



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002773

First-tier Tribunal No: EA/14823/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22 July 2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MUHAMMAD RUFIQUE
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Brown of Counsel, instructed by Pearl Valley Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House by remote video means on 11 July 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.
2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Cruthers promulgated on 28 March 2022, in which the Appellant's appeal against the decision to refuse his application for pre-settled status under the EU Settlement Scheme (the "EUSS") dated 7 October 2021 was dismissed.
3. The Appellant is a national of Pakistan, born on 6 June 1968, who previously had an EEA Residence Card issued in Italy (periodically granted between 2008 and 21 September 2021) where he lived with the Sponsor until August 2019. From then until July 2020 he was resident in Pakistan and after a brief return to Italy, he then entered the United Kingdom on 14 August 2020 with his Sponsor and relying on his Italian Residence Card. He made two applications under the EUSS on 30 August 2020 and 31 December 2020, which were both refused respectively on

18 December 2020 and 29 June 2021. There were no applications for review or appeal against those decisions. On 29 June 2021, the Appellant made a further application for pre-settled status, the refusal of which is the subject of this appeal.

4. The Respondent refused the application the basis that the Appellant did not meet the requirements set out in paragraph EU11 or EU14 of Appendix EU to the Immigration Rules because there was insufficient evidence that he was a dependent relative, specifically he had no Family Permit or Residence Card issued under the Immigration (European Economic Area) Regulations 2016 (the “EEA Regulations”).
5. Judge Cruthers dismissed the appeal in a decision promulgated on 28 March 2022 on all grounds. The Appellant’s claim before the First-tier Tribunal is set out in paragraphs 8 to 11 of the decision as follows:

“8. STRAND I: Miss Patel says that the appeal should be allowed because in fact the appellant is/was within the criteria to be granted status pursuant to Appendix EU. This strand of argument further boils down to reliance on paragraph EU14 of the relevant Appendix – because Miss Patel realistically accepted that the appellant could not be within paragraph EU11.

9. STRAND II: In the alternative, Miss Patel argues – by reference to the Withdrawal Agreement – that the appellant should have been granted status because he meets the criteria in Regulation 8 of the Immigration (European Economic Area) Regulations 2016 (“the 2016 EEA Regulations”). At least (Miss Patel argues) the tribunal should decide this appeal in favour of the appellant through the application of Regulation 8 of the 2016 EEA Regulations.

10. The argument that the Appellant should succeed by reference of the 2016 EEA Regulations (“STRAND II”) is advanced through a 2-page Amended Grounds of Appeal document prepared by Miss Patel on 7 March 2022. For the respondent, Mr Philipps disagreed with the substance of these Amended Grounds of Appeal but he indicated that he had no objection to me considering those grounds.

11. The argument that I am referring to as “STRAND II” is then expanded on through Miss Patel’s 5-page Amended Skeleton Arguments document (dated 7 March 2022). On the question of who qualifies as an Extended Family Member under Regulation 8 of the 2016 EEA Regulations, Miss Patel’s paragraph 20 places reliance on Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 79 (IAC).

6. The First-tier Tribunal found that the Appellant was dependent on and a member of the Sponsor’s household in Italy between 2008 and August 2019 and in the United Kingdom from August 2020; but there was a lack of evidence to show any dependency in the interim period and it could not be said that membership of the same household continued as the Sponsor moved to the United Kingdom at this time and the Appellant returned to Pakistan.
7. In relation to the ‘Strand I’ argument, the First-tier Tribunal decided, by reference to Condition 1 of paragraph EU14 of Appendix EU and the definitions in Annex 1 thereto, that an applicant had to have “*required evidence of family membership*” which for a dependent relative meant having “*a relevant document as the dependent relative of their sponsoring person*” which in turn was effectively defined as a Family Permit issued pursuant to the EEA Regulations. The Appellant

had never made any application under the EEA Regulations and given the discretionary nature of Regulation 8, it could not be said that any such application would have resulted in a Family Permit being issued.

8. In relation to the second 'Strand II' argument, the Appellant's claim was that he had a directly enforceable right under Article 10(2) and (3) of the Withdrawal Agreement as an extended family member who has applied before the end of the transition period. However, although there were two applications before the end of the transition period, the relevant application and decision under appeal was after it on 29 June 2021. Further, the Withdrawal Agreement could only assist the Appellant if his residence had been facilitated by the United Kingdom by the end of the transition period. On the facts of this case, the Appellant's residence had only ever been facilitated in Italy, not in the United Kingdom. The First-tier Tribunal found nothing in the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 (the "EU Exit Regulations") such that Regulation 8 of the EEA Regulations continued to have any effect in relation to any relevant application by the Appellant. This was not therefore an appeal which could be allowed by reference to the EEA Regulations. Finally, there was no breach of the Withdrawal Agreement in this case.

The appeal

9. The Appellant appeals on essentially three grounds. First, that the First-tier Tribunal erred in law in its consideration of the Appellant's appeal under Appendix EU on the basis that the definition in Annex 1 to Appendix EU was not restricted to a Family Permit but also includes a Residence Card, which did not need to have been issued from the United Kingdom (only a derivative residence card had to have been issued in the United Kingdom under the EEA Regulations). The Appellant's Italian Residence Card was therefore sufficient to establish that he is a dependent family member of the Sponsor, satisfying the requirement for a relevant document. On entry to the United Kingdom, this was sufficient evidence of family relationship as entry was granted on that basis without the need for an EEA Family Permit.
10. Secondly, that the First-tier Tribunal erred in law in relation to its assessment of the Appellant's appeal under the EEA Regulations because (i) the Appellant had applied before the end of the six month deadline following the end of the transition period, as required in Article 18(1)(b) of the Withdrawal Agreement; (ii) of a failure to consider that the Appellant's right of residence had been facilitated by the United Kingdom when he was granted a right of entry on 14 August 2020 which was retained at the date of application on 29 June 2021; and (iii) the EU Exit Regulations continued the effect of Regulation 8 of the EEA Regulations for the purposes of the Appellant's application. This is said to be pursuant to Regulation 2(a) of the EU Exit Regulations in conjunction with Article 18(1)(b) of the Withdrawal Agreement and Regulation 3(2) of the EU Exit Regulations.
11. Thirdly, that the First-tier Tribunal erred in law on its factual finding that the Appellant was not a member of the Sponsor's household nor dependent on him between August 2019 and August 2020. The First-tier Tribunal is said to have failed to consider that the Appellant entered the United Kingdom using his Italian Residence Card which must have been issued on the basis of him being a family member, that card proving that the Appellant was a member of the Sponsor's household. It is also said that there was a failure to consider that the Appellant could not return from Pakistan sooner due to the Covid-19 pandemic or that there

was only a short period of quarantine required in Italy when the Appellant stayed with a friend of the Sponsor.

12. The Respondent opposed the appeal. In a rule 24 notice, it was submitted that for the reasons in Sohrab and Others (continued household member) [2022] UKUT 157 (IAC) the finding that there was no evidence of dependency or membership of the same household between August 2019 and August 2020 was fatal to the Appellant's claim as there was no continuing dependency on the evidence, regardless of the fact that the authorities in Italy had previously issued a Residence Card. In the later skeleton argument, it was submitted that the Upper Tribunal decision in the case of Batool and others (other family members) [2022] UKUT 00219 (IAC) clarified that an applicant who had not made any application for facilitation of his residence under the EEA Regulations prior to 31 December 2020 has no right to have any EUS application considered under the EEA Regulations and any failure to do so would not be a breach of the Withdrawal Agreement.
13. Shortly before the hearing, on 8 July 2023, the Appellant submitted a document entitled 'Appellant's arguments in response' which confirmed continuing reliance on the original grounds of appeal and adds that it is not accepted that the case of Batool settles one of the main issues in the appeal which is whether the Appellant had an enforceable right to remain and reside in the United Kingdom as an extended family member under the terms of the Withdrawal Agreement, specifically Article 10(2) and (3) and whether it could be argued that the Appellant's residence in the United Kingdom has been 'facilitated'. It was submitted that the Appellant entered the United Kingdom on a Family Permit issued in Italy such that he was granted entry for a period of no more than 6 months and was then entitled to the benefit of continued residence in accordance with the provisions of the Withdrawal Agreement. Finally, reference was made to a grant of permission by the Court of Appeal in CA-2023-000371 which was said to be a factually analogous case.
14. At the outset of the hearing, Mr Brown sought a stay pending the outcome of the Court of Appeal decision on the basis that it was of potential relevance and had a direct bearing on the issue in this appeal of whether the facilitation of entry amounted to facilitation of residence in the United Kingdom. Although Mr Melvin was content on behalf of the Respondent with the proposal of a stay, I refused it for a number of reasons. First, there were factual differences in the present case, specifically that the Appellant had made three unsuccessful applications for residence in the United Kingdom. Secondly, the case of R (on the application of Fatima Ali) v Secretary of State for the Home Department [2023] EWHC 1615 (Admin) clarified the requirement of lawful residence as at the end of the transition period (i.e. on 31 December 2020) rather than at any time prior, which assisted in at least one aspect of the current appeal. Thirdly, as it transpired in more detailed submissions at the hearing, the issue to be considered in the Court of Appeal had not in fact been raised at all before the First-tier Tribunal and were not directly raised in the grounds of appeal upon which permission had been granted. There was no application to amend the grounds of appeal to include this point, nor could one have realistically been successful given the point was not relied upon in the First-tier Tribunal and was very far from a *Robinson obvious* point.
15. In oral submissions, Mr Brown continued to rely on the original grounds of appeal and in particular that the Appellant has an arguable case that the EEA

Regulations applied to him to give him a right of residence as an extended family member. The focus of his submissions was more however on the new matters raised that the Respondent's decision breached the Withdrawal Agreement, specifically that the Appellant's residence in the United Kingdom was secured by facilitation of his entry to the United Kingdom in August 2020 on the basis that he was an extended family member.

16. Mr Brown stated that the exact basis of the Appellant's entry to the United Kingdom was unclear, but agreed that it was consistent with Regulation 11(2) and (3) of the EEA Regulations for him to be admitted using his Italian Residence Card and pursuant to which no entry stamp would be made in his passport. However, he submitted that it remained unclear as to what period of residence followed such an entry, it would be six months if entering with a Family Permit. It was further said to be unclear if the Appellant's continued residence in the United Kingdom was affected by the subsequent applications and refusals under the EUSS. It was submitted that it was at least arguable that the Appellant's entry amounted to a facilitation of his residence which continued to date, such that his rights under Articles 10 and 18 of the Withdrawal Agreement had been breached.
17. As to the specific grounds of appeal, although Mr Brown did not have instructions to formally withdraw them, he acknowledged that the requirements of Appendix EU required a relevant document, which was one issued under the EEA Regulations and that there was no challenge to the factual finding that there was no dependency or membership of the same household between August 2019 and August 2020. He further acknowledged that Regulation 8 of the EEA Regulations did not confer an automatic right of residence on an extended family member but that an application had to be made and an extensive examination of personal circumstances undertaken by the Respondent.
18. On this basis, I asked Mr Brown what precisely it was that the Appellant said was the error of law by the First-tier Tribunal. It was suggested that this was because the Appellant had been admitted in August 2020, his dependency continued from that point and therefore he has continued to reside lawfully in the United Kingdom, such that there was a breach of the Withdrawal Agreement, specifically Article 10 and Article 18(1)(e). Mr Brown was unable to identify any basis upon which the Appellant was residing in accordance with EU law (or domestic law) as at 31 December 2020 or any specific basis within the Withdrawal Agreement which gave him a right to reside. In any event, it was accepted that none of these points were in issue before the First-tier Tribunal, nor were they in the grounds of appeal upon which permission was granted and instead it was merely hoped that a submission could be developed on the basis of a proposition that facilitation of entry to the United Kingdom amounted to facilitation of residence in the United Kingdom and a continuing right to reside.
19. On behalf of the Respondent, Mr Melvin relied on the rule 24 response and his skeleton argument and relied on Mr Brown's apparent acceptance that there was no error of law in the First-tier Tribunal for the reasons identified in the actual grounds of appeal. Mr Melvin emphasised that the Appellant had not made any applications under the EEA Regulations and his two previous applications under the EUSS were refused on eligibility grounds. The Appellant had not identified any specific part of the Withdrawal Agreement which was even arguably breached on the facts of this case to reveal any error in the First-tier Tribunal's decision.

Findings and reasons

20. Although Mr Brown did not actively pursue any of the written grounds of appeal, I deal with them for completeness. The first ground of appeal is that the First-tier Tribunal erred in law in its interpretation of the requirement for a relevant document in Annex 1. I find no error of law on this basis, the definition in Annex 1 lists a number of documents which satisfy the requirement, all of which had to be have been issued by the United Kingdom under the EEA Regulations on the basis of an application made under the EEA Regulations. The definition can not rationally be interpreted as to require only a derivative residence card (the last document in the list) to have been issued and applied for under the EEA Regulations. There is no basis why that specific document would be treated different to others and that would not be consistent with the clear purpose of the provision and which is also in accordance with Article 18(1)(l) of the Withdrawal Agreement which talks of documents issued by the relevant authority in the host State in accordance with Article 3(2) of Directive 2004/38/EC.
21. The second ground of appeal has no merit. The Appellant did not make any application under the EEA Regulations, nor did he have any right of appeal against a refusal of his EUSS application on that basis. The case of Batool confirmed that an extended family member whose entry and residence was not being facilitated by the United Kingdom before 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely on the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. The Appellant has not made any application for entry or residence to the United Kingdom under the EEA Regulations and his applications under the EUSS were unsuccessful. For the reasons set out below, although arguable that his entry was facilitated pursuant to Regulation 11 of the EEA Regulations, I do not accept that he had any facilitation of his residence as at the end of the transition period. In any event, any consideration of the Appellant's application or appeal under the EEA Regulations would be bound to fail as on the facts, there was no continuing dependency as required and confirmed in Sohrab, such that Regulation 8 of the EEA Regulations was not and could not be satisfied.
22. The third ground of appeal is that the First-tier Tribunal erred in finding that there was no dependency or membership of the same household between August 2019 and August 2020, with a failure to consider the reasons for separation. There is no dispute that the Appellant and Sponsor were not living in the same household for a period of a year and there was no evidence before the First-tier Tribunal as to any financial support or dependency during that period either. This was not a short period and there was no common household as the Sponsor's tenancy had been given up in Italy before he moved to the United Kingdom. The conclusions of the First-tier Tribunal on this point were entirely lawful, rational and open to it on the evidence (or lack thereof) available. The fact that the Appellant had previously been issued with an Italian Residence Card on the basis of assessment of his circumstances at that time (which on its face appears to have been most recently in April 2019 when the last card was issued and is within a period when the First-tier Tribunal accepts there was membership of the same household) does not assist the Appellant and is not determinative of the question of fact as to what happened later that the First-tier Tribunal had to determine.
23. Although outside of the grounds of appeal, I turn briefly to the additional points raised by Mr Brown, although with some difficulty due to the lack of identification of specific provisions relied upon. These are strictly obiter, as above, they did not form any part of the appeal before the First-tier Tribunal nor the grounds of

appeal and no application was made to amend the grounds to include them. Nor would there in any event be any error of law by the First-tier Tribunal for not considering these points which were never put to it on behalf of the Appellant. For completeness however I give brief reasons as to why I would not find that they assist the Appellant in any event.

24. The proposition was that the Appellant's entry to the United Kingdom in August 2020 somehow facilitated and created an ongoing right of residence whilst he remained dependent on the Sponsor; either on the basis of the EEA Regulations and/or the Withdrawal Agreement. For the reasons set out in Fatima Ali, I consider the relevant point in time at which the Appellant's lawful residence needs to be established is at 31 December 2020, both for the purposes of his EUSS application and any rights under the Withdrawal Agreement.
25. The First-tier Tribunal made no express findings of fact as to the basis of the Appellant's entry to the United Kingdom, but it is reasonable to infer that this was on the basis of Regulation 11 of the EEA Regulations which in subparagraph (2) provides for a right of admission to the United Kingdom as the family member of an EEA national who produces on arrival a valid passport and qualifying EEA State residence card. There is no provision within Regulation 11 for any period of residence in the United Kingdom, it deals purely with right of admission. The entry on this basis is not the same of an issue of and use of an EEA Family Permit pursuant to Regulation 12 of the EEA Regulations, for which an application is required and I do not find that any comparison can be made to the residence period granted following arrival with an EEA Family Permit.
26. In my view, a person entering pursuant to Regulation 11 would be given an initial right of residence set out in Regulation 13, of a period not exceeding three months, whilst they are residing in the United Kingdom as the family member of an EEA national. However, on the facts of this case, I can not see how the Appellant could have any right or residence (or further right of entry) beyond 21 September 2020 when his Italian Residence Card expired and there was then no valid document showing that he is the family member of an EEA national, such that he could no longer be said to be residing here as a family member. In any event, even if the three month period were applied, this would still have ended over a month before the end of the transition period. In the absence of a successful application either under the EEA Regulations (for which no application was ever made, nor for the reasons above would have been successful because of the break in dependency/membership of the same household) or under the EUSS, there is no basis upon which it could be said that the Appellant was residing lawfully in the United Kingdom on 31 December 2020.
27. The Withdrawal Agreement does not assist in this regard as it does not create a right of residence as at the end of a transition period, merely protects those rights which exist as at that date subject to certain conditions. Article 10(2) applies only to ensure a right of residence is retained for EU nationals who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside thereafter and for United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter. The Appellant does not fall within either category of person.
28. Paragraph 10(3) further applies paragraph (2) to family members (within Article 3(2)(a) and (b) of Directive 2004/38/EC) who have applied for facilitation of entry

and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter. Whilst the Appellant's entry was arguably facilitated in August 2020, with perhaps a short period of residence permitted thereafter, his only application(s) for continuing residence before the end of the transition period were unsuccessful and for the reasons given above there was no facilitation by the United Kingdom within its national legislation either as at 31 December 2020 or thereafter. Even if the Appellant falls within the personal scope of Article 10(1) (e) of the Withdrawal Agreement, that does not itself create any right to reside in the United Kingdom on or after the end of the transition period, it only retains a right of residence in specific circumstances which are not met here.

29. The suggestion that the Appellant could succeed by some combination of Article 10 and Article 18(1)(e) of the Withdrawal Agreement (the only provision identified by Mr Brown) does not withstand scrutiny either. Article 18(1)(e) is that "*the host State shall ensure that any administrative procedures for applications are smooth, transparent and simple, and that any unnecessary administrative burdens are avoided;*". There is no complaint as to the application process undertaken by the Appellant and in any event, the refusal of his individual EUSS application could not be said to directly breach the Withdrawal Agreement for this reason.
30. The other provision which I had anticipated Mr Brown would seek to rely on (but did not) is Article 18(1)(r) of the Withdrawal Agreement which refers to proportionality, but it is difficult to see how the Appellant could succeed on this basis either when on the facts he did not meet the requirements of Regulation 8 of the EEA Regulations for an EEA Residence Card (nor had he applied for one) in the United Kingdom and does not meet the requirements of Appendix EU.
31. For all of these reasons there is no error of law in the decision of the First-tier Tribunal on the grounds of appeal upon which permission was granted, nor could the alternative points made by Mr Brown at the hearing, even if permission had been granted to amend the grounds of appeal, identify any error of law either.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12th July 2023