Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-003431**
EA/13609/2021

THE IMMIGRATION ACTS

Heard at Birmingham CJC
On the 15 November 2022

Decision & Reasons Promulgated
On the 23 January 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

ERVIS POSHJA
(NO ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Ahmed, instructed by No 12 Chambers
For the Respondent: Mr C Williams, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Albania. He claims to have arrived in the UK illegally in September 2017. On 15th June 2021, he made an application under the EU Settlement Scheme (EUSS) as the dependant relative of his brother-in-law, Mr Albert Xheka ("the sponsor"). The sponsor is married to the appellant's sister, Mrs Suela Xheka.

2. The respondent refused that application with reference to Appendix EU to the Immigration Rules. The respondent said the appellant had not provided sufficient evidence of his relationship with the sponsor. The appellant was also informed that from the information available, he does not meet the requirements of the scheme. The respondent said:

> "Home Office records do not show that you have been issued with a family permit or residence card under the EEA Regulations as the dependent relative of the EEA national and you have not provided a relevant document issued on this basis by any of the Islands."

3. The appellant's appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, was dismissed by First-tier Tribunal Judge Thapar for reasons set out in a decision promulgated on 6th June 2022. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Cox on 7th July 2022.

The decision of First-tier Tribunal Judge Thapar

4. The appellant, his sponsor and Mrs Suela Xheka gave evidence before the Tribunal. At paragraph [15], Judge Thapar records:

> "The Appellant avers he lived with the Sponsor and his sister in Italy. The skeleton argument states the Appellant moved to the UK in 2016 to join the family unit. The Appellant claims he lived in Italy from 2008 until September 2017. The Appellant claims that he was a member of the Sponsor's household in Italy and continues to be a member of the same household in the UK. Mr Balroop advised at the start of the hearing that the Appellant was not claiming to be dependent upon the Sponsor but rather that he is a member of the household."

5. Judge Thapar found, at [16], that the appellant is related to the sponsor as claimed. At paragraph [18], Judge Thapar said:

> "Appendix EU defines a dependent relative (as far as is relevant for this appeal) as a relative of their sponsoring person who for the relevant period was a dependant of the sponsoring person, a member of their household or in strict need of personal care on serious health grounds. The individual must also hold a relevant document as the dependent relative of the sponsoring person for the period of residence relied upon."

6. At paragraph [19], Judge Thapar considered the evidence before the Tribunal regarding the addresses at which the appellant and the sponsor have lived in the UK. She noted that despite claims that the appellant has lived in the UK since 2017, he failed to provide any documents to show that he was residing at the same address as the sponsor and his sister before the specified date. She found that based on the evidence the appellant has been unable to establish that he was a member of the sponsor's household before the specified date.

7. At paragraph [21], Judge Thapar said:

> "I note the skeleton argument states that the Appellant was unable to make an application prior to the specified date because he was not

> present in the UK. The Sponsor claims the Appellant failed to apply because he was worried as he had entered the country unlawfully. The Appellant claims upon his arrival into the UK he commenced a relationship, they were engaged and the Appellant was advised by his solicitors that he would be able to apply for leave to remain based upon his relationship. This relationship broke down and in 2021 the Appellant was then advised to make an application under the EUSS. Different reasons have been provided for the Appellant's delay in applying. I am not satisfied for the reasons stated above that the Appellant entered the UK in 2017."

8. Judge Thapar also noted, at [26], that the appellant failed to provide any documents to show the category under which he was granted a right to reside in Italy. She noted the residence cards relied upon by the appellant indicate that he was only permitted to remain in Italy for a limited duration. There were no documents before the Tribunal to show that the appellant was residing in Italy beyond 18th July 2012. Judge Thapar found, at [26], that the appellant had failed to establish that he was a member of the sponsor's household in Italy or that he was dependent upon him from 2012 onwards. She found the appellant had failed to demonstrate that he was a member of the sponsor's household from 2012 until his claimed date of entry to the UK in 2017. Judge Thapar found the appellant's sponsor and sister not to be credible witnesses. At paragraph [29], she concluded:

> "The onus is upon the Appellant to establish that he can meets the Immigration Rules or that he has a right protected by the withdrawal agreement. I find the Appellant has not shown that he was a member of the Sponsor's household from 2012 until 2017 or that he was residing in the UK with the Sponsor from 2017 until 31 December 2020 for the reasons stated above. Consequently, the Appellant has not established that he retains any rights protected by the withdrawal agreement or that he can meet the eligibility requirements within Appendix EU of the Immigration Rules. Thus, for all these reasons the Respondent's decision is correct in law and the Appellant's appeal is dismissed."

The grounds of appeal

9. The appellant claims that in reaching her decision, Judge Thapar made findings on matters that were neither challenged by the respondent nor the subject of cross-examination. The appellant claims the factual matrix of the claim had not been challenged by the respondent in her decision. The reason for refusing the application was that the appellant had failed to provide a document under the EEA Regulations as the dependent relative of the EEA national. The appellant claims the judge erred (i) in making findings against the appellant on points which were not challenged or upon which he was not cross-examined, and (ii) the judge widened the ambit during the hearing without affording the appellant any opportunity to file further evidence.

The hearing before me

10. At the outset of the hearing before me, I considered with the parties, the reported decisions of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) and Batool & Ors (other family members: EU exit) [2022] UKUT 00219 (IAC).

11. Those decision post-date the decision of First-tier Tribunal Judge Thapar and the grant of permission to appeal. Mr Ahmed quite properly in my judgment accepted that Celik and Batool & Ors now pose the appellant's appeal significant difficulties.

12. As far as the appellant's grounds of appeal are concerned, Mr Ahmed submits the nub of the argument is twofold. The primary focus of the decision of the First-tier Tribunal Judge was whether the appellant was a member of the sponsor's household in Italy, and the judge does not deal with 'dependency' at all in her decision. I referred Mr Ahmed to paragraph [15] of the decision which records that Mr Balroop advised at the start of the hearing, that the appellant was not claiming to be dependent upon the sponsor but rather that he is a member of the household. The fact that dependency was in issue was, Mr Ahmed submits, demonstrated by the wealth of evidence before the First-tier Tribunal in that respect. Mr Ahmed accepted that the grounds of appeal do not claim that the judge erred in recording such a concession was made, and neither is there a statement from Mr Balroop before me, that such a concession was not in fact made.

13. Mr Ahmed submits that as far as the appellant's claim that he is a member of the household of the sponsor is concerned, the judge made findings upon matters that had neither been raised in the respondent's decision, nor raised in cross-examination. He submits Judge Thapar made adverse credibility finding against the appellant's sponsor and sister in circumstances where they were not given any opportunity to address concerns. Mr Ahmed submits that although Judge Thapar refers to a lack of documents to show that they were living in the same household in Italy from 2012 to 2017 or in the UK from 2017 until May 2021, the oral evidence of the witnesses to that effect was equally cogent evidence.

14. In reply, Mr Williams submits that the appellant makes the broad assertion that the judge made findings on matters which were not challenged by the respondent or the upon which the witnesses were not cross examined, without particularising what it is said that the witnesses were not cross examined upon. It is therefore impossible to establish from the grounds, where it is said that the judge went wrong. There is no witness statement from counsel that appeared below. He submits the record held by the respondent demonstrates the appellant was asked why he had not previously applied to regularise his immigration status in the UK and about his living arrangements in Italy. He was also asked why he had not provided wage slips and evidence of his living in Italy previously.

15. At the conclusion of the hearing before me, I informed the parties that I dismiss the appeal for reasons that will follow in writing. This I now do.

Discussion

16. Although I acknowledge that the reasons for refusing the appellant's application as set out in the respondent's decision dated 9th September 2021 are brief, and do not clearly identify any deficiencies in the evidence, in Maheshwaran v SSHD [2002 EWCA Civ 172; [2004] Imm AR 176, the Court of Appeal held that where an individual asserts a fact before the Tribunal which the SSHD did not challenge and the Judge did not raise with the individual any doubts as to the truthfulness of his assertion, the Judge was not obliged to accept the assertion as proved. Lord Justice Schiemann said:

> "3. Those who make a claim for asylum must show that they are refugees. The burden of proof is on them. Whether or not a claimant is to be believed is frequently very important. He will assert very many facts in relation to events far away most of which no one before the adjudicator is in a position to corroborate or refute. Material is often adduced at the last minute without warning. From time to time the claimant or the Home Secretary are neither there nor represented and yet the adjudicator carries on with his task. He frequently has several cases listed in front of him on the same day. For one reason or another not every hearing will be effective. Adjudicators can not be expected to be alive to every possible nuance of a case before the oral hearing, if there is one, starts. Adjudicators in general will reserve their determinations for later delivery. They will ponder what has been said and what has not been said, both before the hearing and at the hearing. They will look carefully at the documents which have been produced. Points will sometimes assume a greater importance than they appeared to have before the hearing began or in its earlier stages. Adjudicators will in general rightly be cautious about intervening lest it be said that they have leaped into the forensic arena and lest an appearance of bias is given.
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> 4. Undoubtedly a failure to put to a party to litigation a point which is decided against him can be grossly unfair and lead to injustice. He must have a proper opportunity to deal with the point. Adjudicators must bear this in mind. Where a point is expressly conceded by one party it will usually be unfair to decide the case against the other party on the basis that the concession was wrongly made, unless the tribunal indicates that it is minded to take that course. Cases can occur when fairness will require the reopening of an appeal because some point of .. significance — perhaps arising out of a post hearing decision of the higher courts — requires it. However, such cases will be rare.
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> 5. Where much depends on the credibility of a party and when that party makes several inconsistent statements which are before the decision maker, that party manifestly has a forensic problem. Some will choose to confront the inconsistencies straight on and make evidential or forensic submissions on them. Others will hope that 'least said, soonest mended' and consider that forensic concentration on the point will only make matters worse and that it would be better to try and switch the tribunal's attention to some other aspect of the case. Undoubtedly it is open to the tribunal expressly to put a particular inconsistency to a witness because it considers that the witness may not be alerted to the point or because it fears that it may have

> perceived something as inconsistent with an earlier answer which in truth is not inconsistent. Fairness may in some circumstances require this to be done but this will not be the usual case. Usually the tribunal, particularly if the party is represented, will remain silent and see how the case unfolds.
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> 6. The requirements of fairness are very much conditioned by the facts of each case. This has been stressed in innumerable decisions …"

17. The appellant is not assisted by the passage quoted from paragraph [14] of the judgement of Lord Justice Maurice Kay in MS (Sri Lanka) v The Secretary of State for the Home Department [2012] EWCA Civ 1548. There, throughout the course of the litigation in the FTT and the UT, the Secretary of State's representatives declined the opportunity to cross-examine the appellant. The appellant had provided a detailed witness statement and it would have been open to the Secretary of State to dispute or at least to test this account in cross-examination but her representative elected not to do so. As Lord Justice Maurice Kay said, it is hardly surprising that, in these circumstances, the FTT accepted the appellant's evidence as "credible and consistent".

18. Here, it was for the appellant to establish his entitlement. The appellant, his sponsor and sister gave oral evidence. The matters on which the judge bases adverse credibility findings are grounded in the oral evidence and the documents relied upon by the appellant, or lack thereof. The criticisms made regarding the lack of documentation relate to the appellant's own documentation that he failed to produce in support of his appeal upon a material issue. The issues identified by the judge are obvious and should have been contemplated by the representative on hearing the appellant's evidence unfold. They are not obscure issues and they are not minor or peripheral but go to the heart of the appellant's case.

19. There is force in the submission made by Mr Williams that the appellant's broad claim that the witnesses were not cross examined on points which were central to the claim is entirely unparticularised. Even leaving to one side the fact that not all points which concern a judge need be put expressly to a witness, there is no evidence whatsoever to support the submission that a particular point was not squarely raised, whether by the judge or the Presenting Officer. As far as such procedural complaints are to be advanced, it is now well established that they must be supported by evidence, usually from the advocate with conduct of the appeal before the FtT. There is no such evidence before me.

20. That is all the more surprising here where the grounds of appeal, at paragraph 2(a) allege that the witnesses were not cross-examined on points which were central to 'household' 'dependency' and the appellant's arrival in the UK. The Judge noted, at [15], the concession made at the start of the hearing, that the appellant was not claiming to be dependent upon the sponsor but rather that he is a member of the household. If it is to be claimed that the judge erroneously referred to such a concession, it

is all the more surprising that such a claim was not advanced as a ground of appeal and supported by evidence.

21. In any event, any error of law is in my judgment immaterial. As Mr Ahmed quite properly accepted, the reported decisions of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) and Batool & Ors (other family members: EU exit) [2022] UKUT 00219 (IAC) pose significant difficulties for the appellant.

22. Mr Ahmed submits however that the Upper Tribunal in Celik was concerned with an individual who was (or may have been) in a durable relationship, prior to 31st December 2020, with an EU citizen but did not marry the citizen until after that time. Mr Ahmed submits that here, the appellant has maintained throughout that he is a dependant of the sponsor and or a member of their household. He accepts, quite properly in my judgment, that despite that distinction, much of the reasoning in Celik is relevant to this appeal. At paragraphs [51] to [53], the Upper Tribunal in Celik said:

> "51. Article 3(2) of Directive 2004/38/EC requires Member States to "facilitate entry and residence" for "any other family members" who are dependents or members of the household of the Union citizen; or where serious health grounds strictly require the personal care of the family member by the Union citizen. A person is also within Article 3.2 if they are a "partner with whom the Union citizen has a durable relationship, duly attested". For such persons, the host Member State is required to "undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".
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> 52. There can be no doubt that the appellant's residence in the United Kingdom was not facilitated by the respondent before 11pm on 31 December 2020. It was not enough that the appellant may, by that time, have been in a durable relationship with the person whom he married in 2021. Unlike spouses of EU citizens, extended family members enjoyed no right, as such, of residence under the EU free movement legislation. The rights of extended family members arose only upon their residence being facilitated by the respondent, as evidenced by the issue of a residence permit, registration certificate or a residence card: regulation 7(3) and regulation 7(5) of the 2016 Regulations.
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> 53. If the appellant had applied for facilitation of entry and residence before the end of the transition period, Article 10.3 would have brought him within the scope of that Article, provided that such residence was being facilitated by the respondent "in accordance with … national legislation thereafter". This is not, however, the position. For an application to have been validly made in this regard, it needed to have been made in accordance with regulation 21 of the 2016 Regulations. That required an application to be submitted online, using the relevant pages of www.gov.uk, by post or in person, using the relevant application form specified by the respondent; and accompanied by the applicable fee."

23. If there were any doubt, in Batool & Ors, the Upper Tribunal confirmed:

> "(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.
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> (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."

24. It is unnecessary to recite the full principles set out in those decisions. As the Upper Tribunal in Celik had pointed out, Article 3 of Directive 2004/38/EC requires member states to facilitate entry and residence for any other family members. In Celik's case, the appellant's residence in the UK was not facilitated by the respondent before the end of the relevant transition period, nor did he apply for such facilitation (64). It was not enough that the appellant may by that time have been in a durable relationship with the person whom he later married in 2021. Unlike spouses of EEA nationals, extended family members enjoyed no such right of residence under the EU free movement legislation and their rights only arose upon their residence being facilitated by the respondent as evidenced by the issue of a residence permit (52).

25. If the appellant had applied for facilitation of entry and residence before the end of the transition period, Article 10.3 of the Withdrawal Agreement would have brought him within the scope of that Article but that was not the case in Celik, nor is it the case in this appeal. As the Tribunal said in Batool, 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. The appellant here did not apply for facilitation of entry or residence before the end of the transition period and his residence in the UK was not facilitated by the respondent prior to 11pm on 31 December 2020. Following Batool and Celik, the appellant cannot rely on the Withdrawal Agreement and his appeal was therefore bound to fail.

26. For the reasons given, I am not persuaded that there is an error of law in the decision of the First-tier Tribunal, but in any event, any error is entirely immaterial because the appeal is bound to fail.

Notice of Decision

27. **The appellant's appeal is dismissed.**

Signed V. Mandalia Date 15th November 2022

Upper Tribunal Judge Mandalia