



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001987

First-tier Tribunal No: EA/50572 /2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 12th of July 2024

Before

UPPER TRIBUNAL JUDGE JACKSON
DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAS JOEL GREEN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms A Nolan, Senior Home Office Presenting Officer

For the Respondent: No attendance

Heard at Field House on 1 July 2024

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals with permission against the decision of First-tier Tribunal Judge Green dated 17 April 2024, in which Mr Green's appeal against the decision to refuse his application under the EU Settlement Scheme dated 13 June 2023 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Green as the Appellant and the Secretary of State as the Respondent.
2. The Appellant is a national of Jamaica, who made an application on 19 April 2021 for an EUSS settlement permit under Appendix EU of the Immigration Rules as the family member of a relevant EEA citizen, his partner (the "Sponsor") who has settled status in the United Kingdom.
3. The Respondent refused the application on 13 June 2023 on the basis that the Appellant did not meet the requirements for a grant of leave under either

paragraph EU11 or EU14. This was primarily because his relationship with the Sponsor was not accepted, nor was there any sufficient evidence of cohabitation, and in any event the Appellant did not hold the required relevant document showing that he was the durable partner of the Sponsor.

4. Judge Green allowed the appeal in a decision dated on 17 April 2024. It was noted in the decision that the primary ground of appeal pursued was that there was a breach of Article 18(1)(e) of the EU Withdrawal Agreement because the requirement for the Appellant to possess a relevant document was an unnecessary administrative burden. The First-tier Tribunal found that the Appellant and Sponsor had been in a relationship and cohabiting since 2013 such that they were in a durable partnership at the specified date.
5. The First-tier Tribunal decision refers to the Court of Appeal decision in Celik v Secretary of State for the Home Department [2023] EWCA Civ 921 and the Upper Tribunal decision in Batool and others (other family members: EU exit) [2022] UKUT 219 to the effect that the Withdrawal Agreement does not give a partner in a durable relationship any substantive rights unless their residence was being facilitated by the specified date of 31 December 2020, or that the durable partner had applied for such facilitation before that time.
6. In relation to this, the following findings were made in paragraph 17 of the decision. First, that the Appellant had made an application under the EEA Regulations on 9 September 2020, prior to the specified date and his application was delayed, as confirmed by the Respondent on 6 October 2020 and 1 March 2021. Secondly, that on 12 March 2021, the Appellant's solicitor received a letter from the Respondent stating that the extant application could not be processed as the United Kingdom had left the EU.
7. In paragraph 19 of the decision, under the heading 'application of the law to the facts' it was stated that: *"The appellant applied under the EEA regulations for his residence to be facilitated prior to 11pm GMT on 31 December 2020. His application was delayed for reasons outwith his control."* The First-tier Tribunal's reasons for allowing the appeal went no further, it was simply then stated at the end that the appeal was allowed.

The appeal

8. The Respondent appeals on three grounds which are all essentially on the same theme. First, that the First-tier Tribunal erred in law in failing to address the issue of whether the Appellant met the requirements of Appendix EU to the Immigration Rules. Secondly, that the First-tier Tribunal erred in law in failing to identify the basis upon which the appeal was allowed, particularly in circumstances where the Appellant had no rights under the EU Withdrawal Agreement. Thirdly, that the First-tier Tribunal erred in law in failing to consider at all that the Appellant did not have a relevant document.
9. On 25 June 2024, an adjournment of the hearing in this appeal for six weeks was sought on behalf of the Appellant on the basis that he was presently unable to pay Counsel's fees for the hearing. That application was refused on 27 June 2024 and again in response to additional information then submitted on both 28 June 2024 and 1 July 2024. Insufficient information had been submitted to support the application for an adjournment and it was not in the interests of justice to adjourn the hearing.

10. On the day of the hearing, neither the Appellant nor anyone else attended on his behalf. There had been no further communication by or on behalf of the Appellant following the third refusal of the application for an adjournment. In any event we considered whether it was appropriate to proceed in the absence of the Appellant or any representative for him and found that it was in the interests of justice to do so. The Appellant had been served with sufficient notice of the hearing, had had applications for adjournment refused in relation to Counsel's fees but was in any event able to attend the hearing if he so chose. The Upper Tribunal is experienced in assisting litigants in person as to procedure and the issues in an appeal and could have done so in this matter without legal representation.
11. At the oral hearing, on behalf of the Respondent, Ms Nolan relied on the grounds of appeal and provided clarification in response to our questions about the earlier application under the Immigration (European Economic Area) Regulations 2016. These submissions expanded on points raised in a skeleton argument submitted on behalf of the Respondent on 14 May 2024. Ms Nolan indicated that there were in fact two separate applications under these Regulations, the first made on 10 September 2020, case ID: 27650338, which was acknowledged on 6 October 2020. That application was rejected as invalid on 27 October 2020 on the basis that the appropriate fee had not been paid. The application had included a postal order but as this was dated 28 January 2020 (more than six months prior to the application) it could not be cashed as a payment.
12. A second application was made on 10 February 2021, with case ID: 28391889, which was acknowledged on 1 March 2021. It is that second application which was rejected on 27 March 2021 on the basis that the application had been made after the specified date/after the United Kingdom had left the European Union; by which time the Immigration (European Economic Area) Regulations 2016 were no longer in force (subject to transitional provisions which did not apply to this Appellant).
13. Ms Nolan acknowledged that not all of the supporting documentation in relation to the two separate applications was before the First-tier Tribunal (only the two application acknowledgment letters and the letter of 27 March 2021 were in the bundle) and therefore made an application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to submit the letter dated 27 October 2020 rejecting the first application to make good her submissions on this part of the history. Ms Nolan submitted that the document was not relevant to the appeal prior to the First-tier Tribunal decision and no issue had previously been made in relation to it. It was however now relevant to the issue of whether there was an error of law in the First-tier Tribunal's decision.
14. In any event, Ms Nolan submitted that on the evidence that was before the First-tier Tribunal, it could be seen from the two different case ID references that there were two separate applications under the Immigration (European Economic Area) Regulations 2016 and that the rejection in March 2021 related to the application acknowledged on 10 February 2021. Further, that there was no evidence at all before the First-tier Tribunal that there were any delays or matters outside the Appellant's control in relation to either application.
15. Ms Nolan submitted that there was an error of law in the decision of the First-tier Tribunal as set out in the grounds; that the decision should be set aside; and that in all of the circumstances the appeal should be dismissed on all grounds as the Appellant could not meet the requirements of Appendix EU to the Immigration

Rules as he did not have a specified document and he had no substantive rights under the EU Withdrawal Agreement, such that there was no basis upon which his appeal could have been allowed on that ground either. However, in the event that the Upper Tribunal considered that the Respondent was wrong to reject either application under the Immigration (European Economic Area) Regulations 2016; Ms Nolan accepted that a further hearing to consider the validity of either or both applications would be appropriate before remaking the appeal.

Findings and reasons

16. The primary issue in this appeal is in essence whether the First-tier Tribunal gave adequate reasons for allowing the appeal and if so, on what basis. We find the reasoning of the First-tier Tribunal to be wholly inadequate. The decision does not identify the relevant ground of appeal upon which it is allowed and provides no reasons at all for allowing it either on the basis that the Appellant met the requirements of Appendix EU or on the basis that the provisions of the EU Withdrawal Agreement were met.
17. As to the first available ground of appeal in relation to the requirements of Appendix EU, there is no express consideration at all by the First-tier Tribunal of whether the Appellant did so. There is, at best, a partial consideration of whether the Appellant was the durable partner of a relevant EEA national, but only as to whether the couple had cohabited for two years prior to the specified date. There is reference to a definition of durable partner being contained in Appendix EU in paragraph 10 of the decision (referring only to the need for cohabitation or other significant evidence) and a list is then given in paragraph 13 of what a relevant document is; together with an alternative that a person has otherwise been lawfully resident in the United Kingdom for the relevant period before the specified date. There is however no consideration of these matters or relevant facts made in relation to them.
18. The First-tier Tribunal's decision does not include any clear citation or even direct reference to the requirements in Appendix EU and in any event, no evidence that any of these matters were then considered or applied to the Appellant's appeal. There is no reference at all in the findings on the issue of whether the Appellant had a relevant document or met any of the alternative requirements for this; nor any reasons in the final 4 sentences said to apply the law to the facts. It is impossible for the parties to know whether the appeal was allowed on Appendix EU grounds and if so, what requirements the Appellant was found to meet or not meet.
19. On the facts of this appeal, it was never specifically argued on behalf of the Appellant that he met all of the requirements of Appendix EU to the Immigration Rules to be issued with settled or pre-settled status; there was only a limited submission that he partially met the requirements of durable partnership based on cohabitation with the Sponsor. The Appellant did not address the lack of a relevant document nor was it suggested that he met any of the alternatives to this requirement. On the evidence before the First-tier Tribunal, it was clear that the Appellant did not and his appeal could not have lawfully been allowed on the basis that the decision was inconsistent with the scheme rules. The requirements of Appendix EU were simply not met, the finding of cohabitation for a durable partnership was insufficient without reference to the other requirements in the definition of durable partner.

20. The First-tier Tribunal erred in law in failing to make relevant and clear findings on whether the Appellant met the requirements of Appendix EU and in failing to specify whether the appeal was allowed on this basis or not. If implicitly allowed on this ground by the general conclusion that 'the appeal is allowed', that was an error of law in circumstances where the Appellant did not meet the requirements of Appendix EU.
21. The second potential ground of appeal before the First-tier Tribunal related to whether the Respondent's decision was in breach of the EU Withdrawal Agreement and that was the primary focus of the Appellant's submissions to the First-tier Tribunal, relying on the requirement to possess a relevant document being in breach of Article 18(1)(e) of the Withdrawal Agreement. The First-tier Tribunal correctly identified the relevant case law on whether a person was within the personal scope of the Withdrawal Agreement and noted that in the absence of an application for or facilitation of a person's residence in the United Kingdom as an extended family member, such a person had no substantive rights under the Withdrawal Agreement.
22. The First-tier Tribunal appear to have inferred that the Appellant had an outstanding application for facilitation of his residence under the Immigration (European Economic Area) Regulations 2016 as at the specified date (a point to which we return below) and that that application had been delayed for reasons outwith his control. Even if that were a finding rationally open to the First-tier Tribunal on the evidence, the inference then has to be drawn from the decision that it was accepted the Appellant was within the personal scope of the Withdrawal Agreement, as there is nothing express to that effect in the decision. However, an appeal can not be allowed simply on the basis that a person is within the personal scope of the Withdrawal Agreement, only in circumstances where that for such persons, there was a breach of a particular part of it. In this case, the First-tier Tribunal does not go on to consider any specific provision of the Withdrawal Agreement at all and there are no findings or analysis on Article 18(1)(e) which was specifically relied upon by the Appellant, or any other provision. In the absence of a finding of a specific breach, the appeal could not lawfully be allowed under the EU Withdrawal Agreement.
23. In these circumstances, the First-tier Tribunal erred in law in failing to make adequate findings on either ground of appeal open to the Appellant, either that he met the conditions under the scheme rules (Appendix EU), and/or that the decision was in breach of the EU Withdrawal Agreement. On the basis of the very limited findings which failed to address all material matters in issue and the lack of any reasons related specifically to either ground of appeal, the Appellant's appeal could not lawfully have been allowed on either ground. The parties are simply unable to understand the reasons for which the appeal was allowed.
24. For these reasons, the decision of the First-tier Tribunal must be set aside.
25. The final consideration is as to what happens next to resolve the Appellant's appeal and whether there is any need for a further hearing to re-make it. For the reasons set out below, we find that the Appellant's appeal can not succeed on any legitimate basis and as such it is not in the interests of justice to list a further hearing in such circumstances. In so deciding, we have taken into account that neither the Appellant, nor any legal representative attended the hearing before us (having been refused an application for adjournment) but had been notified previously in accordance with the standard directions that if an error of law was found, the Upper Tribunal may proceed to remake the appeal immediately

thereafter. We have also taken into account, as set out below, that the Appellant's solicitors, AA Immigration Ltd were fully aware of the correct factual situation in relation to the two separate applications under the Immigration (European Economic Area) Regulations 2016 having been on record and in receipt of all communication in relation to both of them; such that matters outlined below were within the Appellant's knowledge.

26. First, on the evidence before the First-tier Tribunal there was insufficient evidence on which a finding could rationally have been made that the Appellant's application made on 9 September 2020 was delayed for reasons outwith his control. This was not a matter dealt with at all in the skeleton argument relied upon on behalf of the Appellant and at best could only have been taken from the Appellant's written statement which included the following:

"6. I confirm I submitted a number of applications to the Respondent in order to regularise my stay under the EEA Regulations. My initial application was made on 9th September 2020, prior to the UK leaving the EU. My application was delayed. I received an mail both on 6th October 2020 and 1st March 2021 stating that there was a delay on my application. On the 12st March 2021 my solicitors received an a letter stating that the current application I had submitted could not be processed as they had left the EU, even though I applied before the deadline and to submit my application online under the EUSS Scheme."

27. From the Appellant's own evidence, it was clear that there was more than one application made under the Immigration (European Economic Area) Regulations 2016; as confirmed by the two different case ID references in the documents before the First-tier Tribunal. However, what is not supported by the Respondent's communication on 6 October 2020 and 1 March 2021, is that there was any delay in dealing with those applications – to the contrary, these contained only straightforward confirmation of an application having been made. It is notable that neither the Appellant, nor his solicitors, AA Immigration Ltd, who were on record for both applications and to whom all correspondence relating to them was addressed, submitted a copy of the letter of 27 October 2020 nor did either disclose that the first application was rejected as invalid or when. The assertion within the grounds of appeal that the Respondent had unnecessarily delayed the Appellant's application and refused it on incorrect grounds was at best misleading and there was nothing to support any suggestion of delay or matters outwith the Appellant's control in the handling of either application under the Immigration (European Economic Area) Regulations 2016.
28. In these circumstances, the evidence before the First-tier Tribunal did not support the finding that the Appellant had an application which had been delayed by the Respondent; nor the implicit finding that the Appellant had an outstanding application under the Immigration (European Economic Area) Regulations 2016 as at the specified date such as to bring him within scope of the EU Withdrawal Agreement. There was no valid application at all before the specified date and the second application was after that date and therefore lawfully rejected on 27 March 2021.
29. For these reasons, it is not strictly necessary to determine the rule 15(2A) application by the Respondent to adduce the letter dated 27 October 2020 as there is already sufficient information before the Upper Tribunal that was

available to the First-tier Tribunal; however, for completeness and the avoidance of any doubt as to the Appellant's immigration history, we do so.

30. The three limbs of the test in Ladd v Marshall for new evidence to be admitted are, in summary, first, that the fresh evidence could not have been obtained with reasonable diligence for use at the trial; secondly, that if given, it probably would have had an important influence on the result; and, thirdly, that it is apparently credible although not necessarily incontrovertible.
31. Whilst in this case the letter of 27 October 2020 could have been obtained and relied upon by the Respondent with reasonable diligence before, we accept the submission on behalf of the Respondent that the relevance of the document to the Appellant's appeal was not clear or established in advance of the First-tier Tribunal hearing such that it was only identified as relevant to the grounds of appeal. It is also relevant that the Appellant already had a copy of the document and arguably should have also submitted it in any event. Secondly, the document is likely to have had an important influence on the result of the appeal given that it would have given clarity on the question of whether the Appellant had an outstanding application under the Immigration (European Economic Area) Regulations 2016 as at the specified date, a matter which could have been deduced, but not so easily, from a more forensic examination of the case ID references of two separate applications. Finally, the letter is apparently credible. For these reasons, the tests in Ladd v Marshall are satisfied and we admit the further evidence from the Respondent in the form of the letter dated 27 October 2020 rejecting the application acknowledged on 6 October 2020 under the Immigration (European Economic Area) Regulations 2016 as invalid.
32. Secondly, in circumstances where the Appellant had no valid application at all under the Immigration (European Economic Area) Regulations 2016 prior to the specified date, let alone any outstanding application at that date, he does not, for the reasons set out in Celik, have any substantive rights under the EU Withdrawal Agreement. The Appellant's appeal can not therefore succeed on the basis that the Respondent's decision was in breach of the EU Withdrawal Agreement and it is not necessary to consider any of the specific provisions within it.
33. For all of these reasons, the Appellant's appeal can not succeed on any legitimate basis and we therefore remake the Appellant's appeal to dismiss it on all grounds.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

The appeal is remade as follows:

The appeal is dismissed on all grounds.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9th July 2024