



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003849
First-tier Tribunal No:
EA/01692/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 March 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMED MAZHERUDDIN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr Chohan, Counsel

Heard at Field House on 29 November 2022

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for convenience, I will refer to the parties as they were designated in the First-tier Tribunal.

Background

2. The appellant applied for leave under the EU Settlement Scheme on the basis of being a dependent relative of his cousin (“the sponsor”) who is an EEA national. The application was refused by the respondent on the basis that the appellant had not been issued with a residence card or other relevant document under the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”) and therefore did not meet the requirements under Appendix EU of the Immigration Rules.

3. The appellant appealed and his appeal came before Judge of the First-tier Tribunal Karbani (“the judge”). In a decision promulgated on 20 June 2022 the judge allowed the appeal.

First-tier Tribunal Decision and Grounds

4. The judge found that the appellant did not have a residence card prior to 31 December 2020 and therefore was unable to meet the definition of a family member of an EEA national under Appendix EU because he did not hold a “relevant document”. The judge found, however, that refusing the appellant’s application was contrary to the EU Withdrawal Agreement, which required the appellant’s personal circumstances to be considered. The judge then proceeded to find that the appellant was dependent on the sponsor and allowed the appeal.
5. The grounds of appeal argue that the judge was wrong to find that the appellant fell within the personal scope of the EU Withdrawal Agreement. This is because his residence in the UK was not facilitated in accordance with the EEA Regulations (and no application for facilitation had been made) prior to 31 December 2020.

Analysis

6. In order to succeed before the First-tier Tribunal in challenging the respondent’s decision the appellant needed to establish either that the respondent’s decision was contrary to Appendix EU of the Immigration Rules or that it was inconsistent with the EU Withdrawal Agreement: see Regulation 8 of the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020 setting out the grounds of appeal.
7. The judge’s finding that the respondent’s decision was consistent with the Immigration Rules was not challenged. This is plainly correct given that it was common ground before the First-tier Tribunal that, as of 31 December 2020, the appellant did not have, and had not applied for, a residence card.
8. The issue in contention before me is whether the respondent’s decision is consistent with the EU Withdrawal Agreement. The appellant is not a family member of the sponsor, as that term is defined in Article 9 of the EU Withdrawal Agreement. However, he is an “Other Family Member” within the meaning of Article 32 of Directive 2004/38/EC. Such persons fall within the scope of the EU Withdrawal Agreement by operation of Article 10(2) and 10(3) where their entry and residence was facilitated by the UK prior to 11pm GMT on 31 December 2020 or where they have applied for such facilitation before that date. This is explained in *Batool and others (other family members EU exit)* [2022] UKUT 00219 (IAC), the headnote to which states:

“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.”
9. As the evidence before the First-tier Tribunal indicated that the appellant had not applied for facilitation of his entry and residence before 31 December 2020 (and that his entry and residence was not being facilitated at that date) the judge erred in finding that the appellant fell within the scope of the EU Withdrawal Agreement. In the light of this error, the decision cannot stand.

10. I am not in a position to remake the decision because, on the morning of the hearing, the appellant submitted a copy of an application for a registration certificate or residence card as an extended family member of an EEA national dated 23 December 2020 along with a copy of a Royal Mail signed for stamp, with a date 29 December 2020.
11. Mr Chohan submitted that the application dated 23 December 2020, sent by registered post on 29 December 2020, demonstrates that an application for facilitation was made before 31 December 2020. Mr Melvin did not accept that an application had in fact been made. He noted that there was nothing in the respondent's system showing that an application had been made. He made clear that he was not prepared to accept that an application was sent to the respondent, on 29 December 2020, or on any other date, for a residence card under the EEA Regulations.
12. In order to remake the decision a judge will, inter alia, need to determine whether the appellant made an application for a residence card in December 2020 as he now claims. It is likely to assist the judge considering this matter if the appellant submits a detailed statement explaining why in his witness statement and evidence before the First-tier Tribunal he did not mention the application in December 2020. Paragraph 6 of his statement includes the following but no mention of the application in 2020:

I have submitted an application under the EUSS for a Family permit on the basis of my sponsor Syed Khaleel, but the Home Office have refused my application only for the reason that I have not previously been granted a residence permit which I think is unfair and against the provisions of the EUSS.
13. Mr Chohan submitted that I should preserve the First-tier Tribunal's findings of fact concerning whether the appellant is dependent on the sponsor because this has not been challenged by the respondent. I am not prepared to do so because, at the time the respondent drafted the grounds of appeal, she would not have needed to contest the findings in respect of the dependency as the evidence plainly indicated that the appellant could not succeed in any event as he had not applied for facilitation prior to 31 December 2020. Accordingly, no findings are preserved.
14. The remaking of the decision is likely to entail significant judicial fact finding. Accordingly, I have decided, having regard to Paragraph 7.2(b) of the Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal as well as the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, to remit the case to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside. The appeal is remitted to the First-tier Tribunal to be made afresh with no findings preserved.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

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17 January 2023