IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002534

First-tier Tribunal No: EA/09540/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 30 August 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE MAHMOOD

Between

EFTI SHEIKH
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Sharma, instructed by City Heights Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House on 7 August 2024

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge S Moore promulgated on 7 March 2024, dismissing his appeal Immigration (Citizen's Rights Appeals) (EU Exit) Regulations 2020 against the decision of the respondent made on 5 November 2021 to refuse him leave to remain under Appendix EU to the Immigration Rules ("the EUSS").

2. The appellant is a citizen of Bangladesh. On 22 December 2020 he was issued with a Family Permit under the Immigration (European Economic

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Area) Regulations 2016 to join his brother ("the Sponsor"), an EEA citizen exercising Treaty Rights in the United Kingdom. The appellant did not enter the United Kingdom until 5 March 2021, and on 21 April 2021, he applied for pre-settled status under the EUSS.

3. The respondent refused that application on the basis that he was eligible for leave under Rules EU14 or EU14A of the EUSS as he had not been resident in the United Kingdom as at 11 pm on 31 December 2020 (usually referred to as the "Specified Date").

4. The appellant challenged that decision on the basis that:

(1) EU14 did not require him to be resident in the United Kingdom as at the Specified Date; or, in the alternative,
(2) He was a "joining family member of a relevant sponsor for the purposes of rule EU 14A; or, in the alternative,
(3) He fell within the scope of article 10 (3) of the Withdrawal Agreement.

5. The judge found that:

(1) The appellant did not fall within the scope of EU14 as he had not completed any continuous qualifying period prior to the Specified Date;
(2) The appellant was not a joining family member as a dependent sibling did not fall within the scope of the relevant definition;
(3) The appellant did not fall within the scope of the Withdrawal Agreement as he had not, as article 10.1 required him to have resided in the United Kingdom prior to the Specified Date

6. The appellant sought permission to appeal on the grounds that the judge had erred as she had:

(1) misconstrued and misapplied rule EU14 in that the Specified Date applicable to the appellant was, as this is an EEA family permit case, 30 June 2021, not 31 December 2020;
(2) On a proper construction of rule EU 14 he came within its scope in any event; and
(3) Failed properly to reason why the appellant did not fall within the scope of Articles 10.2 or 10.3 of the Withdrawal Agreement.

7. Permission was granted on all grounds on 27 May 2024

8. Subsequent to that, the respondent provided a detailed response to the grounds of appeal pursuant to rule 24, of the Tribunals Procedure (Upper Tribunal) Rules 2008, averring that although the definition of Specified Date had been amended for the purposes of EEA family permit cases, that amendment post-dated the decision in this case, and that it was the rules in force at the date of the refusal decision which were relevant. Further, this was not an argument put to the judge.

9. It was also averred that article 10.2 of the Withdrawal Agreement did not apply as the appellant's residence has not been facilitated before 31 December 2020, and that article 10.3 did not apply as the decision facilitating residence came after that date.

10. In a reply pursuant to rule 25, the appellant drew attention to the fact that the amendment to the rules had been made under a Statement of Changes to the Immigration Rules HC719, published on 18 October 2022 which did not contain transitional arrangements, and which were thus in force at the date of hearing. It is submitted that the judge erred in not applying the amended version of the Rules.

11. We pause at this point to observe that it appears that neither representative nor the judge were aware of the amendment. Or indeed of the amendments made by The EUSS is proverbially complex, if not impenetrable and it is no fault of theirs that this issue was not considered.

12. We do, however, think it important to draw attention to the fact that in cases where an applicant is a EEA family permit holder or is a family members of a qualifying British Citizens, a closer analysis of what the Specified Date and how the continuous qualifying period is calculated may be necessary.

13. With respect to the Withdrawal Agreement it is submitted that a grant permitting entry and residence is facilitation for the purposes of articles 10.2 or 10.3, and thus the appellant falls within scope.

14. When the appeal came before us, Ms Cunha conceded that the judge had erred in concluding that the appellant fell out with the scope of article 10.3 of the Withdrawal Agreement, and that it followed that the decision involved the making of an error of law, and should be remade allowing the appeal on the grounds that the decision was contrary to the appellant's rights under the Withdrawal Agreement.

15. In the light of this concession, we canvassed both representatives' views as to the other grounds, given that these had these raised significant issues as to whether the Immigration Rules to be applied as those applicable at the date of hearing rather than those applicable at the date of decisions when, as here, that would likely favour an appellant, and whether it would be an error for a judge not to do so when that argument was not put to her, nor was the amended rule.

16. Mr Sharma was, understandably, reluctant to pursue this issue at what would have been significant cost to his client, given not least as he had been successful. Nor was Ms Cunha in a position to deal with this issues. Accordingly, we have, for the reasons set out below, confined our decision to whether the appellant came within the scope of the Withdrawal Agreement.

17. We are satisfied that that on a proper construction of Article 10.3 that the appellant does fall within scope. We are strengthened in that view by the

Court of Appeal's decision in Vasa v SSHD [2024] EWCA Civ 777. On any proper view, the appellant had applied for facilitation prior to 31 December 2021, and comes within Article 3.2 (a) of Directive 2004/38. It is notable that article 10.3, unlike articles 10.1 and 10.2 does not require residence prior to 31 December 2020. That makes sense, as otherwise it would deprive those whose applications were being processed from benefitting from the Withdrawal Agreement. We are satisfied also that, as is implicit in Ms Cunha's concession, that the appellant's entry was being facilitated in that he was granted leave to enter.

18. Accordingly, we are satisfied that that judge erred in concluding that the appellant fell out with the scope of the Withdrawal Agreement, and that he does fall within Article 10.3 of that agreement. It therefore follows that on that basis alone, the decision of the First-tier tribunal must be set aside. It also follows that the appeal must be allowed on the basis that the refusal to grant him leave under the EUSS was in breach of his rights under the Withdrawal Agreement.

19. In the circumstances, it is not necessary for us to consider the arguments as to whether the appellant falls within Article 10.2 as that makes no material difference to the outcome. Similarly, whether or not the appellant fell within the terms of rule EU14, and whether the judge erred in finding that he did not, is not a matter on which we need to reach any conclusion, given we have already found that the judge's decision is to be set aside, and remade by allowing it.

20. In reaching these conclusions, we bear in mind that it is not a proper use of court time to decide academic issues, nor do we consider that, bearing in mind the overriding objective, that it would be in the interests of justice to do so.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

2. We remake the appeal by allowing it under the Immigration (Citizen's Rights Appeals) (EU Exit) Regulations 2020 on the basis that the decision was contrary to the appellant's rights under the Withdrawal Agreement

Signed Date: 16 August 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal