Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-001841
[EA/12004/2021]

THE IMMIGRATION ACTS

Heard at Field House, London
On 10 August 2022 and on the papers

Decision & Reasons Promulgated
On 17 November 2022

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE SILLS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

RAJDAVE SINGH MUKHTIAR SINGH
[ANONYMITY DIRECTION NOT MADE]
Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms E Rutherford, Counsel instructed by Gordon and Thompson solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Atreya promulgated on 18 February 2022 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the

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Respondent's decision dated 27 July 2021 refusing him pre-settled status as the durable partner of his EEA national (Polish) partner ("the Sponsor") under the EU Settlement Scheme ("EUSS").

2. The Appellant has lived with the Sponsor since 16 December 2017. The Sponsor has pre-settled status in the UK. The Appellant has never applied for a residence card as the durable partner of the Sponsor. He says that he was unable to do so as he does not have a valid passport and is unable to renew it whilst in the UK as he is not in the UK lawfully. He is a Malaysian national. The Appellant says that he was told by the Home Office that he could apply to the EUSS without a passport and would not need to have applied for a residence card previously. However, in his witness statement he says that "[t]hose instructed contacted the EU Scheme and were advised [he] could apply via a postal application form (evidence enclosed) and there was no requirement to apply directly to the Home Office for a Residence card" ([§4] at [AB/1]. The same is repeated in the Sponsor's statement at [AB/22]. The "evidence enclosed" is, as we understand it, the letter at [AB/19-20] which refers to an application already having been made under the EUSS. Alternatively, it may be the letter dated 13 October 2020 at [AB/17-18] which refers only to the paper application form being sent directly to the Appellant.

3. The Appellant was refused pre-settled status on the basis that he cannot meet the definition of durable partner under Appendix EU to the Immigration Rules ("Appendix EU"). The Appellant argued that the requirement to obtain such a document was not in accordance with the Withdrawal Agreement signed between the UK and EU on the UK's exit from the EU ("the Withdrawal Agreement"). It is also said that the requirement breaches the Appellant's rights under the Withdrawal Agreement.

4. The Judge found that the Appellant would have been entitled to apply for a residence permit under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") at the time he made his application under the EUSS (30 November 2020) but did not do so. The Judge accepted that the Appellant was unable to do so because he did not have a valid passport and could not renew it. She also accepted that he had been advised by the Home Office via his solicitors to make the application he did and that he was told that he would not need a residence card first.

5. The Judge accepted that the issue she had to determine was whether the requirement for a residence card under the EEA Regulations was in accordance with the Withdrawal Agreement. For the reasons set out at [40] to [45] of the Decision, the Judge concluded that the refusal of pre-settled status was not in accordance with the Withdrawal Agreement, that the Appellant was entitled to make an application for a residence permit under the EEA Regulations and should have been issued with a residence card under those regulations. The Judge's reasoning is as follows:

> "40. The appellant relies upon his rights contained in Chapter 1 of Part 2 of the Withdrawal Agreement on the basis that the decision taken by the respondent is not in accordance with the withdrawal agreement.
>
> Article 9(a)(ii) of Part 2 of the Withdrawal Agreement
>
> 41. I accept that the appellant is a family member as provided by Article 9(a)(ii) of Part 2 of the withdrawal agreement.
>
> 42. I accept that a family member is a person who has a right to reside in the UK under the terms of the withdrawal agreement and that the withdrawal agreement does not make a mandatory requirement of a family permit or a residence card for an application to be made under Appendix EU.
>
> 43. I find that the respondent's decision to deny an application under Appendix EU was not in accordance with the withdrawal agreement.
>
> 44. Further, I am persuaded that the appellant was entitled to make an application under the Immigration (EEA) Regulations 2016 because he is accepted to have made his application on 30th November 2020.
>
> 45. The appellant was already a durable partner by 30th November 2020 and applied for confirmation of his right to reside as the durable partner of a Union citizen and I accept that his application was simply to confirm his right to reside as the durable partner of an EEA citizen which he did before the end of the transitional period for which there was no requirement to use a specified form and given there is no challenge to the relationship it is not made clear to me why he was not issued with a residence card under EEA regulations 2016."

6. The Respondent appeals on one ground. It is asserted that the Judge has misconstrued the Withdrawal Agreement. The Appellant could not be in scope of the Withdrawal Agreement unless his residence had been "facilitated" before the end of the transition period on 31 December 2020. The Appellant could not therefore succeed.

7. Permission to appeal was granted by First-tier Tribunal Judge Dempster on 20 April 2022 in the following terms so far as relevant:

> "... 4. The judge at paragraph 42 recorded only that a family member is a person who has a right to reside in the UK under the terms of the Withdrawal Agreement and that the Withdrawal Agreement does not make it a mandatory requirement that a person possess a family permit or residence card for an application further to Appendix EU.
>
> 5. The grounds submit that this finding was not open to the judge who had erred by finding that the appellant was within the scope of the Withdrawal Agreement under Article 10(1)(e) as he was not a durable partner who had been facilitated under Article 10(3).
>
> 6. It is arguable that the judge made a material misdirection of law on a material matter and permission is granted."

8. The matter comes before us to determine whether the Decision contains an error of law and, if we so conclude, to consider whether to set it aside. If the Decision is set aside, it is then necessary for the decision to be re-made either in this Tribunal or on remittal to the First-tier Tribunal. We had before us the core documents relating to the appeal, the Appellant's bundle before the First-tier Tribunal ([AB/xx]) and the Respondent's bundle also before the First-tier Tribunal as well as the Appellant's skeleton argument as before that Tribunal.

ERROR OF LAW

9. Prior to the hearing before us, the Respondent made an application to rely on the Tribunal's decision in Celik v Secretary of State for the Home Department which was at the time unreported. That is now reported as Celik (EU Exit; marriage; human rights) [2022] UKUT 00220 (IAC) ("Celik"). Ms Rutherford had received what was at the time the unreported decision and did not resist the Respondent's application to rely upon it. She indicated that she was able and ready to make submissions on the Appellant's behalf.

10. The Tribunal in Celik gave the following guidance:

> "(1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P's entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.
>
> (2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ("the 2020 Regulations"). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.
>
> (3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State."

11. That guidance is we accept largely determinative of the Respondent's challenge to the Decision. We intend no criticism of Judge Atreya for reaching the opposite conclusion. As she herself pointed out, the Respondent was not represented before her. She did not have, as we do, the Tribunal's guidance on the relevant issue. That guidance is not binding but is persuasive, particularly as a decision of a Presidential panel. Moreover, we consider Celik to be rightly decided.

12. Ms Rutherford pointed out that this is a slightly unusual case in that the Appellant says that he was advised by the Respondent to make the application he did in preference to one under the EEA Regulations. She pointed out that the Judge accepted this claim. She also pointed out that

Appellant was found to be unable to make an application under the EEA Regulations because he could not renew his passport. As Mr Whitwell pointed out, the way in which the Appellant puts that aspect of his case was almost that he was misled into making a wrong application. However, the impact of the submission was that the Respondent should have considered an application which the Appellant did not make and says he could not make. On that basis, the Appellant could not succeed.

13. In support of her submission, Ms Rutherford relied upon the judgment of the CJEU in Secretary of State for the Home Department v Rahman and others [2013] QB 249 ("Rahman"). She submitted that EU law imposes no requirement for an application to be made in a particular way. We drew her attention to the Tribunal's decision in Batool and others v Entry Clearance Officer which is now reported as Batool and others (other family members: EU exit) [2022] UKUT 00219 ("Batool"). The guidance in that case reads as follows:

> "(1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.
>
> (2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member.

The Tribunal in that case considered a similar argument to the argument put forward in this appeal (see [66] to [73] of the decision).

14. Although Ms Rutherford continued to contend that the Respondent should have exercised her discretion to grant the Appellant's application and that not to do so was unfair and/or disproportionate, we are satisfied that, based on the guidance given by this Tribunal in Celik and Batool, there is an error of law established by the Respondent's grounds. We reiterate that Judge Atreya was not assisted by having no representation from the Respondent's side and did not have the benefit of the guidance which we now have.

15. Nonetheless, we find that the Judge erred in law in finding, first, that the Appellant is a family member as provided by Article 9(a)(ii) of the Withdrawal Agreement. The Appellant has claimed to be a durable partner of an EEA national under Article 3(2) of the Directive 2004/38 ("the Directive"). Those covered by Article 3(2) are explicitly excluded from Article 9(a)(ii). The Appellant did not apply for facilitation of his residence on the basis that his presence was required in order not to deprive a Union citizen of a right of residence. The distinction between family members and those falling under Article 3(2) of the Directive is made clear at Article 10 of the Withdrawal Agreement. The Judge has erred in finding that the Appellant is a family member for the purposes of Part Two of the Withdrawal Agreement. As a result of this error, the

Judge's finding that the refusal of the application under Appendix EU breached the Withdrawal Agreement is wrong in law.

16. The Judge's findings at [45] of the Decision are unclear. So far as it is suggested that the Appellant was already a durable partner for the purposes of the EEA Regulations when he applied in November 2020, this is wrong in law as those covered by Article 3(2) must have their status facilitated prior to the "specified date" (31 December 2020) and that has never happened in this case. This is clear from both Appendix EU and Article 10 of the Withdrawal Agreement. So far as it is suggested that the EUSS application should have been treated as an application for facilitation under the EEA Regulations, that was not the application which the Appellant made and did not take effect as such (see Batool).

17. As a result of the errors, we are satisfied that it is appropriate to set aside the Decision. However, we preserve the findings of fact made at [34] to [35] of the Decision. We have not preserved the findings at [36] of the Decision. Although the findings there made were not challenged by the Respondent, we have some observations to make about the evidence in this regard (see below).

18. Having indicated that we were minded to find an error of law and to set aside the Decision, Mr Whitwell invited us to go straight to a re-making and to dismiss the appeal. In fairness to the Appellant, however, we indicated that we would prefer to give Ms Rutherford the time to consider the guidance in Celik and Batool and the arguments there made and for her to provide submissions in writing to which the Respondent could reply. We therefore gave directions for the Appellant to make written submissions by 17 August 2022 and the Respondent to provide submissions in reply by 24 August 2022, whereafter we would make a decision on the papers unless either party asked for a hearing as to the outcome of the appeal or next steps if we considered a hearing to be required.

19. The Appellant's solicitors filed a supplementary skeleton argument on 15 August 2022. Although that was filed within time, it did not come to my attention until later. The Respondent also filed an e-mail response. Although that was originally sent on 26 August, again, it did not come to my attention until 21 September. Although, strictly, the Respondent's e-mail was filed two days' late, we have decided that it is appropriate to take it into account. Both that and the supplementary skeleton argument are considered in what follows.

20. Having read the contents of the supplementary skeleton argument and e-mail, however, we did not consider it necessary to convene a further oral hearing. We have a discretion under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to decide a case without a hearing. We are required in that regard to take into account the views of the parties as to that course. Neither party asked for a further oral hearing as we had indicated they could when making their further written submissions. The

issue which remains is principally one of law and the position of both parties is adequately set out in their respective written submissions taken together with the oral submissions made at the hearing on 10 August. We therefore turn to re-make the decision on the papers as we had agreed we would do.

RE-MAKING

21. As we indicate above, there is no dispute as to the facts. Although there is limited evidence about the advice which the Appellant says he received from the Home Office regarding the application he could make in the absence of a passport, the Respondent does not dispute that the advice was given. However, we have the following observations to make in that regard.

22. First, as we have set out at [2] above, the Appellant's evidence is not that he was personally advised by the Home Office to make an application under the EUSS and that he would not need a residence card first. The evidence is that his solicitors made contact with the Home Office. There is no evidence from the solicitors about what they asked or what they were told in reply.

23. Second, insofar as the evidence of the advice is said to be the letter from the Home Office at [AB/19-20], that is not entirely consistent with the Appellant's case. First, it is dated 19 January 2021 and therefore after the application under the EUSS was made. It indicates only that an explanation was required for the failure to provide a valid passport and that alternative identity documents could be produced if a valid passport was not produced. Second, the letter from the solicitors in response (dated 24 February 2021 at [AB/21]) makes no mention of any advice having been sought or given previously. Even if that evidence is the letter from the Home Office at [AB/17-18], that is only a letter sending a form for completion under the EUSS. It does not refer to any advice having been given and, even if advice was sought before the form was sent, there is no evidence about what the Respondent was told about the Appellant's circumstances.

24. Third, we find it somewhat surprising that such advice should be given. We do not understand why it would be any more acceptable for an application under EUSS to be made without a passport than one under the EEA Regulations or indeed why the Appellant's solicitors thought that it would. If one could be considered without passport identity evidence, we see no reason why the other could not equally be considered. Indeed, regulation 42 of the EEA Regulations provides as follows:

> "Alternative evidence of identity and nationality
>
> 42.—(1) Subject to paragraph (2), where a provision of these Regulations requires a person to hold or produce a valid national identity card issued by an EEA State or a valid passport, the Secretary of State may accept alternative evidence of identity and nationality where the person is

> unable to obtain or produce the required document due to circumstances beyond the person's control."

This suggests that the Appellant could have made an application under the EEA Regulations in November 2020 when he made the application under the EUSS even though he had no valid passport and, it is accepted, could not obtain one.

25. However, as the Respondent does not dispute the Appellant's account about what his solicitors were told and has not challenged the findings made at [36] of the Decision, we have proceeded below on the basis that the Appellant's solicitors were advised as he says they were. However, for reasons which follow we do not consider that this makes any difference.

26. In terms of timing, the Appellant could have made an application under the EEA Regulations as a durable partner prior to the specified date (and indeed could have done so on the date when he made the application under the EUSS). He had been living with the Sponsor since December 2017. It is common ground that he did not do so. He says that he could not do so because he had no valid passport. As we indicate above, under the EEA Regulations, he could have made the application and asked the Respondent to exercise her discretion to entertain it without a passport. That is what he did in relation to the EUSS application, and the Respondent did not decline to deal with that application notwithstanding the failure to produce a valid passport.

27. If and insofar as the Appellant's argument is that the advice gave rise to any legitimate expectation, that could only have been an expectation that his application under the EUSS would be considered without a passport. That is what occurred. The Respondent is not said to have given any indication that the Appellant would succeed under the EUSS. We do not accept that any contact the Appellant or his representatives may have had with the Respondent gave rise to any legitimate expectation other than that any application would be considered in accordance with the applicable law, rules and policy guidance relevant to his circumstances.

28. The way in which the Appellant's case is formulated in this regard as appears from the supplementary skeleton argument is that the Respondent ought to have exercised her discretion to consider the application as one under the EEA Regulations rather than the EUSS notwithstanding that the application as made was under the EUSS.

29. The Respondent's position generally is that the guidance given in Batool and Celik is dispositive of this appeal. The Appellant says that the guidance given in, in particular, Batool is not on point and can be distinguished.

30. We have set out the guidance given in Batool at [13] above. Although Batool was concerned with extended family members rather than durable

partners, the guidance is equally applicable to the position of durable partners. As we have indicated in relation to Celik, we are not bound by the guidance but, particularly as guidance given by a Presidential panel, it is persuasive. Moreover, we consider it to be rightly decided.

31. The Appellant relies in his supplementary skeleton argument on the case of Rehman (EEA Regulations 2016- specified evidence: Pakistan) [2019] UKUT 195 (IAC) ("Rehman"). The guidance in that case reads as follows:

> "The principles outlined in Barnett and Others (EEA Regulations; rights and documentation) [2012] UKUT 142 are equally applicable to The Immigration (European Economic Area) Regulations 2016. Section 1 of Schedule 1 to these regulations provides that the sole ground of appeal is that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom. The provisions contained in regulations 21 and 42 must be interpreted in the light of European Union law. In some cases, this might involve ignoring the requirement for specified evidence altogether if a document is not in fact required to establish a right of residence."

32. We begin by noting that the Appellant's submission that the Tribunal referred to Rehman in Batool is incorrect. The case referred to at [66] of Batool is Rahman and not Rehman (see [14] of the decision in Batool). Ms Rutherford referred to Rahman in her oral submissions as we have noted at [13] above.

33. It is also incorrect to say that the only reference to Rahman is at [66] of Batool. The relevance of Rahman is explained at [37] to [39] of the decision. That case underlines the important distinction between family members under Article 2 of the Directive who have rights of free movement derived from their status as such and extended family members (including durable partners) whose rights under Article 3 of the Directive are only to have their entry and residence facilitated. As is made clear in Rahman (as set out at [39] of Batool), "each Member State 'has a wide discretion as regards to the selection of the factors to be taken into account' when deciding whether a person's entry and residence should be facilitated".

34. That statement of EU law then feeds into the Tribunal's analysis in Batool. Paragraph [66] sets out the submissions of the appellants in those cases about the exercise of discretion and specifically that the applications made under EUSS should have been considered as applications made under the EEA Regulations. However, as the Tribunal there pointed out, the applications made were not on the basis that discretion should have been exercised under Article 3 of the Directive but rather amounted to a claim that they were family members. That is the same situation as here. The guidance in Batool therefore applies equally to this case.

35. We have considered whether the guidance in Batool can be distinguished on the basis that the Tribunal did not consider the decision in Rehman (as

opposed to Rahman). The Respondent makes the following submission in this regard:

> "The Respondent also submits that these authorities [Celik and Batool] have not been decided *per incuriam* and in passing notes that Rehman (EEA Regulations 2016 - specified evidence : Pakistan) [2019] UKUT 195 (IAC) related to application under the I(EEA)R 2016 of which this application was not made under and nor was the issue of any residual discretion of the Secretary of State relevant given the scope and grounds available in this appeal and furthermore as submitted in the error of law hearing the Appellant accepted he cannot succeed under the I(EEA)R 2016 for want of a relevant document."

36. We consider that Rehman does not avail the Appellant at all for the following reasons.

37. First, Rehman concerned a former family member and not an extended family member. The appellant in that case was a divorced spouse who sought a retained right of residence as a former family member and not a person who was seeking facilitation of his residence under Article 3 of the Directive.

38. Second, in the case of Rehman, the Respondent had refused the application on the basis of lack of specified documentation. That is not this case. As we have pointed out, the Respondent did not refuse the application in the decision under appeal on the basis that the Appellant lacked the necessary documentation. She did so because the Appellant could not meet the substantive requirements of the EUSS.

39. The Appellant relies on Rehman as identifying a requirement for the Respondent to exercise discretion and to have treated the application as one under the EEA Regulations rather than under the EUSS. He relies in particular on a discretion given by regulation 21(6) of the EEA Regulations.

40. As we have already pointed out, Rehman was a case concerning the rights of a former family member who had the right of free movement and was seeking a retained right of residence. Here, the Appellant has and even before EU Exit had no such rights. Although we accept that the Tribunal in Rehman did not apparently distinguish between the rights of a family member and an extended family member in the discussion at [21] to [26] of the decision, it is apparent that the focus of EU law in terms of the requirement of specified evidence is on rights derived from EU law. Otherwise, what is there said is inconsistent with what is said in Rahman (see [33] above). In other words, the Appellant has no EU law right to have his application treated as anything other than it was, namely an application for status as the family member of an EEA national.

41. Third, as the Respondent points out, the guidance in Rehman relates to the exercise of discretion under the EEA Regulations and not under the EUSS. The Appellant relies on a discretion provided for by regulation 21(6) of the EEA Regulations. However, he did not make an application

under the EEA Regulations. The provisions of the EEA Regulations which underpin the case of Rehman do not apply to the application in this case which was under the EUSS.

42. Furthermore, the two schemes arise in an entirely different context. In particular, as the Tribunal has pointed out in both Celik and Batool, “it is not possible to invoke principles of EU law in interpreting the Withdrawal Agreement, save insofar as that Agreement specifically provides”.

43. Finally, we consider that reference to Rehman undermines rather than assists this Appellant’s position. In Rehman, the application had been made under the EEA Regulations without a valid passport. That is the position in which the Appellant found himself. If Rehman applies to the Appellant’s situation as he appears to contend, then it is difficult to see why he could not have applied under the EEA Regulations before the specified date. His only reason for not doing so was his lack of a valid passport and the advice which he says was given by the Home Office to his solicitors. As we have already observed, it is difficult to see why the Appellant should be permitted to apply under one scheme without a specified document and not under the other. If anything, the decision in Rehman reinforces the position that the Appellant could have made an application under the EEA Regulations at the time he made the application under the EUSS and could have asked the Respondent to exercise discretion to consider the application without a specified document.

44. Doubtless, the Respondent can always exercise discretion to consider an application made on one basis on a different basis or even to consider an individual case without any formal application. The issue is whether there is any requirement for her to do so. The only basis on which this Tribunal can allow an appeal against a decision refusing status under the EUSS is that the decision breaches a right under the Withdrawal Agreement or is not in accordance with the Immigration Rules (here Appendix EU). An argument that the Respondent should have exercised discretion in domestic law and that not to do was unfair does not fall within either the Withdrawal Agreement or Appendix EU. Put another way, the Appellant had and has no rights under either the Withdrawal Agreement or Appendix EU to have his application made on one basis considered on a different basis. That is the effect of the guidance given in Batool which we consider applies equally to this appeal.

45. For those reasons, we dismiss this appeal. The Respondent’s decision does not breach either the Withdrawal Agreement or Appendix EU.

CONCLUSION

46. We have found there to be an error of law in the decision of First-tier Tribunal Judge Atreya promulgated on 18 February 2022. We set that decision aside in consequence. Having considered the submissions made orally at the hearing and the written submissions made subsequently, we

dismiss the appeal. The Respondent's decision under appeal does not breach any rights of the Appellant under the Withdrawal Agreement or Appendix EU.

DECISION

We are satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Atreya promulgated on 18 February 2022 is set aside.

We re-make the decision. We dismiss the appeal.

Signed L K Smith Dated: 5 October 2022
Upper Tribunal Judge Smith