IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003260

First-tier Tribunal No: EU/50234/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6th of December 2023

Before

UPPER TRIBUNAL JUDGE KEITH
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Mr Adewale Isola Bamgbopa
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms S Ferguson, Counsel, instructed by Freemans Solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

Heard at Field House on 9 November 2023

DECISION AND REASONS

1. The first part of these written reasons on whether the First-tier Tribunal erred in law reflect the full oral reasons which we gave to the parties at the end of the hearing. We reserved our decision in which we remade the decision on the appellant's underlying appeal.

Background

2. The appellant appeals against the decision of First-tier Tribunal Judge Eldridge (the 'Judge') promulgated on 18th June 2023. In that decision, the Judge considered the appellant's immigration history. The appellant, a national of Nigeria, had made an in-country application to the respondent under the EU Settlement Scheme for indefinite leave to remain based on a retained right of residence through his previous marriage to an EEA national. The respondent refused the application on 8th December 2022. The appellant appealed against

that refusal to the Judge. The Judge noted that the appellant had applied previously on several occasions for a permanent residence card under the Immigration (EEA) Regulations 2016 (the 'Regulations'). The respondent had refused those earlier applications and the appellant's last appeal was refused by FtT Judge Bowler in 2021. Her decision is relevant as she made findings on the appellant's marriage, to which we return later in these reasons.

3. We pause to note the terms of the refusal letter of 8th December 2022 considered the applicant's application made after 30th June 2021, so after the end of the so-called 'grace period' under the EU Settlement Scheme (see The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020). No issue on timeliness was taken. The respondent refused the application on the sole basis that she regarded the marriage between the appellant and his former wife as one of convenience.

4. Notwithstanding the limited basis of the respondent's refusal, the Judge went on to consider issues broader than the issue of a marriage of convenience. At ¶3 of his reasons, the Judge considered issues of proportionality under the Withdrawal Agreement and the appellant's Article 8 rights. The Judge, in rejecting the appeal, referred to the appellant's four previous unsuccessful applications, noting that there was no further evidence that he could provide relating to his ex-wife's exercise of treaty rights. In particular, at ¶10 (and with which Ms Ferguson took particular issue), the Judge said:

> "In all his appeals the Appellant has not been able to demonstrate that his former wife was exercising her treaty rights in this country when they divorced in May 2015. On the evidence available to me in this appeal, the position remains the same. It follows that he cannot show that he has a retained right of residence based on that relationship."

The Judge went on to consider, at ¶11 onwards, Article 18.1 of the Withdrawal Agreement and the issue of proportionality. The Judge concluded that the appellant could not succeed on any argument in respect of proportionality in the Withdrawal Agreement and that in relation to the question of Article 8 ECHR, this was not a permitted ground of appeal. The Judge dismissed the appeal.

The appellant's appeal to this Tribunal

5. The appellant argued that the Judge had erred in his analysis of the proportionality of the respondent's decision. The grounds of appeal reiterated that the appellant was a family member who had retained rights under the Withdrawal Agreement and that Article 18.1(o) of that Agreement obliged the respondent to help him prove his eligibility, which he had requested, and the respondent had refused. The Judge's conclusion there was nothing to stop the appellant from making a different kind of application in due course, ignored the fact that the respondent had refused one of the appellant's earlier applications as a skilled worker, on the basis that she treated him as an overstayer. While the Judge had cited Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC), the appellant's circumstances were different from Celik.

6. First-tier Tribunal Judge Hollings-Tennant granted the appellant permission to appeal on 8th August 2023. He considered that whilst the Judge found there was insufficient evidence to establish retained rights of residence, the Judge had failed to address the question of whether the respondent should have made

enquiries with HM Revenue & Customs to assist in proving the appellant's eligibility, as per Amos v SSHD [2011] EWCA Civ 552 and the relevant Home Office guidance.

7. A number of documents have been subsequently referred to, which we do not set out in their entirety save to identify that there was, in particular, one issue, namely timeliness, which we raised before this hearing, and about which we gave directions on 1st September 2023. We required the appellant to file and serve written submissions on whether his application, made on 14th March 2022, was within the time limit specified in Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 or any relevant provision of the Immigration Rules. If the answer to that was 'no,' the appellant was required to state what impact that had on the timeliness of the original application and the impact on his appeal.

8. In response to those directions, on 21st September 2023, the appellant provided written submissions in which he accepted that he had made his application after the primary 'grace period', but said that there were potential extensions beyond that period for late applications. In any event, the issue of timeliness was ultimately not relevant, for reasons we set out below.

The hearing before us

9. At the start of the hearing , we canvassed with the representatives two issues.

10. The first was whether the Judge had gone beyond the ground of the refusal in the impugned decision itself, namely whether the marriage was one of convenience and whether this was an error of law. We are conscious of the need for procedural rigour and that we should not consider the grounds of appeal, in respect of which permission has not been granted but, in our view, that was potentially one that went to the question of proportionality, a ground of appeal that had been permitted to proceed.

11. The second issue was whether the point about the appellant's ex-wife's exercise of treaty rights was irrelevant, in any event, under Appendix EU, as distinct from the Regulations. This would be relevant on the materiality of any error. We queried whether, by reference Appendix EU, and, in particular, Condition 3 of Paragraph EU11, as cross-referred to in Annex 1, there was a requirement of the exercise of treaty rights.

The respondent's concessions

12. In response, Mr Deller made three concessions.

13. The first was that the Judge had erred in failing to explain why he had widened the scope of consideration beyond the sole issue taken in the refusal letter, namely whether the marriage was one of convenience, to the broader issue of proportionality.

14. The second was that the Judge had erred in not addressing the specific requirements of Appendix EU, instead considering the requirements of the Regulations.

15. The third was that the Judge's decision was not in accordance with the Devaseelan guidelines, (see Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* [2002] UKIAT 00702, [2003] Imm AR 1). He had not taken as his starting point Judge Bowler's finding, following a hearing on 23rd September 2021, that the appellant's marriage was not one of convenience. Mr Deller added that even if the respondent had sought to persuade a Tribunal to reach an alternative conclusion, the refusal letter did not come close to providing grounds for doing so.

16. Mr Deller accepted that the consequence of the three errors was that the Judge's decision was not safe and could not stand.

Our decision – error of law

17. We accept that the concessions were correctly made. The Judge went beyond the terms of the refusal letter and had failed to consider Judge Bowler's findings on the appellant's marriage not being one of convenience. He fell into the trap of accepting that because of previous appeals had failed under the Regulations on the question of exercise of treaty rights by the former spouse, this meant that meant that an appeal under the Appendix EU could not succeed, without considering that the terms of Appendix EU might differ from the Regulations.

Disposal of appeal and reserved remaking

18. We have come on to consider the question of remaking and in particular ¶7.2 of the Senior President's Practice Statement. This Tribunal is likely to re-make decisions, absent either of the exceptions under ¶7.2(a) or 7.2(b) applying. In relation to sub-para (a), that is clearly not applicable, as there is no suggestion that the effect of the error has been to deprive either party of a fair hearing or to put their case. In relation to sub-para (b) and in particular, the nature and the scope of any fact-finding, as Mr Deller points out, there is no challenge to the central issue identified in the refusal letter, namely whether the marriage was one of convenience.

19. This is a case where resolution of the appeal relies entirely on legal submissions on whether the appellant meets the requirements of Appendix EU, so it is appropriate that we retain re-making in this Tribunal. We therefore heard submissions from both parties at the hearing and reserved our decision.

Re-making decision

20. We had given provisional views on the applicability of Condition 3 of Paragraph EU11 of Appendix EU, when read with the definition of a 'family member who has a retained right of residence' in Annex 1. Whilst Ms Ferguson made submissions on how the Immigration (EEA Regulations) 2006 should be considered, in the context of whether the appellant's former spouse was exercising treaty rights, we accept Mr Deller's submission that the focus of re-making should be on whether the appellant met Appendix EU. Neither representative suggested that there were relevant parts of Appendix EU, other than those we had identified.

The relevant provisions of Appendix EU

21. These are as follows:

> "EU11. The applicant meets the eligibility requirements for indefinite leave to enter or remain as a relevant EEA citizen or their family member … where the Secretary of State is satisfied, including (where applicable) by the required evidence of family relationship, that, at the date of application, one of conditions 1 to 7 set out in the following table is met:
>
> Condition 3.
>
> (a) The applicant:
>
> (iii) is (or, as the case may be, for the relevant period was) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; and
>
> (b) The applicant has completed a **continuous qualifying period** of five years in any (or any combination) of those categories; and
>
> (c) Since then no intervening event has occurred in respect of the applicant."
>
> [Bold is in original]

22. Annex 1 defines a 'family member who has retained the right of residence' as:

> "a person who has satisfied the Secretary of State, including by the required evidence of family relationship, that the requirements set out in one of sub-paragraphs (a) to (e) below are met and that since satisfying those requirements the required continuity of residence has been maintained:
>
> (d) the applicant ("A") is an EEA citizen … or non-EEA citizen who:
>
> (i) ceased to be, or as the case may be, a family member of a relevant EEA citizen …, on the **termination of the marriage or civil partnership** of that relevant EEA citizen; …and
>
> (ii) was resident in the UK at the date of the termination of the marriage or civil partnership; and
>
> (iii) one of the following applies:
>
> (aa) prior to the initiation of the proceedings for the termination of the marriage …, the marriage … had lasted for at least three years and the parties to the marriage … had been resident for a continuous qualifying period in the UK of at least one year during its duration."
>
> [Bold is in original]

Findings of fact and conclusions

23. The facts and chronology are undisputed. The appellant entered the UK lawfully on a visit visa in August 2004 and married his former wife, a Slovakian national, on 24th November 2005. She in turn was issued with an 'Accession State Worker Registration Scheme Certificate' on 18th July 2007 in the UK. The couple continued to reside in the UK and the appellant was issued with an EEA residence

card on 10th July 2010, valid until 22nd May 2015. The couple were divorced by a decree absolute, issued by the Central Family Court in London, on 22nd May 2015. Mr Deller pragmatically accepted that it appeared, from the evidence, that the appellant was resident in the UK with his then wife continuously from 2007 until 2012. We find that this is correct on the basis of the appellant's evidence, with which Mr Deller takes no substantive issue. We also find the appellant was resident in the UK on the termination of his marriage in May 2015. The marriage had lasted for at least three years (indeed from 2005 to 2015) and the appellant and his wife had been resident in the UK for at least one year of that marriage, as evidenced by the Registration Scheme Certificate, issued two years after the couple's marriage, and the grant of an EEA residence card to the appellant in 2010.

24. Applying the law to these uncontested facts, we pause to record Mr Deller's express statement that the respondent did not resist the appeal on the basis that the appellant's application was made after the end of the grace period.

25. For the reasons set out below, we conclude that the appellant met all of the requirements of Condition 3, (a)-(c) and the definition in Annex 1, ¶(d)((i) to (iii) (aa), of a 'family member who has retained the right of residence' at the date of the respondent's decision in December 2022.

26. Turning to Annex 1 first, the appellant was, and ceased to be, a family member on the termination of his marriage (¶(d)(i)). He was resident in the UK at the time of the termination (¶(d)(ii)). His marriage had lasted at least three years, during which the couple had been resident continuously in the UK for at least one year (¶(d)(iii)(aa)).

27. In relation to Condition 3.(a)(iii), the appellant meets the definition of a family member who has retained rights. He completed a continuous qualifying period of at least five years from 2007 to 2012 (condition 3.(b)) and Mr Deller did not suggest that there was any intervening event (condition 3.(c)). Whether the appellant's former spouse was or was not exercising treaty rights for the whole of the period between 2007 and 2012 is not relevant to the definitions we have set out. The requirements of Appendix EU appear to be more generous than the Regulations, in the appellant's personal circumstances. In the circumstances, the appellant's appeal against the respondent's refusal of his application under Appendix EU succeeds.

Notice of Decision

28. **First-tier Tribunal Judge Eldridge's decision contained an error of law. We set it aside, without preserved findings.**

29. **We remake the appellant's appeal by deciding that the respondent's decision dated 8th December 2022 to refuse the appellant's application for settled status under the EU Settlement Scheme is not upheld. The appellant appeal succeeds.**

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21st November 2023