



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI-2022-003235
(EA/08285/2021)

THE IMMIGRATION ACTS

**Heard at: Field House
On: 28 October 2022**

**Decision & Reasons Promulgated
On: 4 December 2022**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOYEZ UDDIN

Respondent

Representation:

For the Appellant: Ms S Lecointe, Senior Home Office Presenting Officer
For the Respondent: Mr A Rehman, instructed by Saint Martin Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Uddin's appeal against the decision to refuse his application under the EU Settlement Scheme (EUSS) as the dependent relative of an EEA national.
2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Uddin as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant, a national of Bangladesh born on 5 April 1978, arrived in the UK in 2006. Prior to his arrival in the UK, he had been living in a household with his brother, the sponsor, Kabir Uddin. The sponsor is a Portuguese national with pre-settled status in the UK who is said to have been supporting the appellant financially whilst living in Portugal and who came to the UK in September 2020. It is claimed that the appellant has been living with him in the UK since November 2020 and continues to be financially dependent upon him.

4. The appellant made an application under the EUSS as the dependent relative of an EEA national, his brother. The date he made the application is now a matter of dispute, as the appellant claims to have made the application on 28 December 2020 but his Certificate of Application confirms that his application was received on 19 February 2021.

5. The appellant's application was refused by the respondent on 29 April 2021. The respondent considered that the requirements of Appendix EU of the immigration rules were not met as the appellant had not provided sufficient evidence to confirm that he was the dependent relative of a relevant EEA citizen. The relevant evidence which was required was a valid registration certificate, family permit or residence card issued under the EEA Regulations as the dependent relative of the EEA citizen. The respondent had no record of the appellant having been issued with such a document. It was considered by the respondent that the appellant therefore qualified for neither settled nor pre-settled status under the EUSS.

6. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Smeaton on 4 April 2022. There was no dispute before the judge as to the fact of the appellant's dependency upon his brother and that he would have met the requirements of an extended family member under the EEA Regulations 2016. The only issues for determination, as identified by the judge, were whether the refusal decision was in accordance with Appendix EU of the immigration rules and whether the refusal decision breached any right the appellant had under the Withdrawal Agreement. With regard to the first issue, the judge confirmed that it was not disputed that the appellant did not meet the definition of dependent relative in Appendix EU because he did not hold a relevant document as the extended family member of an EEA citizen by the specified date (31 December 2020), and she accordingly found that the refusal decision was in accordance with the provisions of Appendix EU. However, with regard to the second issue, the judge found that the requirement for the appellant to hold a relevant document interfered with his brother's rights as an EEA citizen and the appellant's rights as the dependent relative of an EEA citizen and was contrary to a primary aim of the Withdrawal Agreement. She concluded that the refusal of the appellant's application on the sole ground that he did not hold a relevant document at the relevant time was wholly disproportionate, with reference to Regulation 19(1)(r) of the Withdrawal Agreement (by which I assume she meant Article 18(1)(r)). She allowed the appeal on that basis.

7. The Secretary of State sought permission to appeal to the Upper Tribunal on the grounds that the judge had materially erred in law by failing properly to

consider the provisions of the Withdrawal Agreement. It was asserted that the appellant could not come within the scope of the Withdrawal Agreement as he was not residing in the UK in accordance with EU law as of 31 December 2020 since he had not had his residence facilitated or applied for such facilitation in accordance with the EEA Regulations 2016 by that date. He could not, therefore, benefit from the range of judicial redresses including the requirement for proportionality under Article 18(1)(r). The judge had also erred by finding that the refusal under Appendix EU breached the appellant's brother's rights as that was not a permissible ground of appeal under regulation 8(2) of The Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020. The judge had therefore erred in law by finding that the decision to refuse the appellant's application, due to him not holding a relevant document, was in breach of his rights under the Withdrawal Agreement.

8. Permission was granted by the First-tier Tribunal and the matter then came before me.

9. Although this was the Secretary of State's appeal, both parties agreed that it would be helpful to hear submissions for the appellant first, in light of the President's decisions in Celik (EU exit, marriage, human rights) [2022] UKUT 220 and Batool & Ors (other family members: EU exit) [2022] UKUT 219.

10. Mr Rehman's first submission was that Celik did not affect the appellant's case because unlike in that case, this appellant had made his application on 28 December 2020, prior to the specified date of 31 December 2020. There was then some discussion on that matter as the appeal before the First-tier Tribunal had proceeded on the basis that the appellant had made his application on 19 February 2021 and there had never been any suggestion that it had been made prior to 31 December 2020. I then adjourned the hearing for 30 minutes in order for Ms Lecointe to check the Home Office database and make further enquiries. The appellant produced evidence to support his claim that the application had been made on 28 December 2020 and reference was also made to the first page of the respondent's appeal bundle which gave the date of application as 28 December 2020. Ms Lecointe, however, relied upon the Certificate of Application which gave the date as 19 February 2021. I asked the parties to address me in their submissions on the alternative basis of the application having been made on 28 December 2020.

11. Mr Rehman relied on [53] of Celik which referred to the appellant in that case falling within the scope of Article 10.3 of the Withdrawal Agreement if he had applied for facilitation of entry and residence before the end of the transition period. I put it to Mr Rehman that this appellant had not, however, applied for facilitation and residence under the EEA Regulations 2016 but had applied under the EUSS. His response was that that did not preclude the judge from considering the appellant's rights under the Withdrawal Agreement and that the Withdrawal Agreement was still applicable to him. He submitted that the Directive 2004/38/EC did not require a particular application form to be used and it was therefore irrelevant that the application had been made under the EUSS. He submitted that even if it was found that the judge had erred in

law, that was not material and the outcome would have been the same. The judge's decision should therefore stand.

12. Ms Lecointe submitted that the Certificate of Application was the official record of the date of application, and she did not accept that the appellant had made his application prior to 31 December 2020. She submitted that on that basis the appellant did not come within the scope of the Withdrawal Agreement and the judge erred by finding that he did. However even if it was accepted that the application was made before 31 December 2020 the appellant could still not succeed as he was not residing in the UK in accordance with EU law prior to 31 December 2020.

13. Both parties accepted that if Judge Smeaton's decision was set aside, the decision could be re-made without a further hearing on the evidence available.

Discussion

14. The first issue to be considered is the date on which the appellant made his application and whether or not that pre-dated the specified date of 31 December 2020. The appellant now claims that he made the application on 28 December 2020 and not on 19 February 2021 as previously considered. He relies upon the front page of the respondent's bundle which gives the date as 28 December 2020, as well as a print-off giving his unique application number which is dated 28 December 2020. Mr Rehman also referred to an email confirming that date which the appellant had with him, and which could be shown to the Tribunal if required. He relied upon paragraph 34G(3) of the immigration rules which stated that the date of application was the date on which the online application was submitted. Ms Lecointe relied upon the Certificate of Application as the official document giving the application date of 19 February 2021.

15. It seems to me that the correct application date has to be 19 February 2021. I note from the record of proceedings before Judge Smeaton that it was accepted without any question that that was the application date. Indeed, the submissions made on behalf of the appellant at that hearing specifically stated that the appellant did not realise that he had to apply for a residence permit before the cut-off date, which is in itself a clear indication that he considered that the application had been made after 31 December 2020. Further, at [22] of her decision Judge Smeaton recorded that it was not in dispute that, since the appellant did not hold a relevant document as the extended family member of an EEA citizen by the specified date and had not applied for one by that date, he did not meet the definition of dependent relative in Appendix EU - again confirming that it had never been in question that the application had been made after the relevant date.

16. Accordingly, until the hearing before me, there had never been any suggestion of the application having been submitted prior to the specified date. The appellant is therefore now seeking to proceed on an entirely different basis to that presented before the judge. In any event, and putting that aside, I agree with Ms Lecointe that, whilst the first page of the respondent's bundle refers to

the date of application as 28 December 2020, that date was entered on a form by a member of staff and was not an electronically generated date supported by an electronically generated receipt like the Certificate of Application. I also consider that the print-out form produced by the appellant dated 28 December 2020 which provides a unique application number is simply confirmation of him having commenced the application process on that date but, when taken together with the Certificate of Application, suggests that the application was not actually completed and submitted until the date of the application, 19 February 2021. In such circumstances there is no question of the appellant being able to argue his case on the basis of an application made prior to the cut-off date of 31 December 2020 and he cannot distinguish his case from that of Celik on such a basis.

17. Nevertheless, I also consider the case on the basis that Judge Smeaton proceeded on a mistake of fact and that the application was actually made on 28 December 2020, as the appellant now claims. It seems to me, however, that the appellant still cannot succeed, whether or not he made his application prior to 31 December 2020, since his application was made under the EUSS and not under the EEA Regulations 2016. Indeed, it seems to me that his case is on all fours with Batool. It was Mr Rehman's submission that the appellant's case would still fall within the scope of the Withdrawal Agreement even if his application was made under the EUSS, since no particular form was specified under the Directive and the spirit of the Directive still applied. However, that was a matter specifically considered by the Presidential Tribunal in Batool whereby it was found, at [66] and [67], that the appellant had to have made an application for facilitation for entry to or residence in the UK under the EEA Regulations 2016 in order to fall within the scope of the Withdrawal Agreement (Article 10.3). The appellant had clearly not done that. At [69] to [71] the Tribunal rejected the suggestion that the respondent ought to treat an application made under the EUSS as one under the Regulations. That reflected their earlier finding at [49] that a valid application had to have been made before 1 January 2021 and that a valid application was one submitted on the specified form in compliance with regulation 21 of the EEA Regulations 2016. In the circumstances it seems to me that the appellant simply cannot succeed on the arguments made by Mr Rehman.

18. It is relevant to note that Judge Smeaton's decision to allow the appeal was not on the basis now argued by Mr Rehman in any event. As recorded at [22] of her decision, it was not in dispute that the appellant did not hold a relevant document as an extended family member and had not applied for one by the specified date of 31 December 2020, and on that basis, it was accepted by the judge that he could meet the requirements of Appendix EU. The only basis upon which the judge found that the appellant could benefit from the Withdrawal Agreement was by applying the principle of proportionality as set out in Article 18.1(r) of the Withdrawal Agreement (mistakenly referred to as Article 19(1)(r) at [29]) and concluding that the requirement for the appellant to hold such a relevant document or to have applied for one by the specified date was disproportionate. However, the Tribunal in Batool comprehensively rejected such an argument at [72] to [73].

19. As a final point, Mr Rehman submitted that the appellant's appeal had been made under regulation 8(2) of The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 and therefore the Withdrawal Agreement applied to him. However, the appellant's grounds of appeal were not made under regulation 8(2) of The Immigration (Citizens' Rights Appeals)(EU Exit) Regulations. In fact the grounds of appeal were made on the basis of the EEA Regulations 2006, Article 8 and the Refugee Convention, none of which were relevant or applicable and, as such, it is questionable whether he even had a valid right of appeal in the circumstances. Nevertheless, the validity of the appeal was never questioned, and I therefore do not take that matter any further, other than as a response to Mr Rehman's submission.

20. Accordingly Judge Smeaton clearly erred in law by allowing the appeal on the basis that she did. The appellant, quite rightly, has not challenged her finding at [23] that the respondent decision was in accordance with the provisions of Appendix EU. The basis upon which she found that the appellant fell within the scope of the Withdrawal Agreement was clearly wrong and, as such the judge's decision is set aside. For the reasons already given the appellant simply does not fall within the transitional provisions in the Withdrawal Agreement in Article 10(3), having made no application for facilitation of entry or residence under the EEA Regulations 2016 prior to the relevant date. He therefore cannot succeed, and the decision must therefore be re-made by dismissing the appeal.

DECISION

21. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed, and First-tier Tribunal Judge Smeaton's decision is set aside.

22. I re-make the decision by dismissing Mr Uddin's appeal.

Signed: S Kebede
Upper Tribunal Judge Kebede
2022

Dated: 31 October