IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003740

First-tier Tribunal No: EA/09873/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24 June 2024

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

Ibrahim Ajibola Matanmi
(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 Law LLP
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House on 24 October 2023

DECISION AND REASONS

1. This is an appeal by a citizen of Nigeria who was born in 1999 against the decision of the First-tier Tribunal dismissing an appeal against the respondent's decision on 13 September 2022, refusing his application for settled status under the EU Settlement Scheme.

2. I apologise for the delay in promulgating this decision which was based very closely on a draft that I received from typing on 31 October 2023.

3. Although, for reasons I endeavour to explain below, I have decided to dismiss this appeal, I do understand that the appellant has a sense of grievance.

4. The applicant based his case on his being the son and dependant of a man who had been married to an EEA national and had retained rights of residence as a result of that marriage. It is also a feature of the cases that his father's marriage had ended by the time the appellant applied for settlement status. Nevertheless,

the appellant's father was entitled to and had been granted settled status because of his retained rights.

5. The appellant arrived in the United Kingdom on 13 September 2015. He had applied for entry clearance as a family member of an EEA national in August 2013, but the application was refused. The appellant appealed the decision to refuse his entry clearance and was successful but was not able to enter the United Kingdom until fact slightly more than two years after he applied. He was issued with a residence card on 21 July 2016 valid until 21 July 2021.

6. The decision to refuse the application leading to the present appeal, under the EU Settlement Scheme, was decided on 13 September 2022. It was the appellant's case that he was the family member of a person who had retained the right of residence by reason of having been married to an EEA national. It was the appellant's case that his father's marriage had broken down so that his father and his father's then wife stopped cohabiting in the end of 2014, the relationship, obviously, having deteriorated and broken down before then. They were divorced in 2015. It is not clear from the judge's findings if the appellant's father and former wife were actually divorced when he arrived in the United Kingdom in September 2015, but it is clear that the marriage was over and the appellant's father and (former?) wife were not cohabiting.

7. According to the Secretary of State the appellant did not satisfy the requirements for status under the EU Settlement Scheme because he could not meet one of the essential preconditions, namely that he was required to have been resident in the United Kingdom during the duration of the appellant's father's marriage.

8. The appellant's case is that his father divorced his father's wife on 22 May 2015.

9. The sense of grievance is obvious. The appellant did not meet the requirements of the necessary Rules by the time he arrived in the United Kingdom. There is every reason to believe he would have met the appropriate requirements had his application succeeded when it was considered by the Entry Clearance Officer rather than after it had been the subject of an appeal.

10. It was also the appellant's case, according to his entry clearance application form, that he intended to travel to the United Kingdom on 10 October 2013.

11. However, it was also then his intention to leave on 15 August 2015, so it may be that things have changed.

12. The First-tier Tribunal Judge made two important findings. At paragraph 12, he concluded that the appellant could not satisfy the relevant Rules because he had not lived in the United Kingdom with his father and his father's then wife when they were married. The judge said bluntly that the appellant "therefore cannot rely on any retained rights".

13. The judge then said at paragraph 13:

> "I move next to consider if the appellant has the right to appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 and to rely on proportionality. Article 10 of the withdrawal agreement sets out who is in the scope of the agreement. The appellant ceased to be a family

> member of his stepmother, the only relevant EEA national, from the point of the divorce. He was not a family member therefore on entry to the UK. I find that he does not then come within the scope of the withdrawal agreement and cannot rely upon proportionality."

14. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Landes on grounds settled by Ms Ferguson. With respect, I found Judge Landes' grant of permission particularly illuminating. She gave permission on all grounds. She said:

> "Either the appellant comes within the terms of the EUSS in which case he succeeds, or he is a person within the scope of the withdrawal agreement, in which case it may be a breach of the withdrawal agreement not to recognise his residence rights."

15. Judge Landes then indicated her provisional view, with which I completely agree, that the appellant cannot succeed under the EUSS. He just does not meet the necessary requirement of being resident in the United Kingdom at the date of the termination of his father's marriage. Without formally agreeing the point, Ms Ferguson made no progress with this ground.

16. The second ground seeks to argue that the appellant's circumstances come within the scope of the Withdrawal Agreement. It is very advantageous to the appellant if they do because then he could turn to Article 18(1)(r) of the Withdrawal Agreement, which provides that an applicant shall have access to judicial or other redress procedures "shall ensure that the decision is not disproportionate".

17. Without any way of commenting on its merits, or at least indicating that this would be resolved in the appellant's favour, there is clearly a case to be made that the decision is disproportionate, given that he would not be in the position that he is if the Home Office had not wrongly refused his application in the first place. This is enhanced by the specific duties writing for such applications to, in cases where the Rule are satisfied, give the necessary entry clearance quickly.

18. However, it is the respondent's case that the appellant's circumstances are not within the scope of the Withdrawal Agreement. It is argued that the appellant does not get into the Withdrawal Agreement because he has not "legally resided with the Union citizen in the host Member State for a continuous period of five years" as required by Article 16 of Directive (2004/38/EC) (Citizens' Free Movement). It may be that Judge Landes anticipated this point when she gave permission because she indicated that some flexibility has to be given to the meaning of "reside". She said "but case law recognises that 'resided with' does not literally mean living with".

19. I was not referred to any relevant decision and the only decision that I have been able to find on my own research is EA/00920/2017. It is an unreported decision and happened to be made by me. There, the Tribunal was considering a student who spent a significant part of her time staying in college accommodation but was very much under the guidance and financial control of her father. An experienced Presenting Officer agreed that that particular appellant was "residing with" her father. However, although I did not refer to it directly, I was probably simply reflecting the explanation in the circumstances where continuity of residence will not be affected set out in Article 16(3) of the

Citizens' Free Movement Directive. It is not an authoritative decision that the word reside simply extends to living in the same country.

20. I have considered Ms Ferguson's arguments and particularly the skeleton argument she prepared for the First-tier Tribunal. This is not a case where human rights were raised. It could not be. It was not that kind of application. Judge Landes indicated how such a claim might be profitable for the appellant. It might be that there are things to explore, but that is for the appellant and his advisors. It does not assist him here. Notwithstanding the sense of frustration which Ms Ferguson very clearly identified, far from finding legal error on the part of the First-tier Tribunal, I conclude that the judge reached the only decision available on the facts and I dismiss this appeal.

Notice of Decision

21. This appeal is dismissed.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 June 2024