



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003281
EA/14109/2021**

THE IMMIGRATION ACTS

**Heard at Field House IAC
On the 7 November 2022**

**Decision & Reasons Promulgated
On the 24 January 2023**

Before

**UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE MONSON**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**BASHIRU DADA ABUBAKAR
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer

For the Respondent: Ms L Appiah, Counsel instructed by Omnis Legal Services

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Mill promulgated on 8 April 2022 (“the Decision”). However, for ease of reference we will hereafter refer to the parties as they were before the First-tier Tribunal.

2. By the Decision, the Judge allowed the appellant's appeal against the decision of the respondent to refuse to grant him settled or pre-settled status under the EU Settlement Scheme ("EUSS") in the capacity of a dependant relative of a relevant EEA citizen.

Relevant Background

3. The facts found by the Judge are that the appellant is a national of Nigeria who entered the UK at the invitation of his sponsor in 2015, and never left. His sponsor is one of his three brothers. He is a dual national, being both a citizen of Nigeria and a citizen of Ireland. He moved to the UK from Ireland in 2013, and continued to maintain his family members, including the appellant, who were residing in Nigeria. The sponsor paid for the appellant's educational fees in Nigeria, and since inviting him to enter the UK in 2015, the sponsor had accommodated the appellant and had provided him with funding for all his essential needs.
4. On 30 December 2020, the appellant made an application for an EEA residence card in the capacity of an extended family member of an EEA national exercising Treaty rights here. On 8 February 2021, the Home Office returned the application as invalid, stating that the issuing bank had failed to process the payment. On 7 March 2021 the appellant applied for leave to remain under the EUSS.

The Reasons for Refusal

5. On 18 September 2021 the respondent gave her reasons for refusing the appellant's application.
6. The required evidence of a family relationship for a dependant relative of a relevant EEA citizen, where the dependant relative did not have a documented right of permanent residence, was a valid family permit or residence card issued under the EEA Regulations as a dependant relative of that EEA citizen; and evidence which satisfied the Secretary of State that the relationship continued to subsist. Home Office records did not show that he had been issued with a family permit or residence card under the EEA Regulations as a relative of an EEA national who was a dependant of the EEA national or of their spouse or civil partner, a member of their household or in strict need of their personal care on serious health grounds. Therefore, he did not meet the requirements for settled status or pre-settled status as a family member of a relevant EEA citizen.

The Proceedings in the First-tier Tribunal

7. The substantive hearing of the appeal was originally listed to take place before Judge Gibb on 24 January 2022. For the purposes of the appeal hearing, the appellant's representatives compiled a bundle of documents which contained the completed EEA (EFM) application form, and a set of bank statements relating to an account held by the sponsor which covered the period December 2020 through to February 2021. In his signed

witness statement for the hearing, the sponsor said that he was surprised to receive the invalidity letter in February 2021, as he had provided his card details with the application and he had had adequate funds in his bank account. He had instructed his lawyer to re-send the application with a postal order. A few weeks later the application was sent back without any explanatory note.

8. Although not foreshadowed by this witness statement evidence, at the outset of the hearing Ms Appiah informed the Judge and her opponent, Mr Nath of Counsel, that she wished to raise as an additional ground of appeal that the application for an EEA residence card had been wrongly rejected as invalid. Mr Nath objected to this proposal, and Judge Gibbs decided to adjourn the hearing with directions.
9. The directions are not before us, but we are able to infer from what followed that the Judge directed the appellant to set out in writing his case on the matter raised by Ms Appiah at the hearing, and whether it was accepted or disputed that this was a new matter for which the Secretary of State's consent was required. The Judge further directed that the respondent should respond to the case put forward by the appellant within a specified time limit.
10. In compliance with the directions made by Judge Gibb on 24 January 2022, the appellant's representatives sent a letter to the Tribunal at Hatton Cross dated 3 February 2022 setting out the appellant's case. They set out the Headnote of **Basnet (Validity of application - respondent) [2012] UKUT 00113 (IAC)**. They submitted that when the respondent refused the EEA (EFM) application, no evidence was provided to show there was an issue with payment. They acknowledged that the grounds of appeal did not raise this issue. So, the appellant applied under Rule 19(7) of the Procedure Rules to vary his grounds of appeal. If the appellant was not permitted to vary his appeal in this way, he would be left without any recourse because the date for applying for a residence card had passed, ending on 31 December 2020. Permission from the Secretary of State was not required, as this was not an appeal under section 82.
11. The directions of Judge Gibb required a response from the respondent by 21 March 2022. No response was forthcoming.

The Hearing Before, and the Decision of, the First-tier Tribunal

12. The appeal was re-listed before Judge Mill, who heard it remotely by CVP at Hatton Cross on 5 April 2022. Ms Appiah appeared on behalf of the appellant, but there was no appearance by a legal representative for the respondent.
13. In his Decision, the Judge said that he found both the appellant and his sponsor to be credible and reliable witnesses. At paragraph [15], he observed that the RFRL did not challenge the "dependency" which the appellant had upon his sponsor. Nonetheless, for the sake of

completeness, he had turned his mind to this and he was satisfied that the appellant had established a dependency upon his sponsor. He was financially dependent upon him in Nigeria, and since entering the UK he had continued to be financially supported by him and to be a member of the sponsor's household.

14. At paragraph [17], he said that when exercising their powers in this area, member states must ensure the basic freedoms guaranteed by the EC Treaty and the effectiveness of Directives containing measures to abolish obstacles to free movement. Evidence of dependency might be adduced by any appropriate means.
15. At paragraph [19], the Judge cited sub-paragraphs (o) and (r) of Article 18.1 in the Withdrawal Agreement. At paragraph [20], he found that the failure of the respondent to assist the appellant and to refuse the application on the basis of the lack of a relevant document which the respondent had it within her power to provide was unlawful, and resulted in a disproportionate decision.
16. At paragraph [21], the Judge observed that Article 18.1(e) provided that the host state should ensure that any administrative procedures for applications were "*smooth, transparent and simple, and that any unnecessary administrative burdens are avoided.*" The Judge held that the necessity to have a document simply to confirm the factual position was an unnecessary administrative burden.
17. At paragraph [22], the Judge acknowledged that Article 8 ECHR played no part in this "*EEA appeal*". However, for the purposes of the Withdrawal Agreement, Union Law included the Charter of Fundamental Rights of the European Union. He found that the unnecessary administrative burden sought to be imposed by the UK Government upon the appellant breached Article 7 of this Charter.
18. At paragraph [23], the Judge found that the appellant met the relevant eligibility requirements for pre-settled status under the EUSS. He held that any refusal on the basis of a lack of documents was disproportionate, and a breach of the appellant's rights under the Withdrawal Agreement.
19. At paragraph [24], the Judge addressed the second argument advanced on behalf of the appellant. The Judge found as follows:

"As the respondent asserts that the application was not accompanied by a fee, and so is not valid, the respondent has the onus of proof. The respondent has had fair notice of this additional point taken by the appellant. The respondent has not answered the appellant's submissions in this respect. I accept the factual background and find that due to a failure in the respondent's system of processing payments, the appellant did suffer a prejudice as he otherwise would have been granted the EEA family permit which he had previously applied for. This would have resolved the issue in this appeal."

20. The Judge went on to allow the appeal under the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020.

The Application for Permission to Appeal

21. Peter Deller of the Specialist Appeals Team settled the application for permission to appeal on behalf of the SSHD. He pleaded four grounds of appeal, which are set out below:

“GROUND ONE: Misconstruing the Reasons for Refusal

The Judge correctly identifies that the refusal was based on the Scheme rules requirement that the appellant holds a “relevant document” (paragraph 18), but wholly fails to appreciate the significance of this requirement. The EU Settlement Scheme gives effect to the Withdrawal Agreement, and eligibility based on the former regulation 8(2) “dependent family member” route is restricted under Article 10 of the WA to those who are lawfully resident under Union law immediately prior to 31 December 2020 (Article 10(1)(e); and to those whose residence had already been facilitated under domestic legislation transposing Article 3.2 of the Directive (Article 10(2)) or was being facilitated on an application for this made before 31/12/20 (Article 10(3)). The “relevant document” requirement in the rules reflects that limitation and could not be bypassed. Residence as a facilitated extended family member was not in accordance with Union law but was facilitated under domestic law and existed only after the process had been completed.

GROUND TWO: Misapplication of Withdrawal Agreement Rights

In similar vein, the Judge’s reliance on procedural rights under Article 18 of the WA (paragraphs 19-21) is misconceived. Those rights arise only where a person is in scope of the Agreement and as set out above the appellant was not.

GROUND THREE: Inappropriate Regard to the Charter of Fundamental Rights

The Judge correctly states that Article 8 ECHR issues do not arise but seeks to invoke the Charter of Fundamental Rights, which applies only where Union law is engaged. Here, again, it was not. Even had residence been facilitated it would have been pursuant to domestic not Union law.

GROUND FOUR: Misapprehension on the Status, Outcome and Effect of the Rejected Application of 30 December 2020

It is a matter of record that an application of 30 December 2020 for a residence card as an extended family member was rejected for lack of payment of a fee, but in purporting to apply Basnet principles against the Secretary of State without regard to the subsequent reported decisions in Mitchell and Ved the Judge errs in creating for himself a valid application, deciding a non-existent appeal against it at first instance on a supposedly inevitable outcome on the single issue of dependence; and/or unlawfully applying unilaterally the regulation 18 “extensive examination” which would have ensued; and in considering that this contributed to the EUSS rules being met when pointedly no relevant document had yet been issued. At its highest the Basnet principle would have left the 30 December 2020 application valid and outstanding with an appeal right on a different

statutory basis to follow in due course. It was not before the Judge to consider a refusal which had not happened, much less so on such an inadequate and incomplete basis.

For all these reasons the Secretary of State asserts that there was no valid basis to allow the appeal on the two available grounds in an EUSS appeal. The Scheme rules were manifestly not met and [no] Withdrawal Agreement rights existed which could have been breached. [T]he only appeal before the Tribunal simply could not succeed, whether or not dependence before 31/12/20 was established.”

The Reasons for the Grant of Permission to Appeal

22. On 10 June 2022 First-tier Tribunal Judge Mills granted permission to appeal on all grounds raised. The Judge held that the grounds made out arguable errors of law in the decision of Judge Mill which could have led to a material difference to the outcome of the appeal.

The Hearing in the Upper Tribunal

23. At the hearing before us to determine whether an error of law was made out, Ms Ahmed developed the grounds of appeal by reference to a number of authorities, including **Macastena [2018] UWCA Civ 1558**, **labangbe [2019] EWA Civ 339**, and **Mitchell [2015] UKUT 00562 (IAC)**. After hearing from Ms Appiah, we ruled that an error of law was made out on all grounds raised, with written reasons to follow in due course. We then invited the representatives to make submissions on remaking, and we reserved our decision on that issue.

Reasons for Finding an Error of Law

24. In **Celik (EU exit: marriage; human rights) [2022] UKUT 00220 (“Celik”)** which was promulgated on 19 July 2022 a Presidential panel ruled on two issues which also arise in the appeal before us. 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.”

25. The Presidential panel addressed the issue of proportionality at paragraphs [61] to [63] of their decision:

“(2) The appeal to proportionality: Article 18.1(r)”

61. The appellant places great reliance on Article 18.1(r) of the Withdrawal Agreement. As we have seen, this gives a right for ‘the applicant’ for new residence status to have access to judicial redress procedures, involving an examination of the legality of the decision as well as of the facts and circumstances on which the decision is based. These redress procedures must ensure that the decision ‘is not disproportionate’.

62. Ms Smyth submitted at the hearing that, since the appellant could not bring himself within Article 18, sub-paragraph (r) simply had no application. Whilst we see the logic of that submission, we nevertheless consider that it goes too far. The parties to the Withdrawal Agreement must have intended that an applicant, for the purposes of sub-paragraph (r), must include someone who, upon analysis, is found not to come within the scope of Article 18 at all; as well as those who are capable of doing so but who fail to meet one or more of the requirements set out in the preceding conditions.

63. The nature of the duty to ensure that the decision is not disproportionate must, however, depend upon the particular facts and circumstances of the applicant. The requirement of proportionality may assume greater significance where, for example, the applicant contends that they were unsuccessful because the host State imposed unnecessary administrative burdens on them. By contrast, proportionality is highly unlikely to play any material role where, as here, the issue is whether the applicant falls within the scope of Article 18 at all.

64. In the present case, there was no dispute as to the relevant facts. The appellant’s residence as a durable partner was not facilitated by the respondent before the end of the transitional period. He did not apply for such facilitation before the end of that period. As a result, and to reiterate, he could not bring himself within the substance of Article 18.1.

65. Against this background, the appellant’s attempt to invoke the principle of proportionality in order to compel the respondent to grant him leave amounts to nothing less than the remarkable proposition that the First-tier Tribunal Judge ought to have embarked on a judicial re-writing of the Withdrawal Agreement. Judge Hyland quite rightly refused to do so.

66. We also agree with Ms Smyth that the appellant’s interpretation of Article 18(1)(r) would also produce an anomalous (indeed, absurd) result. Article 18 gives the parties the choice of introducing ‘constitutive’ residence schemes: see Article 18.4. Article 18.1(r) applies only where a State has chosen to introduce such a scheme. If sub-paragraph (r) enables the judiciary to re-write the Withdrawal Agreement, this would necessarily create a divergence in the application of the Withdrawal Agreement, as between those States that

have constitutive schemes and those which do not. This is a further reason for rejecting the appellant's submissions."

26. Finally for completeness, we 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. Although **Celik** is not binding on us, it is highly persuasive and the panel's analysis of the relevant parts of the Withdrawal Agreement accords with our own analysis.

28. One of the functions of the Withdrawal Agreement is to preserve the rights of extended family members of EEA nationals that have crystallised by the end of the transition period. Consistent with this, sub-paragraph (l) of Article 18.1 of the Withdrawal Agreement permits the host state to require, for persons referred to in Article 10.2 or 10.3: *"a document issued by the relevant authority in the host state in accordance with Article 3(2) of Directive 2004/38/EC."*

29. Thus, it is entirely lawful and compatible with the Withdrawal Agreement for Appendix EU to require that sufficient evidence of eligibility as a dependant relative in the extended family member category should be made up of two elements - the first of which the applicant already has as an EEA residence card as an extended family member, and the second element of which is proof that the relationship of dependency has continued since the end of the transition period. Indeed, the wording of Article 10.2 impels the first requirement (holding a relevant document such as an EEA residence card) as a matter of inexorable logic: the only way a person can verify that they come within the scope of Article 10.2 of the Withdrawal Agreement is to produce an EEA residence card that had been issued to them as an extended family member before the end of the transition period.

30. 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. However, the appellant did not contest at the time the rejection of his EEA application on invalidity grounds, and he made his EUSS application on the premise that he did not have a pending application under the EEA Regulations 2016.

31. The first error in the Judge's line of reasoning was that instead of asking himself whether the appellant came within the scope of the Withdrawal Agreement (to which the answer was clearly no – see above), he assessed the issue of dependency by reference to Community Law. This was a wholly irrelevant line of enquiry, as the appellant could not take the benefit of Community Law in an appeal under the EUSS.
32. The Judge's second error was to treat the principle of proportionality that is contained in Article 18.1(r) as enabling him to find that the respondent's refusal decision was disproportionate, and thereby in breach of the Withdrawal Agreement.
33. The principle of proportionality contained in Article 18.1(r) does not operate as a free-floating principle which hovers above any relevant decision taken under the Withdrawal Agreement, giving the judicial decision-maker free rein to disapply an evidential requirement which is specifically mandated by other provisions within the Withdrawal Agreement. The appellant did not meet the requirements of the Rules and he did not come within the personal scope of the Withdrawal Agreement. In the light of those facts, it was not open to the Judge to deploy the principle of proportionality to re-write the Rules or the terms of the Withdrawal Agreement in order to deliver a different outcome.
34. As stated in **Celik** at paragraph [58], it is not possible to invoke principles of EU Law in interpreting the Withdrawal Agreement, save insofar as that agreement specifically provides. This is apparent from Article 4.3. EU Law does not apply more generally. Thus, the Judge's third error was to treat the Withdrawal Agreement as being subject to the Charter of Fundamental Rights of the European Union. As set out at paragraph [69] of **Celik**, the Charter of Fundamental Rights no longer applies, pursuant to section 5(4) of the EU Withdrawal Act [2018]. Although part of Union Law for the purposes of the Withdrawal Agreement, the Charter does not apply generally.
35. The Judge also erred in law in allowing the appeal on the alternative basis set out by him at paragraph [24] of his decision. Although the respondent had had fair notice of the additional point taken by the appellant, it was a new matter for which the respondent's consent was required. Silence is not consent. In the absent of consent from the respondent, the Judge had no jurisdiction to allow the appeal on the ground that in retrospect the EEA application of 30 December 2021 had been wrongly rejected as invalid.
36. Even assuming for present purposes that the above finding of fact was sustainable, it was incapable of changing the fact that the EUSS application had been rightly refused under Appendix EU and the Withdrawal Agreement. At best, all that the finding could establish was that a valid EEA application was still outstanding for decision by the respondent.

37. Aside from the fact that the respondent had not given her consent to the Judge deciding an appeal under the EEA Regulations in respect of an EEA application that had not been decided, the Judge also failed to take into account that the appellant only ever had a limited procedural right under the EEA Regulations, and that it would have always been a matter of discretion for the Secretary of State to decide whether it was appropriate to grant him an EEA residence card, having considered all the relevant circumstances.

Conclusion

38. For the above reasons, we find that there is a material error of law in the decision of the First-tier Tribunal Judge Mill such that the Decision should be set aside in its entirety and remade.

Remaking

39. As is apparent from our reasoning on the error of law question, the only legally sustainable outcome is that the appellant's appeal is dismissed. We do not find it necessary or appropriate to revisit the question of whether the EEA application of 30 December 2020 was wrongly rejected on invalidity grounds. It does not appear that the sponsor checked with his bank to ascertain whether it had failed to process the payment as asserted in the rejection letter, or whether the fault lay with the respondent. In any event, the indisputable fact is that the appellant and the sponsor did not challenge the rejection at the time, but submitted the EUSS application in April 2021 on the premise that there was no outstanding application for an EEA residence card. 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 is being facilitated by the host state.

Notice of Decision

We are satisfied that the Decision involves the making of a material error on a point of law. The Decision of the First-tier Tribunal Judge Mill promulgated on 6 April 2022 is therefore set aside. We remake the decision. We dismiss the appeal on all grounds raised.

Signed Andrew Monson

Date 21 November 2022

Deputy Upper Tribunal Judge Monson

