



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005225

First-tier Tribunal No: EU/52902/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 19th of January 2024

Before

UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

Ms WINTA GIRMAY
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Z Raza, Counsel instructed by Jan Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

Heard at Field House on 11 January 2024

DECISION AND REASONS

Anonymity

1. An anonymity direction has not been made or sought and we saw no reason to make one.

Introduction

2. By a decision dated 14 November 2023 Judge of the First-tier Tribunal Mace (“the judge”) dismissed an appeal brought by the appellant, a citizen of Germany, against a decision of the respondent dated 24 January 2023 refusing her

application for settled/ pre-settled status under paragraphs EU11 and EU14 respectively of Appendix EU of the Immigration Rules. The appellant had exercised her right of appeal under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020. The appellant now appeals against the decision of the judge with the permission of the First-tier Tribunal.

Factual background

3. The judge found that there was a degree of obscurity regarding the appellant's account of her residence in the United Kingdom. The appellant was born in Germany and came to the United Kingdom to reside with her aunt and uncle at some date in 2015. She was 16 years old. She attended Harris Aspire Academy and gained her GCSEs in the summer of 2017. The judge noted a gap in her chronology between June 2017 and November 2018. In December 2018 the appellant started a course at the London School of Business. She returned to Germany in December 2019 in order to care for her mother, who had heart problems. It is agreed she remained in Germany during 2020, caring for her mother.
4. On 22 June 2021 the appellant returned to the United Kingdom and she made her first application under Appendix EU. The respondent says the appellant did not respond to enquiries and a refusal followed on 23 September 2021. The appellant had in any event returned to Germany because, sadly, her mother's health took a down turn and she died on 17 February 2022. After seeing to her mother's funeral, the appellant returned to the United Kingdom on 6 April 2022 for a short break. Thereafter she made several trips back to the United Kingdom and, on 16 November 2022, her solicitors applied out of time for administrative review of the decision refusing her settled status. The appellant maintained she was entitled to settled status as a consequence of five years' continuous residence. The application for administrative review was refused because it had been made too late.
5. On 24 January 2023 the appellant's solicitors submitted another application seeking settled status on the basis of her residence from 2015 to 2020. On 29 April 2023 the respondent refused the appellant's application. Evidently the appellant had returned to Germany at some point because, on 29 April 2023, she was refused entry and removed to Germany. Her appeal was lodged on 2 May 2023 and, on 6 June 2023, the appellant managed to return to the United Kingdom. She attended her appeal hearing at Taylor House on 27 October 2023.
6. The respondent's notice of decision considered the appellant's application as being an application for settled status or, alternatively, for pre-settled status. The notice of decision begins with paragraph EU11 of Appendix EU (eligibility for settled status). The appellant had not shown five years' continuous residence, meaning five years in a row, as a 'relevant EEA citizen'. The appellant needed to show she had been in the United Kingdom for at least six months in any 12-month period, except that one period of up to 12 months would be permitted provided the absence was for an important reason. There were further exceptions if the reason was due to COVID-19. The respondent found there was evidence the appellant had resided in the United Kingdom periodically between September 2015 and March 2023, the evidence did not show five years' continuous residence. The appellant had not provided sufficient evidence to confirm she was resident in the United Kingdom prior to the 'specified date' (23:00 GMT, 31 December 2020). Evidence such as boarding cards and flight booking details were

not acceptable evidence unless accompanied by a letter from the airline confirming attendance on the flight.

7. The notice of decision then considers paragraph EU14 of Appendix EU (pre-settled status). To succeed the appellant needed to show a continuous qualifying period of less than five years. The appellant could not demonstrate this for the same reasons she did not qualify under paragraph EU11. She had not established she was currently completing a qualifying period of residence in the United Kingdom. There was no available evidence of residency between August 2017 and January 2023. This was a gap of more than six months which broke the continuity of residence. The notice of decision states that the Home Office tried several times to contact the appellant by telephone, email and text to ask for evidence of her residence but the appellant did not respond.
8. The appellant relied on both the available grounds of appeal under the 2020 Regulations. She argued the decision was not in accordance with the Immigration Rules and also that it breached her rights under the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C3841/01 (“the Withdrawal Agreement”). In relation to the first of those grounds, the appellant's skeleton argument relied on both paragraphs EU11 and EU14. However, the judge recorded in her decision (para 15) that it was accepted in submissions that the appellant could not succeed in showing she was entitled to settled status on the basis of five years' residence.
9. The first matter which the judge addressed in her decision was the fact the appellant's application had been made late. The rules set out that applications should be made no later than 30 June 2021 (the ‘required date’) but the appellant did not make her second application until 24 January 2023. The judge noted the appellant had made a previous application, an application for administrative review and she had issued a pre-action protocol letter. This showed she had been taking active steps to resolve her status. She noted her young age and the background of her caring for her mother before she passed away. She noted Home Office guidance on late applications and she concluded the appellant had shown reasonable grounds for the late application.
10. The judge then examined the question of whether the appellant had resided in the United Kingdom for a continuous period “beginning with the specified date and continuing until the date of the application” (para 10). She summarised the appellant's chronology (para 11) and noted the appellant had returned to Germany in December 2019 due to her mother's ill health and was absent from the United Kingdom throughout 2020. There were also periods she was in the United Kingdom in 2021. She found there was a lack of detail in the chronology and it was unclear where the appellant was residing between June 2017 and November 2018 (para 12). She found there were further significant periods when the appellant had not resided in the United Kingdom. After returning to Germany in December 2019 due to the deterioration in her mother's health, she did not return because she was caring for her mother full-time and she also developed depression. Her aunt had suggested she make an application in the United Kingdom, which she did in June 2021. After that application was refused, she returned to her mother in Germany in September 2021, only returning to the United Kingdom for short trips (para 13). The judge (incorrectly) noted the appellant had remained in the United Kingdom since January 2023 (para 14).
11. It is helpful to set out the judge's findings on the appellant's claim for pre-settled status in full:

“15. The period of residence required to be shown under Appendix EU for settled status is a continuous period of five years. It was accepted in submissions that it cannot be demonstrated that the appellant meets this requirement, and I agree.

16. To qualify for pre-settled status under Appendix EU, the appellant must be a relevant EEA citizen; that is someone who has been resident in the UK for a continuous qualifying period which began before the specified date of 31 December 2020. I am not satisfied that the appellant has demonstrated that she was living in the UK before the specified date. She was not present in the UK on the specified date as she had previously returned to Germany in December 2019 to care for her mother. It is stated that the appellant was absent from the UK during 2020 due to Covid-19 travel restrictions. It is stated that flights from Germany did not resume until January 2021. However, there is no supporting evidence before me to that effect, and in any event the appellant did not return to the UK until June of that year.

17. The notion of residence before 31 December 2020 does not necessarily require the physical presence of a person in the UK on that date as certain absences are permitted by the rules. However, the appellant must demonstrate continuous residence up to the date of her application.

18. The respondent's position is that, while the appellant has provided evidence of residing periodically in the UK between September 2015 and March 2023, there is not sufficient evidence to confirm that she is currently completing a continuous qualifying period. No residency evidence had been provided from August 2017 to January 2023 and therefore there had been a gap of more than six months which had broken the qualifying period of residence.

19. Appendix EU, Annex 1, defines continuous qualifying period as beginning before the specified date and during which none of the listed events occurred. Those events include absence from the UK which exceeded a total of six months in any 12-month period, with certain specified exceptions.

20. An absence of more than six months but less than 12 months is permitted because of Covid-19. However, the appellant did not return to the UK from Germany until 22 June 2021. Flights from Germany to the UK had resumed, even on her account, some months prior to that in January 2021. While a large portion of the appellant's absence in 2020 was due to Covid restrictions, she was absent for more than 12 months.

21. There are further exceptions in Annex A where a single period of absence of more than six months but which does not exceed 12 months is permitted where this is for an important reason. Examples are given, such as pregnancy, childbirth or serious illness.

22. However, the appellant was not absent for a single period of more than six months but less than 12 in 2022. She returned to the UK on four occasions, staying for a short period before returning to Germany. That indicates that she was able to return to the UK during that period. In 2022, the appellant spent the majority of the year in Germany. She visited the UK in April, July into August, September and December of 2022 for a total of six

weeks. She was absent from the UK for more than six months in total in one, or more than one period of absence.

23. There is an exception in paragraph (ee) which provides that where the absence is covered by one of the exceptions, but which exceeded 12 months, it will not break continuous residence where Covid-19 meant that the person was prevented from, or advised against, returning earlier. This does not apply to the appellant. It was not Covid-19 which prevented her from returning to the UK in 2021, or 2022. She did return on a number of occasions, for short periods. It was submitted on behalf of the appellant that (ee) also covers absences of more than 12 months for compassionate reasons. That does not appear in the rules.

24. The appellant has not demonstrated that she has resided in the UK for a continuous qualifying period. She was not continuously resident in the UK before 31 December 2020. Her absences do not come within the exceptions in Annex A. Neither has she demonstrated residence for a continuous qualifying period after that date up to the date of the application. Again, her absences do not come within the exceptions in Annex A.”

12. Finally, the judge found the appellant could not rely on the Withdrawal Agreement because her presence in the United Kingdom was not being facilitated before the specified date. As the appellant could not fall within the scope of Article 10, she could not rely on the principle of proportionality (paras 26 and 27). She relied on Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC).

Issues on appeal to the Upper Tribunal

13. There are two grounds of appeal. The first is that the judge erred in applying the requirements of Appendix EU, particularly in her application of the exception in paragraph (b)(i)(ee) of Appendix 1. The judge’s self-direction at paras 10 and 17 to assess whether the appellant had resided in the United Kingdom for a continuous period beginning before the specified date and continuing until the date of application was wrong in law. To qualify under Condition 1 of paragraph EU14, the appellant was required to demonstrate she had a continuous qualifying period until the specified date; not until the date of application. In finding the exception in paragraph (b)(i)(ee) does not apply to the appellant, the judge had considered the position up to the date of application. The judge should have considered whether the COVID-19 exception applied.
14. The second ground is that the judge erred in her reliance on Batool. She was resident in the United Kingdom before the specified date so it was immaterial that her residence was not being facilitated by the host state. The appellant fell within the scope of Article 10(1)(a) of the Withdrawal Agreement and the decision was disproportionate.
15. The First-tier Tribunal granted permission to appeal on both grounds.
16. The respondent has not filed a Rule 24 response.

The error of law hearing

17. When the matter came before us, Mr Walker requested more time to discuss the case with Mr Raza, which he was granted. On resuming the hearing Mr Walker stated that the respondent's position was that the judge had made a material error of law in her decision. Furthermore, given the history of the appeal and how it had progressed, the respondent conceded that the appeal should be allowed and the appellant should be granted pre-settled status. Mr Raza did not need to address us.

Decision on error of law and on the appeal

18. In light of the concession made by Mr Walker on behalf of the respondent, we shall be brief. It is sufficient to say that we agree the judge's analysis of the appellant's entitlement to pre-settled status was flawed. Mr Walker's concession went further than agreeing there was a material error of law in the judge's decision and he conceded the appellant was entitled to pre-settled status. We agree with him on that as well.
19. There has been no challenge to the judge's finding that there were reasonable grounds for the lateness of the appellant's second EUSS application. Applying the definitions of 'relevant EEA citizen' and 'continuous qualifying period' in Appendix 1 to Appendix EU, the appellant has shown on the accepted facts that she was resident in the United Kingdom for a continuous qualifying period (of less than five years) before the specified date. There was an absence of more than 12 months (December 2019 onwards) but the appellant can rely on the exception found in paragraph (b)(i)(ee) because she was prevented from returning to the United Kingdom by COVID-19.
20. The judge noted the exceptions at para 19 of her decision and she found at para 20 that a large portion of the appellant's absence in 2020 was due to COVID-19 restrictions. However, she did not apply the exception in paragraph (b)(i)(ee) to those facts. She found the appellant could not fall within the exception by reference to the period after the specified date (para 23), whereas the appellant should have been accorded the benefit of the exception in order to establish a continuous qualifying period of less than five years before the specified date.
21. The decision of Judge Mace involved the making of a material error of law and we set it aside. We remake that decision by allowing the appellant's appeal.

Notice of Decision

The decision of Judge Mace involved the making of an error of law. It is set aside and we remake that decision by allowing the appellant's appeal.

N Froom

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

15 January 2024