



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-006115

First-tier Tribunal No:
EA/00103/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22 September 2023

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JOHN AKOLOGO

Respondent

Representation:

For the Appellant: Ms S Mackenzie, Senior Home Office Presenting Officer
For the Respondent: Mr Akologo appeared in person

Heard at Field House on Tuesday 29 August 2023

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Cohen promulgated on 4 October 2022 (“the Decision”) allowing the Appellant’s appeal against the Respondent’s decision dated 16 December 2021 refusing him pre-settled status under the EU

Settlement Scheme (“EUSS”) as the father-in-law of Mr Mikel Pelmar, who is a French national exercising Treaty rights in the UK. Mr Pelmar is married to the Appellant’s daughter, Ms Belinda Mbo who has been granted pre-settled status under the EUSS on 15 December 2020.

2. Ms Mbo attended the hearing with the Appellant and in response to a question from us at the outset confirmed that, although the documentation and Decision continually refer to her as the “durable” or “unmarried” partner of Mr Pelmar, she is in fact married to him. We have therefore proceeded on the basis that she is therefore his spouse.
3. The Respondent has not challenged any of the factual findings made by Judge Cohen. As we will come to, those include findings that the Appellant is related as claimed to Ms Mbo and Mr Pelmar and is dependent on them.
4. The Judge found on the basis of those findings that the Respondent’s decision was “not in accordance with the law and Regulations” (by which we understood him to mean the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”). He allowed the appeal on that basis.
5. The Respondent appealed the Decision on the basis that it was not open to the Judge to rely on the EEA Regulations as this was an appeal under the EUSS. Reliance was placed also on this Tribunal’s decision in Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC) (“Batool”). Based on Batool, the Respondent submits that the Appellant was not entitled to rely on an application under the EUSS as an application for facilitation under the EEA Regulations. The Judge had erred by treating it as such.
6. Permission to appeal was granted by First-tier Tribunal Judge Thapar on 22 November 2022 on the basis that the grounds raised an arguable error of law.
7. Having discussed the relevant legal provisions with Ms Mackenzie, we indicated that, although we agreed that the Judge had erred by purporting to allow the appeal under the EEA Regulations, on the findings made (which were not challenged), the Appellant’s appeal falls to be allowed under the EUSS on the basis that the Respondent’s decision is not in accordance with the Immigration Rules in that regard (“Appendix EU”) and/or the withdrawal agreement between the UK and the EU following the UK’s withdrawal from the EU (“the Withdrawal Agreement”).
8. For the benefit of both parties, we indicated that we would provide our reasons in writing which we now turn to do.

DISCUSSION

9. Ms Mackenzie indicated that she intended to place reliance on the Tribunal's decision in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) ("Celik") (as now upheld by the Court of Appeal in Celik v Secretary of State for the Home Department [2023] EWCA Civ 921). Insofar as that decision confirms that an application under the EUSS cannot be treated as an application under the EEA Regulations (as also confirmed by Batool), we understand that reliance. However, as we pointed out to Ms Mackenzie, in this case, the application made under the EUSS was made prior to the specified date (on 29 December 2020) and therefore the other considerations raised in Celik are of no relevance. Further, this is of course the case of a relative (dependent parent) and not a durable partner.
10. Ms Mackenzie took us to the Withdrawal Agreement and sought to argue that Article 10 thereof could only apply to the Appellant if Articles 10(2) or (3) apply. Those require either facilitation of residence prior to the end of the transition period (11pm on 31 December 2020) or an application prior to that date which remained under consideration by the Respondent as at that date. We accept that no application was made for facilitation in this case. The application was squarely under the EUSS.
11. However, the Respondent's argument in this regard is misconceived as the Appellant in fact falls within Article 10(1)(e) of the Withdrawal Agreement. That applies to "family members of the persons referred to in points (a) to (d)". Article 10(1)(a) applies to "Union citizens 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 there thereafter". Mr Pelmar is one such person.
12. "Family member" is a term defined at Article 9(a) of the Withdrawal Agreement. It means "the following persons irrespective of their nationality, who fall within the personal scope provided for in Article 10 of this Agreement" and includes at the first bullet point "family members of Union citizens ...as defined in point (2) of Article 2 of Directive 2004/38/EC" ("the Directive").
13. We took Ms Mackenzie to the Directive. Article 2(2) thereof reads as follows:

""Family member' means:

 - (a) the spouse;
 - (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships

as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)."

[our emphasis]

14. Confronted with that definition, Ms Mackenzie accepted that the Respondent's reliance on both Celik and Batool as well as reliance on Articles 10(2) and (3) of the Withdrawal Agreement was misconceived.

15. At [15] to [19] of the Decision, the Judge made the following findings:

"15. I accept that the appellant is the father-in-law of the sponsor who is in the UK in accordance with the regulations and exercising Treaty rights.

16. The appellant is the direct relative in the ascending line of a relevant EEA citizen or their durable partner.

17. The appellant is dependent upon the relevant EEA Citizen and was at the date of application.

18. The appellant has made a valid application under the EU Settlement Scheme. He submitted appropriate documentation in support of the application.

19. The appellant meets the eligibility requirements for limited leave to enter under appendix EU. The appellant is not eligible for indefinite leave to remain."

16. We accept that had Ms Mbo been only a durable partner (and therefore herself an extended family member), there may have been an issue raised about the applicability of the definition in Article 9 of the Withdrawal Agreement. However, we do not need to decide that point because Ms Mbo assured us that she is married to Mr Pelmar and had been at the time of the Appellant's application.

17. We were not taken to Appendix EU. However, the rules reflect the provisions of the Withdrawal Agreement as one would expect. A "dependent parent" is defined separately from a "dependent relative". The latter requires a relevant document to be held. The former does not.

18. We observe also that "family member" as defined in Appendix EU includes at sub-paragraph (a) a durable partner who has been recognised as such prior to the specified date and remains so as at the specified date. It would appear from the definition of "spouse or civil partner" in relation to a dependent parent that this includes those defined as family members under sub-paragraph (a). As we have indicated, however, we do not need to decide whether the

Appellant could qualify under Appendix EU or the Withdrawal Agreement if Ms Mbo were only a durable partner as she confirmed that she is married to Mr Pelmar and was prior to the specified date.

19. For the foregoing reasons, we set aside paragraphs [20] to [23] of the Decision and we substitute for those paragraphs a finding that the Respondent's decision is not in accordance with Appendix EU and/or the Withdrawal Agreement. For those reasons, we allow the Appellant's appeal.

CONCLUSION

20. Judge Cohen erred by finding that the Appellant's appeal should be allowed on the basis that the Respondent's decision "is not in accordance with the law and [the EEA] Regulations". We set aside [20] to [23] of the Decision in consequence. We preserve the remainder of the Decision. Having made the findings which the Judge did at [15] to [19] of the Decision, we allow the Appellant's appeal on the basis that the Respondent's decision is not in accordance with Appendix EU and/or the Withdrawal Agreement.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Cohen promulgated on 4 October 2022 involves the making of an error of law at [20] to [23] of the Decision. We set aside those paragraphs whilst preserving the remainder of the Decision. We re-make the decision by allowing the Appellant's appeal. The Respondent's decision is not in accordance with Appendix EU and/or the Withdrawal Agreement.

L K Smith

Upper Tribunal Judge Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 August 2023

