Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/06192/2021
Ce-File Number: UI-2022-001138

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 25 November 2022

Decision & Reasons Promulgated
On the 07 February 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDUL RAZZAK MOHAMMED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr A Chohan, counsel instructed by Direct Access

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Beach promulgated on 25 January 2022 ("the decision"). However, for ease of reference I will hereafter refer to the parties as they were before the First-tier Tribunal.

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Anonymity

2. No direction has been made previously, and there is no reason for one now.

Background

3. The appellant is a citizen of India who, on 7 December 2020, applied for settled status under the EUSS as the brother-in-law of an EEA national who was residing in the United Kingdom and exercising Treaty rights.

4. The application under the EUSS was refused essentially because the appellant had not shown that he had been issued with a relevant document and therefore the respondent concluded as follows.

> '… you have not provided sufficient evidence to confirm that you are a dependent relative of a relevant EEA citizen. Therefore, you do not meet the requirements for pre-settled status on this basis. It is considered that the information available does not show that you meet the eligibility requirements for settled status set out in rule EU11 or for pre-settled status set out in rule EU14 of Appendix EU to the Immigration Rules. This is for the reasons explained above. Therefore, your application has been refused under rule EU6.'

The decision of the First-tier Tribunal

5. At the hearing before the First-tier Tribunal, it was argued that the respondent ought to have considered whether the appellant met the requirements of the 2016 Regulations rather than Appendix EU. The judge rejected that argument as well as the additional argument that the appellant fell within a grace period, as set out in the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020. The appeal was allowed because the judge considered that the Secretary of State had failed to assist the appellant in proving his eligibility and as such the decision was in breach of the Withdrawal Agreement.

The grounds of appeal

6. The grounds of appeal were as follows.

> The Judge of the First-tier Tribunal has made a material error of law in the Determination. It has been said that the decision breached rights under the Withdrawal Agreement by failing in the duty to assist an applicant through the procedure under the Scheme, but no such rights can arise in the case of an undocumented Extended Family Member (at best) who was not residing in the UK in accordance with EU law before 31 December 2020 (see Article 10(1) WA). Aside from the issues as to whether the application (apparently made and certainly decided) under the Settlement Scheme could have been made under the Regulations and could ultimately have led to the issue of a "relevant document", it was not and it did not. The duties alluded to (including in Article 18 of the WA" could not extend to a person who was not in scope. The suggestion that Article 10(3) was applicable is misconceived – while the Appellant could have applied for "facilitation" he did not. Reliance on a ground of appeal attached only to a decision which it was claimed

> should not have been made as the application should have been treated (or amended to) one under the Regulations. In any event a finding of dependence would still have required an extensive examination as to whether residence was being facilitated.

7. Permission to appeal was granted on the following basis.

> The determination discloses an arguable error of law arising from the interpretation of Articles 10 and 18 of the Withdrawal Agreement, and whether, as an undocumented extended family member not residing in the UK in accordance with EU law prior to the specified date, the appellant is afforded the protections arising under the Withdrawal Agreement.

8. No Rule 24 response was filed.

9. This matter was listed for an error of law hearing 21 June 2022 and was adjourned following a joint application by the representatives, to await the decision of a Presidential panel of the Upper Tribunal in *Batool* which had been heard in March 2022. The following case management directions were made:

> (i) Within 6 weeks of promulgation of the judgment of the Presidential Panel in *Batool v SSHD*, the parties are to write to the Upper Tribunal to clarify their positions on this appeal in light of that judgment.
>
> (ii) If the parties consider that this appeal should stay in the Upper Tribunal, they should file and serve skeleton arguments to set out their position within 6 weeks of promulgation of the judgment in *Batool*.
>
> (iii) The parties have liberty to apply to the Upper Tribunal.

10. On 16 August 2022, the respondent served a skeleton argument in compliance with the directions. The respondent's view can be summed up in the concluding paragraph of this document:

> The SSHD invites the Tribunal in applying the guidance in ***Batool*** to find that the SSHD's grounds are made out and thus the decision of FTTJ Beach falls to be set-aside.
>
> When applying the law to the facts the SSHD submits that this is a case that can be retained and remade on the papers in the UT, without need of a further hearing, dismissing the Appellant's appeal (there being no ECHR aspect for which the SSHD has granted consent) against the refusal of the EUSS application.

11. The appellant filed a skeleton argument on the eve of the hearing in which it was contended, for the first time, that he had made an application under the 2016 Regulations on 12 December 2018. At paragraph 3 of the skeleton argument, it was accepted that this claim 'constitutes a new matter.'

The resumed error of law hearing

12. I heard succinct submissions from both representatives. Mr Avery relied on the respondent's skeleton argument and made the following points. The

judge had erred in making no reference to the Rules. There was no basis for the judge finding that the Secretary of State should have informed the appellant he was making the wrong application and this point had been made in *Celik*. As the appellant made an application for which he did not qualify, there had been no facilitation and he had not come within the Withdrawal Agreement. The judge was wrong to find that he did.

13. As for the recent claim, that the appellant had an outstanding EEA application, this was not his case before the First-tier Tribunal and, in any event, there was no Home Office record of this application that Mr Avery could detect. I was asked to disregard this matter. Mr Avery urged me to find a material error of law and remake the decision, dismissing the appeal.

14. Mr Chohan argued that there was no material error of law. He contended that as the appellant had applied for facilitation, he came within the Withdrawal Agreement.

15. I informed the parties that I was satisfied that the First-tier Tribunal materially erred in finding that the appellant could benefit from the Withdrawal Agreement given that the appellant had not been issued with a relevant document under the 2016 Regulations.

16. There was no objection to the decision being immediately remade. The remaking proceeded by way of submissions only. Mr Avery argued that the guidance in *Batool* should be followed. The appellant did not fall within the Withdrawal Agreement and there was no basis on which the appeal could succeed. As for the claimed application under the 2016 Regulations, this had not been raised previously and in any event the respondent's systems showed no such application. The only information on the system related to the appellant being granted leave to remain as a student on two occasions, the last of which was granted until 2023. If the appellant put in an application under the 2016 Regulations, why was it not pursued. This was simply a distraction. There was insufficient evidence to show an application was made and it certainly was not granted.

17. Mr Chohan relied on the skeleton argument and referred to a document said to be a proof of posting. He was unable to explain how an unresolved application under the 2016 Regulations could be relevant to the appeal against the decision to refuse the appellant leave under the EUSS.

18. At the end of the hearing, I reserved my decision on the remaking.

<u>Decision on error of law</u>

19. In *Celik (EU exit: marriage; human rights)* [2022] UKUT 00220, which was promulgated on 19 July 2022 a Presidential panel ruled on two issues, one of which arises in this appeal. The headnote reads as follows:

> "(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."

26. For completeness, I set out Article 18.1(r):

> "(r) the applicant shall have access to judicial and, where appropriate, administrative redress procedures in the host State against any decision refusing to grant the residence status. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed decision is based. Such redress procedures shall ensure that the decision is not disproportionate."

27. Of particular relevance to this appeal is what is said in the headnote of *Batool and others (other family members: EU exit)* [2022] UKUT 00219 (IAC):

> (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.

28. The findings in *Celik* and *Batool* are persuasive and accord with my own analysis. I accordingly find that the First-tier Tribunal materially erred in law in finding that the appellant was in scope of the Withdrawal Agreement. On the case advanced before Judge Beach, the appellant had not lodged an application for facilitation under the 2016 Regulations prior to 31 December 2020 and had not been issued a residence card as an extended family member prior to this date or indeed at all. Furthermore, the judge erred in concluding that the respondent had a duty to treat the application under the EUSS as an application under the 2016 Regulations, applying *Batool*, headnote 2.

29. For the foregoing reasons, I find that there is a material error of law in the decision of the First-tier Tribunal such that the decision should be set aside in its entirety and remade.

Remaking

30. In reaching this decision, I have taken into consideration the written and oral submissions of the representatives as well as the evidence before me, including material in the appellant's appeal and supplementary bundles.

31. The alternative way in which the appellant could have come within the scope of the Withdrawal Agreement after the end of the transition period is if he had applied for an EEA residence card before the end of the transition period, and the application had been ultimately successful with the consequence that the appellant's entry and residence was being facilitated by the host state at the date of the appellant's EUSS application and/or at the date of the appellant's EUSS appeal. The appellant would have thereby come within the scope of Article 10.3 of the Withdrawal Agreement.

32. At the time of the hearing before the First-tier Tribunal the appellant did not claim to have an outstanding EEA application. His witness statement dated 12 November 2021 mentions only one application, that made on 31 December 2020, and which was refused on 22 March 2021. The decision of 22 March 2021 is the decision under appeal. It is only on the eve of the error of law hearing that the appellant claimed for the first time that he had, in 2018, made an application under the 2016 Regulations. The skeleton argument prepared on the appellant's behalf contains an acceptance that this is a new matter. While Mr Avery attempted to respond to this last-minute claim, he did not consent to this matter being considered by the Upper Tribunal. The evidence put forward by the appellant is, on balance, far from being cogent proof that he made an application under the 2016 Regulations. My view on this is fortified by the absence of any Home Office record of such an application being made. Even if the appellant had made such an application, it does not change the fact that the EUSS application had been rightly refused under Appendix EU. An undecided EEA application does not amount to facilitation, entitling the appellant to come within the scope of the Withdrawal Agreement. At best, a valid EEA application remains outstanding for a decision by the respondent.

33. As is apparent from my reasoning on the error of law question, the only legally sustainable outcome is that the appellant's appeal is dismissed. In the circumstances, at all material times the appellant has not been a person who comes within the scope of the Withdrawal Agreement. In particular, he does not come within the scope of Article 10.3 of the Withdrawal Agreement as he is not a person whose entry and residence was being facilitated by the host state.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside.

The decision is re-made before the Upper Tribunal.

The appeal is dismissed.

No anonymity direction is made.

Signed: T Kamara Date: 30 November 2022
Upper Tribunal Judge Kamara

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed: T Kamara Date: 30 November 2022
Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email