IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005008
First-tier Tribunal No: EA/00312/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 April 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ELSON HANKO
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: No appearance

Heard at Field House on 2 March 2023

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Karbani promulgated on 10 August 2022 allowing the appeal of Elson Hanko against a decision of the Secretary of State for the Home Department dated 6 December 2021.

2. Although before us the Secretary of State for the Home Department is the Appellant and Mr Hanko is the Respondent, for the sake of consistency with the proceedings before the First-tier Tribunal we shall hereafter refer to the Secretary of State as the Respondent and Mr Hanko as the Appellant.

3. In his appeal witness statement before the First-tier Tribunal, signed on 7 July 2022, the Appellant admitted that he had illegally entered the UK on 23 March 2019 - seemingly financed by his sister and brother-in-law, who also thereafter accommodated and financially supported him. He took no steps to regularise his position in the UK until he made an application on 15 July 2021 for status under the EU Settlement Scheme. The application was based on a claim to be the

dependent relative of his brother-in-law Eduart Dema (date of birth 21 November 1981), a Greek national with settled status in the UK ('the Sponsor').

4. The application was refused by the Respondent on 6 December 2021 for reasons set out in a decision letter of that date: in summary, the Appellant had failed to provide requisite evidence in the form of a valid family permit or residence card issued under the EEA Regulations.

5. The basis upon which the Appellant pursued his appeal before the First-tier Tribunal is summarised at paragraph 8 of the Decision of Judge Karbani:

> "*It was argued that the appellant was residing in accordance with Union law, which does not require him to be possessed of a relevant document and therefore he was within the scope of the Withdrawal Agreement. It was not disputed that the appellant was a dependent family member or that he had resided in the UK with the sponsor since 2019. Therefore, the respondent ought to have directed him to make an application within the EEA regime when he applied, and the decision to refuse is not in accordance with her duty to facilitate residence under Article 18. It was submitted the decision was therefore disproportionate under the Withdrawal Agreement.*"

6. The Judge found that the Appellant could not meet the requirements of the Immigration Rules because he did not hold a 'relevant document' as required (paragraph 15). The Judge, however, found that the Appellant came within the 'personal scope' of the Withdrawal Agreement, in particular accepting the submission that Article 10 "*is not to be read as requiring the appellant to have held a relevant document before the end of the transition period*" (paragraph 16). Consequently the Judge, noting the undisputed evidence that the Appellant had been residing for almost 3 years in the UK as a dependent of the Sponsor, found that the Respondent had "*breached her duty to facilitate the residence of family members under the Article 3(2) of the Citizens' Directive 2004/38*"; the Judge also concluded on this basis that the decision not to grant a residence card was "*disproportionate under Article 18(1)(r) of the Withdrawal Agreement because the Appellant is being deprived of his rights as an EEA family member solely due to the absence of a document*" (paragraph 17).

7. The appeal was heard on 3 August 2022. It appears that neither representative raised, and the Judge was otherwise unaware of, the decision in **Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC)**, which had been promulgated on 19 July 2022.

8. **Batool** was raised by the Respondent in Grounds of Appeal seeking application for permission to appeal against the decision of the First-tier Tribunal. Permission to appeal was granted by First-tier Tribunal Judge Landes on 30 September 2022, it being observed that **Batool**:

> "*… makes clear that extended family members without a relevant document and who have not applied for a relevant document before the end of the transition period cannot rely on the withdrawal agreement. Extended family members who had not even applied for a relevant document before the end of the transition period were not residing in the UK in accordance with Union law and hence not within scope of the withdrawal agreement.*"

9. We note that permission to appeal the decision in **Batool** was refused by the Court of Appeal.

10. On the morning of the hearing before us the Appellant's representatives sent an email to 'Loughborough Edets' which in material part stated:

> "*In light of the case law that had been decided since the appeal was launched, we request for this appeal to be withdrawn.*
>
> *Our client will be submitting an alternative Home Office application based on their private life to regularise their stay.*"

11. In the event we did not see this email until after the case had been called on at 10am, and only after raising enquiries about the apparent non-appearance and non-representation of the Appellant. (In this context it appears that there may have been some miscommunication with the hearing centre's reception which initially led us to believe that a named counsel was expected.) The email explains why there was no appearance before us.

12. Because the appeal before us is one brought by the Secretary of State, it is not for the Appellant to withdraw the appeal at this stage. In the circumstances we consider it appropriate to treat the "*request for this appeal to be withdrawn*" as a notice of withdrawal of the Appellant's case - being in substance an indication that the Respondent's appeal against the decision of the First-tier Tribunal is not resisted: see Tribunal Procedure (Upper Tribunal) Rules 2008, rule 17. Given the lateness of the communication – and in any event because it is necessary for us formally to deal with the contended error in the decision of the First-tier Tribunal - we do not grant consent to formal withdrawal of the Appellant's case; nonetheless we recognise the acknowledged lack of merit in the Appellant's case.

13. In circumstances where the Appellant's non-appearance was explained and it was adequately clear that he did not wish to participate in the hearing, we decided it was appropriate to proceed in his absence.

14. We heard brief submissions from Mr Tufan on behalf of the Respondent. He invited us to set aside the decision of the First-tier Tribunal for the reasons set out in the Grounds and the grant of permission to appeal, and to remake the decision in accordance with the approach in **Batool**.

15. We indicated at the conclusion of the hearing that we were satisfied that there was a material error of law, that the decision of the First-tier Tribunal should be set aside, and that we would remake the decision in the appeal in favour of the Respondent – and that our reasons would follow in writing.

16. We accept the substance of the Respondent's challenge to the Decision of the First-tier Tribunal. We accept and adopt the approach in **Batool**: it follows that the decision of the First-tier Tribunal was in material error of law in that it should not have been concluded that the Appellant fell within the scope of the Withdrawal Agreement, or that there was any breach of the duty to facilitate residence for the Appellant further to the Citizens' Directive 2004/38, or that there was any disproportionality within the contemplation of Article 18(1)(r) of the Withdrawal Agreement. The decision of the First-tier Tribunal is set aside accordingly.

17. There being no further arguments in the appeal it is appropriate now to remake the decision: we remake the decision in accordance with the approach in **Batool**, which inevitably means the appeal must now be dismissed.

Notice of Decision

18. The decision of the First-tier Tribunal contained material errors of law and is set aside.

19. The decision in the appeal is remade: the appeal of Mr Elson Hanko is dismissed.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

2 March 2023