



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-001570
First-tier Tribunal No: EA/08111/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

14th February 2024

Before

UPPER TRIBUNAL JUDGE SMITH

Between

EARLE RICHOLAS
[NO ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Decision made on the papers on Monday 12 February 2024

DECISION AND REASONS

1. By a decision promulgated on 17 November 2023, the Tribunal (myself and Deputy Upper Tribunal Judge Monson) found an error in the decision of First-tier Tribunal Judge Bartlett promulgated on 6 February 2023 allowing the Appellant's appeal against the Respondent's decision dated 10 July 2022 refusing the Appellant's application for status under the EU Settlement Scheme ("EUSS"). The error of law decision is appended hereto for ease of reference.
2. The error of law was conceded by the Appellant on the basis that he accepted that he could not benefit from retained rights of residence as the Judge had found. It was argued on his behalf, however, that he could succeed under the EUSS based on his continuity of residence. Although the appeal to this Tribunal was initially that of

the Respondent, an error of law having been found, I have reverted to the designation of the parties as they were before the First-tier Tribunal.

3. The error of law decision also gave directions for the parties to file and serve skeleton arguments. On 1 December 2023, the Appellant filed a skeleton argument and a witness statement with supporting documents.
4. The main facts of the case are set out at [2] and [3] of the error of law decision and I do not repeat those. In addition, it is worthy of note that the Appellant's mother ("the Sponsor") was made subject to a deportation order in April 2018. At the last hearing, Mr Clarke indicated that this may preclude the Appellant from being able to rely on his continuity of residence.
5. The Appellant argues in his skeleton argument that, having lived in the UK in accordance with EU law from October 2009 (when the Sponsor married his EEA national stepfather) until at least April 2018 when the Sponsor was made subject to a deportation order, he had acquired permanent residence and is therefore entitled to settled status under the EUSS.
6. In an earlier appeal, there was a finding that the Sponsor had not exercised Treaty rights for a continuous period of five years. It is however pointed out that even if that finding were to stand, Appendix EU to the Immigration Rules does not contain a requirement of the exercise of Treaty rights throughout the period; it merely requires a continuous period of residence throughout the qualifying period. The Appellant's witness statement casts some doubt on the finding that the Sponsor had not been permanently resident prior to the making of the deportation order.
7. The Respondent failed to file and serve a skeleton argument. It should have been filed by 22 December 2023. The Appellant sought a variation of directions to oblige the Respondent to file a skeleton argument by 8 January 2024 but still nothing was received. A further application was made on 17 January 2024 requiring the skeleton by 19 January but that too received no response.
8. Finally, on 6 February 2024, the Tribunal received the following email from the Respondent:

"The SSHD apologises for non-compliance with the directions of Upper Tribunal Judge L Smith and Deputy Upper Tribunal Judge Monson this was due to operational constraints and limited resources.

For ease of reference the parties are referred to as they were before the First-tier Tribunal.

Having reviewed the skeleton argument and bundle served by appellant the respondent concedes that the appellant meets Appendix-

EU11(3)(a)(ii) as a family member of a relevant EEA citizen. As this was the only live issue in the appeal it is submitted that there is no need for an oral hearing on Thursday 8 February as the matter can be remade on the papers noting the respondent's concession and allowing the appellant's appeal."

9. The Appellant's response to the email was requested. An email was received from the Appellant's solicitor later on 6 February as follows:

"We continue to act for the Appellant, Mr Earle.

On the basis that the Respondent has conceded that our client is eligible to be granted settled status under Appendix EU11 and that his appeal should be allowed, we are content for the hearing to be vacated for the Judge to deal with this by way of a decision on the papers. The Appellant's position is reserved in relation to making an application for his costs from 01 December 2023."

10. In light of the Respondent's concession and the Appellant's acceptance of that concession and the parties' agreement that the decision could be re-made on the papers, I allow the Appellant's appeal. The Respondent's decision is contrary to the Immigration Rules relating to the EUSS (Appendix EU) and/or contrary to the withdrawal agreement between the UK and the EU on the UK's departure from the EU (the Withdrawal Agreement).

NOTICE OF DECISION

The Appellant's appeal is allowed.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 February 2024

APPENDIX: ERROR OF LAW DECISION



**IN THE UPPER TRIBUNAL
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Case No: UI-2023-001570

First-tier Tribunal No:
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THE IMMIGRATION ACTS

Decision & Reasons Issued:

.....17/11/2023.....

Before

**UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE MONSON**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**EARLE RICHOLAS
[NO ANONYMITY DIRECTION MADE]**

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: Ms E Doerr, Counsel instructed by Bindmans LLP

Heard at Field House on Tuesday 17 October 2023

DECISION AND REASONS

1. This is an appeal brought by the Respondent. 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 J Bartlett promulgated on 6 February 2023 (“the Decision”) allowing the Appellant’s appeal against the Respondent’s decision dated 10 July 2022 refusing the Appellant’s application for status under the EU Settlement Scheme (“EUSS”).

2. The Appellant is a national of Jamaica. He was born in April 2000 and has lived in the UK since the age of two with his mother who was until her divorce on 7 December 2021 married to an EEA (Portuguese) national. She married the EEA national in October 2009 but they separated soon after. Under EU law, however, she potentially remained a family member until her divorce.
3. The Appellant and his mother were granted five years' residence permits from June 2011 to June 2016 and from June 2015 to June 2020. However, their applications for permanent residence made in June 2020 were refused by the Respondent in November 2020 and appeals against those decisions were dismissed by the First-tier Tribunal (Judge Cohen) said to have been promulgated in April 2020 but which must (on the face of the decision) have been April 2022.
4. The application which led to the decision under appeal on this occasion was made, it appears, in June 2022. The reason for refusal given by the Respondent was that the Appellant did not have retained rights of residence. Judge Bartlett found however that he did and allowed the appeal on that basis.
5. The Respondent appealed on the basis that the Judge had failed to consider all elements of the relevant immigration rules (Appendix EU), in particular that the EEA national stepfather was the subject of a deportation order made in 2018 and that the Appellant had not shown dependency as at date of the divorce (at which time he was aged 21 or over).
6. Permission to appeal was refused by the First-tier Tribunal but granted on 5 September 2023 by Upper Tribunal Judge McWilliam on the basis that the Respondent's grounds were arguable.
7. The Appellant filed a Rule 24 response dated 12 October 2023. In that response, the Appellant concedes that the Decision discloses an error of law as the Appellant could not succeed based on retained rights of residence. The Appellant however invited the Tribunal to re-make the decision in the Appellant's favour on the basis that he could meet Appendix EU because of his continuity of residence. I do not rehearse the arguments here as I have now given directions for fuller skeleton arguments on the relevant issues.
8. Ms Doerr also indicated that the earlier appeal decision finding that the Appellant was not permanently resident might have involved an error in the application of EU law at that time and that the Appellant may wish to have that finding revisited. As we understood the position, however, that may depend on the establishing of certain facts. The Appellant has made a subject access request in order to ascertain the facts and evidence. The request was expected to be dealt with within the next couple of weeks.

9. Mr Clarke indicated that the Respondent had not yet had the opportunity to consider the Appellant's arguments as set out in the Rule 24 response in detail and invited me to find an error of law based on the concession but then to adjourn with directions for written arguments before re-making the decision. He indicated that if the Respondent accepted the Appellant's argument, then the decision under appeal would be withdrawn on an agreement to grant the Appellant leave under the EUSS.
10. Whilst mindful of the potential costs consequences for her client, Ms Doerr did not object to the course proposed by Mr Clarke. It was agreed that she should provide the first skeleton argument in order to set out the Appellant's case in detail to include if so advised the further argument that the Appellant was permanently resident prior to the specified date. Directions were therefore agreed with the parties and given as set out below.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge J Bartlett promulgated on 6 February 2023 involves the making of an error of law as conceded by the Appellant. We set aside the Decision. We make the following directions for the rehearing of this appeal:

DIRECTIONS

- 1. By no later than 4pm on Friday 1 December 2023, the Appellant shall file with the Tribunal and serve on the Respondent (copied to Mr Clarke and Mr Deller) a skeleton argument setting out his case and any further evidence on which he seeks to rely at the resumed hearing.**
- 2. By no later than 4pm on Friday 22 December, the Respondent shall file with the Tribunal and serve on the Appellant (copied to Ms Doerr) her skeleton argument in response.**
- 3. The Appellant may if so advised file a reply to the Respondent's skeleton argument, such reply to be filed and served (as above) by no later than 4pm on Friday 5 January 2024.**
- 4. The re-hearing of this appeal is to be listed before UTJ Smith for a face-to-face hearing on the first available date after Monday 15 January 2024, time estimate ½ day. To be listed to the convenience of Ms Doerr of Counsel. No interpreter is required for that hearing unless the Appellant notifies the Tribunal of the need for one no later than 14 days prior to the resumed hearing.**

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal

Immigration and Asylum Chamber
18 October 2023