4. Cancel leave.
5. Cancel or revoke an EUSS family permit or travel permit.
6. Refuse leave to enter under article 7(1) of the Immigration (Leave to Enter and Remain) Order 2000 where the individual has an EUSS family permit or travel permit.
7. Vary or cancel leave to enter granted by virtue of entering with a valid EUSS family permit.
8. Deport someone with leave under the EUSS or where they arrived with an EUSS family permit, or someone who would have had leave but for the making of a deportation order (unless the decision to remove the individual is taken under reg.23(6)(b) of the Immigration (European Economic Area) Regulations 2016).

Where the appeal will be heard

The appeal will ordinarily go to the First-tier Tribunal, unless it is certified as to be appealed to the Special Immigration Appeals Commission because it relates to national security or for other reasons of public interest.

When to appeal by and the effect of administrative review

If the appellant is in the UK the notice of appeal must be received not later than 14 days after the appellant is sent the notice of the decision. If the appellant is outside the UK the notice of appeal must be received not later than 28 days after the appellant receives the notice of the decision.

However, if the appellant applies for an administrative review of the decision under Appendix AR (EU), the time starts to run from the date the appellant is sent (if in the UK) or receives (if outside the UK) the administrative review decision. The same time periods apply i.e. 14 days if in the UK and 28 days if outside the UK.

This means that the appellant can choose:

1. to appeal straight away; or
2. to apply for administrative review and, if unsuccessful, to appeal afterwards.

This does not mean that you can appeal an administrative review decision received after exit day if it relates to an EUSS application submitted before exit day: there is no right of appeal in these circumstances.

Grounds of appeal

You can only appeal on one of two grounds:

1. the decision breaches rights under the Withdrawal Agreement (these essentially refer back to the provisions of the citizens' rights directive Directive 2004/38/EC
2. the decision is not in accordance with the relevant immigration rules or legislation under which it was made.

In addition, you may raise new matters in a section 120 statement (under the Nationality, Immigration and Asylum Act 2002) which must be considered if they constitute a specified ground of appeal either under the list above or under s.84 of the 2002 Act. These are:

- removal of the appellant from the UK would breach the UK's obligations under the Refugee Convention;
- removal of the appellant of the UK would breach the UK's obligations in relation to persons eligible for a grant of humanitarian protection; or
- removal of the appellant from the UK would be a breach of human rights.

The section 120 statement can be made before or after the appeal is commenced.

The tribunal or SIAC may also consider "new matters", which are defined in the same way as for other immigration appeals under s.85 of the 2002 Act.

Where you can appeal from

Appeals can be brought either inside or outside the UK. This is subject to a certification procedure for national security decisions, which restricts the appellant's right to bring or continue an appeal where the decision is certified by the Secretary of State in accordance with paragraphs 1-2 of Schedule 1.

Schedule 3 provides for re-admission to the UK to attend the hearing in certain circumstances. Where a removal decision was certified on the basis removal would not infringe human rights, the appellant can return to the UK in order to attend their appeal hearing in person, unless their appearance *"may cause serious troubles to public policy or public security"*. Where a person is permitted

to return to the UK in these circumstances, they will be admitted on immigration bail for the duration of their time in the UK.

Abandonment of appeals

An appeal will be treated as abandoned where the individual is granted leave under Appendix EU, but if the individual is only granted pre-settled status, the appellant may give notice that they wish to pursue the appeal insofar as it relates to a decision not to grant them, or to cancel or revoke, settled status.

Leaving the UK does not cause the appeal to be abandoned.