IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-001421
UI-2023-001423
UI-2023-001424
First-tier Tribunal Nos: EA/10461/2022
EA/10462/2022
EA/10465/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 October 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ONYEMA UZODINMA OKONJO-ADIGNE
UDOKANMA MARYANNE OKONJO
KENELUMCHUCKWU JASON UZODINMA
(Anonymity order not made)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Vokes, instructed by Finchley Legal Limited
For the Respondents: Ms S McKenzie, Senior Home Office Presenting Officer

Heard at Field House on 11 October 2023

DECISION AND REASONS

1. This is the re-making of the decision in the appellants' appeals, following the setting aside of the decision of the First-tier Tribunal which allowed their appeals against the respondent's decision to refuse their applications under the EU Settlement Scheme (EUSS).

2. The first and second appellants are nationals of Nigeria born on 1 April 1969 and 31 October 1969 respectively, and are husband and wife. They are the parents of the third appellant who is a

Canadian national born on 15 July 2010, and the parents of the sponsor, Chukua Okonjo, an Irish national born on 11 August 2001. The appellants assert that they have been residing with the sponsor in the UK since July 2014, holding multiple-entry visitor visas, in a house which they own and occupy exclusively with the sponsor and which they have treated since that time as their principal residence. The sponsor had been in the UK since the age of 9 years, from April 2011 until July 2014 as a boarding student at Port Regis School in Shaftesbury, Dorset, but from September 2014 to July 2019 attended Abingdon School in Abingdon, Oxon. He subsequently pursued, and was currently in, tertiary education at King's College London and remained dependent upon his parents both financially and emotionally. It is said that throughout the period of his residence in the UK the sponsor remained self-sufficient, supported by his parents, and that the appellants had been *de facto* settled in the UK with him since July 2014, and had thus been in the UK continuously since before he turned 18.

3. The appellants applied, on 30 June 2021, for settled status under the EUSS. The first and second appellants applied on the basis of having completed a continuous qualifying period of five years in the UK on the basis of a "Chen" right to reside as joint primary carers of a self-sufficient EEA citizen child, and the third appellant applied as their dependant. Their applications were refused by the respondent on 6 October 2022 on the basis that it was not accepted that the first and second appellants were "a person with a derivative right to reside" in the UK because they did not meet the relevant requirements in the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). The respondent considered that the appellants could not succeed under the EEA Regulations, under Regulation 16(2), because the sponsor was over the age of 18 at the date of the application. They therefore did not meet the eligibility requirements for settled status in paragraph EU11 of Appendix EU to the immigration rules or for pre-settled status under paragraph EU14.

4. The appellants appealed against that decision, arguing that they were eligible for settled status under paragraph EU11, with reference to Condition 3(a)(iv), (b) and (c), asserting that the time spent caring for the sponsor prior to him reaching the age of 18 was relevant for the purposes of recognising them as persons with a derivative right of residence.

5. The appellants' appeals came before First-tier Tribunal Judge O'Keeffe on 14 February 2023. The judge was satisfied that since at least July 2014 the appellants had been the primary carers of their sponsor in the UK and they had the derivative right to reside in the UK in accordance with Regulation 16 of the 2016 Regulations for a continuous period of five years, noting that the sponsor turned 18 on 11 August 2019. The judge was satisfied that the use of the past tense in the regulations and the guidance enabled the appellants to rely on rights already accrued and that they therefore met the requirements for leave under Appendix EU. The judge accordingly allowed the appeals, with the appeal of the third appellant being allowed in line with the appeals of the first two appellants.

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the grounds that the judge had erred by misinterpreting the provisions of Appendix EU of the immigration rules and thereby reaching an incorrect conclusion as to whether the appellants were persons who had a derivative right to reside as per the definition section at Annex 1 to Appendix EU. It was submitted that the appellants were persons who had a derivative right to reside until they stopped being such and that there was no provision which permitted reliance on an earlier "banked" period of holding the relevant right prior to the UK leaving the European Union.

7. Permission was granted by the First-tier Tribunal. The appellants issued a rule 24 response in which it was noted that the judge appeared to have made an error by confusing the conditions in

3(a)(iv) and (vi) of paragraph EU 11, relating to a "person with a derivative right to reside" and a "person who had a derivative or Zambrano right to reside", but it was considered that it may have been a typographical error and did not affect the reasoning in any event because the emphasis was on the retrospective position in relation to persons who had a derivative or Zambrano right to reside**.**

8. In a decision promulgated on 11 July 2023 I set aside Judge O'Keeffe's decision as follows:

> "12. Judge O'Keeffe's reasoning, for concluding that the appellants could meet the requirements to qualify for settled status under EU.11 of Appendix EU, was that the wording of the definition of a "person with a derivative right to reside" in Annex 1 indicated a retrospective element which enabled reliance upon rights already accrued prior to the sponsor turning 18 years of age. Mr Vokes submits that that was the correct interpretation and that the appellants were able to rely upon the five year period prior to August 2019 throughout which they had a derivative right of residence.
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> 13. However I do not agree that the wording of that definition permits such an interpretation or suggests that reliance could be placed on a past period of rights as enduring after the sponsor turned 18 and after the UK exited the EU. As the respondent submits, there is nothing in that definition allowing for such rights to be 'banked'. In so far as the appellants may suggest that the completion of the five years under the EEA Regulations led to any entitlement, or quasi-entitlement, to permanent residence which then endured from that time, that was clearly not possible under the EEA Regulations, as is apparent from Regulation 15 relating to the right of permanent residence, where Regulation 15(2) stated that: "*Residence in the United Kingdom as a result of a derivative right to reside does not constitute residence for the purpose of this regulation.*" It is clear from Regulation 16(2) that the derivative rights endured only whilst the EEA national child was under the age of 18 and that once he turned 18, those derivative rights simply stopped. Further, in so far as the judge relied on the Home Office Guidance as supporting the appellants' claim in that respect, it is relevant to note that the Guidance states at pages 13 and 21 of 72 that the "relevant period" referred to in the definition of "person with a derivative right to reside" must have been continuing at 11pm on 31 December 2020, which was clearly not the case with the appellants. That was made clear also at page 14 of the Guidance setting out the three key elements to be met when relying upon being or having been a "person with a derivative right to reside".
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> 14. If it was the case that Judge O'Keeffe was relying upon Condition 3(vi) rather than 3(iv), namely that the appellants were persons who had had a derivative right to reside (and Mr Vokes accepted that the judge appeared to have mixed the two provisions), the respondent's grounds of appeal properly explain that the appellants could not meet fulfil that condition either. That is because they would have had to have then immediately become persons with a derivative right to reside, which they could not do as they stopped being such persons once the sponsor turned 18. As such, they were not 'continuing to qualify', for the purposes of the "continuous qualifying period" at 11pm on 31 December 2020, as required under the definition of a "person who had a derivative or Zambrano right to reside".
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> 15. In the circumstances I am entirely in agreement with the respondent that Judge O'Keeffe had misconstrued and misinterpreted the provisions of Appendix EU and that the appellants could not, in fact, meet the requirements for settlement under the EUSS on the basis of any derivative rights previously or currently held. I therefore set aside Judge O'Keeffe's decision.
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> 16. As for the disposal of the appeal, Mr Vokes requested that there be a further hearing in order that he may pursue the argument that the appellants fell within the scope of the Withdrawal Agreement. Ms Gilmour did not object to that course. I note that the appellants relied upon the Withdrawal Agreement in their skeleton argument before Judge O'Keeffe but the matter was not addressed in her decision, no doubt because she had allowed the appeals under Appendix EU of the Immigration Rules. I have some difficulty seeing, at this stage, how the appellants could succeed under the Withdrawal Agreement, but will nevertheless permit the matter to be argued at a resumed hearing

> given that it was a matter previously raised in the skeleton argument for the appeal before the First-tier Tribunal. However the specific arguments relied upon by the appellants must be set out in detail in a skeleton argument prior to the hearing. "

9. Directions were made for the parties to file and serve skeleton arguments in relation to the appellants' arguments relying upon the Withdrawal Agreement.

10. The appellants' representative filed a skeleton argument on 3 October 2023 and the respondent on 5 October 2023.

11. The matter came before me for a resumed hearing on 11 October 2023. An application to adjourn the hearing had been made prior to the hearing on the grounds that the appellants were unable to attend the hearing as they were currently out of the country. The adjournment request was refused because it had made clear that only legal submissions were to be made, with no oral evidence. The appellants' attendance was therefore not required.

12. The matter then proceeded on the basis of submissions only and both parties made their submissions before me.

13. Mr Vokes relied on the judgment in Celik v Secretary of State for the Home Department [2023] EWCA Civ 921, in so far as it referred, at [49] and [52], to Article 5 of the Withdrawal Agreement obliging the United Kingdom and the European Union to act in good faith and to Article 31 which required the Withdrawal Agreement to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. He submitted that the appellants had accrued five years lawful residence by August 2019 on the basis of their "Chen" derivative rights. They fell within the scope of the Withdrawal Agreement as they were "*family members*" for the purposes of Article 9(ii) and thus came under Article 10(1)(e)(i) as "*family members of the persons referred to in points (a) to (d)…*" who "*(i) resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter*" and submitted that the principles of proportionality in Article 18(1)(r) of the Withdrawal Agreement therefore applied. He relied upon [53] and [54] of Celik which interpreted Article 10(1)(e)(i) of the Withdrawal Agreement as protecting UK and EU nationals and their families who had exercised free movement rights before the end of the transition period and submitted that that applied to the appellants who ought therefore to be accepted as qualifying under paragraph EU11 of Appendix EU.

14. Ms McKenzie, in response, relied upon the respondent's skeleton argument in which it was submitted that the appellants did not fall within the scope of the Withdrawal Agreement.

Discussion

15. It was Mr Vokes' submission that, adopting the purposive interpretation of the Withdrawal Agreement advocated in Celik v Secretary of State for the Home Department [2023] EWCA Civ 921, and giving the natural meaning to the words "*continue to reside there thereafter*", the appellants fell within the scope of Article 10 of the Withdrawal Agreement, specifically Article 10(1)(e)(i), having exercised free movement rights prior to the end of the transition period and having continued to do so thereafter, so ensuring that their EU national son would not be forced to leave the UK. However it seems to me that such an interpretation suffers from the same flaws as the arguments made when seeking to resist the challenge to Judge O'Keeffe's decision in relation to the provisions of paragraph EU11 of Appendix EU, as it ignores the condition in Article 10(1)(e)(i) that the relevant family members were to have resided in the host state "*in accordance with Union*

law" before the end of the transition period, which the appellants did not, once the sponsor turned 18. As made clear in the error of law decision of 11 July 2023, the appellant's derivative rights endured only whilst their EEA national child was under the age of 18 and that once he turned 18, those derivative rights simply stopped and they no longer had any residence rights under the EEA Regulations 2016. I therefore disagree with Mr Vokes that the appellants fall within the scope of the Withdrawal Agreement, and do not consider that there is anything in [54] of Celik which supports his assertion that they do.

16. As for Mr Vokes' reliance upon Article 18(1)(r) of the Withdrawal Agreement, that is properly addressed at [56] of Celik, where it was made clear that "*The principle of proportionality, in this context, is addressed to ensuring that the arrangements adopted by the United Kingdom (or a Member State) do not prevent a person who has residence rights under the Withdrawal Agreement being able to enjoy those rights after the end of the transition period. The principle of proportionality is not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside.*" The appellants, as in the case of Celik, did not have any rights under Article 10(1)(e)(i) of the Withdrawal Agreement and the refusal to grant them residence status was not, therefore a disproportionate refusal of residence status which would have conferred rights already enjoyed under the Withdrawal Agreement. The fact that the appellants may have enjoyed residence rights under the EEA Regulations 2016 up until their EEA national son's 18th birthday did not provide them with any rights after the transition period, whether or not they remained living in the UK. There was accordingly nothing disproportionate about the refusal to issue them with residence status under the EUSS.

17. For all these reasons, and for the reasons given in my decision of 11 July 2023, the appellants simply could not succeed under paragraph EU11 of Appendix EU and were not entitled to any status under the EUSS.

Notice of Decision

18. The Secretary of State's appeal having been allowed and the decision of the First-tier Tribunal having been set aside, the decision is re-made by dismissing the appellants' appeals.

Signed: *S Kebede*
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 October 2023