Neutral Citation Number: [2024] EWCA Civ 1459

Case No: CA-2023-001213

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGES RINTOUL AND O'CALLAGHAN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/11/2024

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE SINGH
and
LORD JUSTICE DINGEMANS

- -

Between :

Shaun Emambux	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

The Appellant attended remotely in person
Jack Anderson attended remotely (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : 29 October 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 28/11/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Dingemans:

Introduction and issues

1. This appeal from the decision dated 22 May 2023 of the Upper Tribunal (Immigration and Asylum Chamber) (UT) raises issues about the obligations of the Secretary of State for the Home Department 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 (the Withdrawal Agreement). The Withdrawal Agreement was given domestic legal effect by the European Union (Withdrawal Agreement) Act 2020, which amended the European Union (Withdrawal) Act 2018. The UK left the EU at 11pm on 31 January 2020. The transition period for which the Withdrawal Agreement provided ended at 11pm on 31 December 2020.

2. The UT had dismissed the appeal of the appellant, Mr Emambux, from the First-tier Tribunal (Immigration and Asylum Chamber) (FTT) dated 18 August 2021. The FTT had itself dismissed Mr Emambux's appeal against the decision by the respondent Secretary of State, dated 11 December 2020. By that decision the Secretary of State had refused to grant Mr Emambux leave to remain under the EU Settlement Scheme (EUSS).

3. The appeal was stayed by the order of Lewis LJ to await the decision of the Court of Appeal in *Siddiqa v Entry Clearance Officer* [2024] EWCA Civ 248 (*Siddiqa*). The decision in *Siddiqa* was itself given after the decision of the Court of Appeal in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921; [2023] Imm AR 5 (*Celik*). Permission to appeal to the Supreme Court in both *Celik* and *Siddiqa* was refused by the Supreme Court.

4. Lewis LJ granted permission to appeal on the ground whether the Secretary of State should have treated the application for leave to remain made by Mr Emambux under the EUSS as an application under the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations). Lewis LJ refused permission to appeal on grounds that the UT was wrong to find that Mr Emambux was not in fact married to an EEA national in a manner which satisfied the requirement for a formal marriage under the law of England and Wales.

5. Mr Emambux produced written grounds for the hearing and a further document in the course of the hearing. In the light of the basis on which permission to appeal was granted, there were effectively three main issues on the appeal. On these issues Mr Emambux contends that: (1) the Secretary of State should have treated the application for leave to remain by Mr Emambux as an application under the 2016 Regulations; (2) the Secretary of State should have told Mr Emambux, when rejecting his application under the EUSS, to make an application under the 2016 Regulations; (3) there should be a reference to the Court of Justice of the European Union (CJEU) on the effect of provisions of the Withdrawal Agreement. Mr Emambux, who was supported at the hearing by his partner, Ms Cynthia Emambux, also sought to raise again the issue of the validity of his marriage, and complained about his treatment by the Secretary of State, courts and tribunals.

6. Mr Anderson, on behalf of the Secretary of State, submitted that: (1) Mr Emambux made an application under the EUSS when he did not qualify under the EUSS, and it

was not an application under the 2016 Regulations; (2) the Secretary of State had no obligation to advise Mr Emambux about what applications to make, particularly in circumstances where Mr Emambux had made past, unsuccessful, applications under the 2016 Regulations; and (3) although there was power to refer certain issues concerning the Withdrawal Agreement to the CJEU, it was not necessary to do so, because the answer to Mr Emambux's case was clear.

7. The AIRE centre had intervened in both *Celik* and *Siddiqa* in the Court of Appeal and in these proceedings before the UT. The AIRE centre did not seek permission to intervene in the hearing of the appeal by Mr Emambux.

Relevant facts

8. Mr Emambux was born in January 1982 and is a national of Mauritius. Mr Emambux entered the UK as a visitor in February 2004. He was granted leave to remain as a student. He had previously been married in Mauritius and had children. Those children are now adults who live in the UK. He does not have contact with them. Mr Emambux had leave to remain as a student and student nurse from 2004 until 30 November 2009 but subsequent applications for leave to remain were refused.

9. Mr Emambux remained in the UK and his partner is now Cynthia Emambux, who was formerly Cynthia Angelloz-Nicoud, and who is a national of France. They entered into an Islamic marriage in London on 28 November 2015. They have a child.

10. In 2017 Mr Emambux applied for a residence card as a family member of a European Economic Area national. This was rejected by the Secretary of State on 12 June 2017 because, although Mr Emambux submitted a driving licence, he did not submit a valid passport or identity card. Mr Emambux said that his ex-wife had disposed of his identification documents. A further application for a residence card was made, but that was rejected by the Secretary of State by letter dated 29 June 2017 because the specified fee was not paid. These rejections were not challenged, and Mr Emambux continued to reside in the UK.

11. On 5 November 2020 Mr Emambux made an application pursuant to the EUSS on the basis that he was the spouse of Cynthia Angelloz-Nicoud. The Secretary of State wrote by email on 7 December 2020 requesting evidence of a marriage certificate, together with evidence of its registration. Mr Emambux submitted what he headed as "a declaration statement" on 8 December 2020, accompanied by a letter from Ms Emambux, and a copy of an Islamic marriage certificate issued by the I.E.C.C. in Seven Sisters.

12. The application was then refused by letter dated 11 December 2020. This was because, although Mr Emambux stated that he was a spouse of a relevant EEA citizen, being Cynthia Angelloz-Nicoud, he had not provided sufficient evidence to confirm that. The letter continued "the required evidence of family relationship for a spouse of a relevant EEA citizen, where the spouse does not have a documented right of permanent residence, is a valid registration certificate, family permit, or residence card issued under the EEA Regulations … as the spouse of that EEA citizen, or a valid marriage certificate". The letter stated that Mr Emambux had not provided any of those, recording that the marriage certificate which had been provided was not recognised in

the UK as it was a religious document. The letter recorded that Mr Emambux's next steps would be another application or applying for administrative review.

13. Mr Emambux applied for an administrative review. The review upheld the original decision. Mr Emambux appealed to the FTT. Mr Emambux did not attend the first hearing of the FTT on the basis that he had not received the administrative review. The hearing was adjourned and the administrative review was then emailed to Mr Emambux, but he did not attend the adjourned hearing. The appeal was then dismissed.

Relevant schemes under the EUSS and 2016 Regulations

14. The EUSS provided a basis for EEA citizens resident in the UK by the end of the transition period at 11 pm on 31 December 2020, and their family members, to apply for UK immigration status to enable them to remain in the UK after 30 June 2021. The EUSS was made pursuant to the Withdrawal Agreement, and the European Union (Withdrawal Agreement) Act 2020. It was introduced on 30 March 2019, and covered "direct family members" as well as "extended family members who had already been granted residence rights". The EUSS was provided for by Appendix EU of the Immigration Rules.

15. The EEA residence card scheme under the 2016 Regulations covered "extended family members" as well as direct family members. The difference between direct family members and extended family members was itself derived from Directive 2004/38 EC (known as the "Citizens' Rights Directive") which identified the two different categories of family members. Applications by extended family members could not be made under the 2016 Regulations after 31 December 2020.

16. As part of the orderly withdrawal of the UK from the EU provided for by the Withdrawal Agreement, in cases where an extended family member made an application under the EEA residence card scheme by 31 December 2020, it was for the UK to determine that application and, if it was granted, to facilitate the residence of that extended family member. Mr Emambux was present in the UK, and so could apply under the EEA residence card scheme.

The Citizens' Rights Directive

17. As noted above the Citizens' Rights Directive created two different categories of family members. Article 2 of the Citizens' Rights Directive covered direct family members and article 3 covered extended family members.

18. Article 2 of the Citizens' Rights Directive covered family members who are spouses; registered partners; direct descendants who are either under 21 or who are dependants; and dependent direct relatives. These were referred to as direct family members. They were given the right to enter the UK, to remain for three months, and to reside for a longer period if relevant conditions were satisfied, see articles 6 and 7.

19. Article 3 of the Citizens' Rights Directive covered beneficiaries being other family members who were not covered by article 2 including dependants or members of the household of the Union citizen. These were referred to as extended family members. Article 3(2) provided:

> "Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
>
> (b) the partner with whom the Union citizen has a durable relationship, duly attested.
>
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

20. The meaning of "facilitate" within article 3 of the Citizens Rights Directive was considered by the CJEU in *Rahman v Secretary of State for the Home Department* Case C-83/11 [2013] QB 249. Member states were given a wide discretion as to how to implement the terms of article 3, so long as this amounted to facilitation and there existed a judicial remedy to determine whether the criteria which the state had adopted were properly applied, see paragraphs 25 and 26 of *Rahman*. In *Banger v Secretary of State for the Home Department* (Case C-89/17) [2019] 1 WLR 845 the CJEU confirmed that under the Citizens' Rights Directive, member states were under an obligation to confer a certain advantage on applications submitted by the third-country nationals envisaged in that article, compared with applications for entry and residence by other nationals of third countries. A decision by a member state to refuse a residence authorisation to a third-country national partner in such circumstances had to be founded on an extensive examination of the applicant's personal circumstances and be justified by reasons, see paragraphs 37 to 41. The extent of the judicial remedies available under the Citizens' Rights Directive was considered by the CJEU in *Chenchooliah v Minister for Justice and Equality* Case C-94/18; [2020] 1 WLR 1801.

21. In *Celik*, the Court of Appeal summarised the effect of article 3(2) of the Citizens' Rights Directive in paragraph 13 of the judgment. The Court identified that article 3(2) conferred a certain advantage on applications made by a person who had a relationship with Union citizens and that "any right to reside was granted by the member state in accordance with its national legislation …". The criteria used had to be consistent with the normal meaning of "facilitate" and "dependence" and could not deprive them of effectiveness. The applicant was entitled to a judicial remedy to ensure that national legislation remained within the limits set by the Citizens' Rights Directive.

22. Articles 15, 30 and 31 of the Citizens' Rights Directive provided for procedural safeguards and the rights to effective judicial appeals to establish rights.

The 2016 Regulations

23. The Citizens' Rights Directive was given domestic effect by Regulations made in 2006 which were later replaced by the 2016 Regulations. The 2016 Regulations provided for the provision of EEA family permits and residence cards for direct family members, see regulations 7, 12 to 14 and regulation 18. The 2016 Regulations provided a discretion to the Secretary of State to permit the entry of extended family members in regulations 8 and 12(5) or their residence in regulations 8 and 18(4). Applications for an EEA family permit or for a residence card had to be made pursuant to regulation 21 of the Regulations. This provided for applications to be made online or by post using the specified application form. In this appeal, the relevant application was made online. Regulation 21(4) provided that where an application was not made in accordance with the requirements of the regulations it was invalid.

The online application form

24. In *Siddiqa,* the Court of Appeal considered the online application for entry to the UK as an extended family member on the Gov.uk website. On the website there was a starting page which invited the applicant to select their language. There was then a page headed "Apply for a permit to join your EU or EEA family member in the UK" which identified the two types of family permit being "the EU Settlement Scheme family permit" and "the EEA family permit". The website stated that "the one you should apply for depends on your circumstances". Under the EUSS family permit it was stated "Apply for the EU Settlement Scheme family permit if you're the close family member of an EEA or Swiss citizen and they have `settled' or `pre-settled' status … You must be a `close' family member, such as a spouse, civil partner, dependent child or dependent parent". Further guidance noted "If you're from outside the EEA and cannot apply for the EU Settlement scheme family permit, apply for the EEA family permit instead".

25. Under the EEA family permit it was stated "Apply for the EEA family permit if you're a close or extended family member of an EEA or Swiss citizen. You can be a close or `extended' family member – for example a brother, sister, aunt, uncle, cousin, nephew or niece". Further guidance noted "You must be able to show that you're dependent on the EEA citizen or are a member of their household, or have a serious health condition and rely on them to care for you … Extended family members and unmarried partners are not guaranteed to get a permit. Your individual circumstances will be considered when you apply."

26. In *Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC) (*Batool)* the Upper Tribunal referred to the website at paragraph 71 and said: "The guidance on www.gov.uk, however, shows that the Secretary of State has been at pains to provide potential applicants with the relevant information, in a simple form, including highlighting the crucial distinction between "close family members" and "extended family members". That is a distinction which, as we have seen from the Directive and the case law, is enshrined in EU law. It is not a novel consequence of the United Kingdom's leaving the EU. It is, accordingly, not possible to invoke sub-paragraphs (e) and (f) of Article 18 as authority for the proposition that the respondent should have treated one kind of application as an entirely different kind of application".

27. At paragraph 66 of *Siddiqa* it was held that, under domestic law, the strict application of rules relating to applications under the Immigration Rules was permissible, referring to *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58; [2018] 1 WLR 5536 at paragraphs 14 to 17. This was because applicants were expected to make the proper applications and the Secretary of State to determine them, it was not for the Secretary of State "to chase shadows" to see if the applicant intended to make a different application. The Secretary of State was not under a duty to see whether a successful application might have been made in the past. The role of the Secretary of State is to assess the application made, and reference was also made to *CS (Brazil) v Secretary of State for the Home Department* [2009] EWCA Civ 480; [2009] 2 FLR 933 at paragraphs 9-10 and *Macastena v Secretary of State for the Home Department* [2019] EWCA Civ 1558; [2019] 1 WLR 365 at paragraph 17.

28. It was also noted in *Siddiqa* at paragraph 67 that, under domestic law, if an application has purportedly been made under the EUSS family permit scheme when it is, as a matter of fact, another application it can be treated as that other application, and reference was made to the decision of the UT in *Eco v Ahmed* UT-2022-002804. In that case the applicants, who were brothers of an EU national with leave to remain in the UK, had gone to the starting web page for both EUSS family permit and EEA family permit applications. They had chosen the EUSS family permit drop box, when it was common ground that they could not satisfy those provisions, and put in a covering letter to the effect that they were making an application under the 2016 Regulations, for an EEA family permit, making reference to specific regulations in the 2016 Regulations. In those circumstances the FTT and the UT found that the applicants had in reality made an application under the 2016 Regulations. In this case there was no such letter from Mr Emambux referring to the EEA residence card scheme or the 2016 Regulations.

Relevant provisions of the Withdrawal Agreement and their effect

29. The Withdrawal Agreement was made in 2019 to "ensure an orderly withdrawal of the United Kingdom from the Union". It is an international treaty. The relevant interpretative principles are contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969. The Withdrawal Agreement must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose. The recitals, which it is not necessary to set out, provide identification of the object and purpose of the Withdrawal Agreement. Article 4 of the Withdrawal Agreement set out methods and principles relating to the effect, implementation and application of the Withdrawal Agreement, see generally *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307; [2024] CMLR 10.

30. Part One of the Withdrawal Agreement, articles 1 to 8, dealt with objectives, principles and methods. Part Two dealt with citizens' rights. Part Two was divided into Title I, articles 9 to 12, which dealt with general provisions and Title II, articles 13 to 29, which dealt with rights and obligations relating to residence. Title II was itself divided into three chapters, chapter one, articles 13 to 23 dealt with rights related to residence and residency documents, chapter two, articles 24 to 26 dealt with rights of workers and self-employed persons, and chapter three, articles 27 to 29 dealt with professional qualifications.

31. Article 10 of the Withdrawal Agreement is headed "personal scope" and was set out in full in *Siddiqa.* The Court of Appeal in *Celik* confirmed that an applicant who was an extended family member in a durable relationship was not covered by the definition of family member in article 9(a) of the Withdrawal Agreement and therefore could not satisfy the provisions of article 10(1)(e)(i). In paragraph 61 Lewis LJ stated that articles 10(2) and (3) of the Withdrawal Agreement applied to persons whose residence has been facilitated, being a person whose status as an extended family member has been recognised.

32. In paragraph 95 of *Celik,* Lewis LJ rejected the submission made on behalf of the Independent Monitoring Authority (IMA) in that appeal to the effect that the fact that an application, even under the wrong route, was made was sufficient to enable the appellant to fall within article 10(3) and to benefit from article 10(5) of the Withdrawal Agreement. Lewis LJ stated that "article 10(3) deals with persons who have applied for facilitation before that date but the decision facilitating residence comes after that date". In *Siddiqa* IMA sought to distinguish that part of the judgment in *Celik* in written and oral submissions on the basis that it was not dealing with an application which did not comply with regulation 21 of the 2016 Regulations. In *Siddiqa* it was confirmed that Lewis LJ was not dealing with regulation 21 of the 2016 Regulations, but he was dealing with an application which had been made under the EUSS which did not comply with it, and that the approach to articles 10(3) and (5) of the Withdrawal Agreement, in a judgment with which Singh and Moylan LJJ agreed, should be followed, and was right.

33. In these circumstances article 10(3) applied to a person "whose residence is being facilitated" namely a person who was an extended family member who had applied before the end of the transition period under national law "and, if granted such rights, those persons fall within the scope of Part Two of the Agreement". This meant that the extended family member had to apply under national law for "facilitation" before the end of the transition period. In the UK that meant an application under the EEA family permit or residence card provisions pursuant to the 2016 Regulations.

34. In *Siddiqa* it was held that a family member of an "Union citizen who exercised their right to reside in the UK in accordance with Union law before the end of the transition period and continue to reside there thereafter" (article 10(1)(a)), fell within article 10(3) if they fell "under points (a) and (b) of article 3(2) of the Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host state in accordance with national legislation thereafter". Directive 2004/38/EC is the Citizens' Rights Directive which, as noted above, was given domestic effect by Regulations made in 2006 which were later replaced by the 2016 Regulations. An application under the EUSS family permit scheme was not an application under the 2016 Regulations for an EEA family permit. It was held that was a conclusion consistent with the approach of Union law. This was because Union law provided that it was for domestic law to determine how to give effect to the rights to facilitation set out in article 3(2) of the Citizens' Rights Directive, so long as the rights to facilitate and effectiveness are not removed.

35. Title II of the Withdrawal Agreement was titled "rights and obligations" and chapter I of Title II was headed "rights related to residence, residence documents". Article 13 was headed "residence rights". Article 14 was headed "right of exit and of entry". This

article applied to applications for visas made by family members after the end of the transition period. Article 15 was headed "right of permanent residence".

36. Article 18 was headed "issuance of residence documents" and was set out in full in *Siddiqa*. In *R(Independent Monitoring Authority for the Citizens' Rights Agreements) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin); [2023] 1 WLR 817, Lane J upheld a challenge by IMA, supported by the European Commission, to the Secretary of State's scheme implementing the Withdrawal Agreement so far as it related to those EU citizens who had a right of residence which had not yet become permanent, and who would have to make a further application after five years or they would lose their Withdrawal Agreement residence rights which were protected under article 13 of the Withdrawal Agreement. In the course of the judgment Lane J recorded submissions about article 18 of the Withdrawal Agreement and its effect. IMA, supported by the Commission, both contended that article 18 contemplated only one application, but that was disputed by the Secretary of State, see paragraph 114 of the judgment. Lane J analysed article 18 in the judgment and recorded that the UK had adopted a "constitutive", as opposed to "declaratory" scheme under article 18. For the purposes of article 18 a "constitutive" scheme meant that the rights in question must be conferred by the grant of residence status, rather than just adducing the underlying documentation to prove the right.

37. In those circumstances, in order to take advantage of the provisions of article 18, including article 18(1)(o) which provided for competent authorities helping applicants to prove eligibility and avoid errors or omissions, and 18(1)(r) which provided for access to administrative redress procedures to ensure that the decision was not disproportionate, the applicants had to supply the documents, obtained under the EEA Regulations, proving the family relationship. As noted at paragraph 56 of *Celik*, the principle of proportionality in article 18(1)(r) was not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside.

The Secretary of State was right not to treat the application made by Mr Emambux under the EUSS as an application under the 2016 Regulations – issue one

38. Mr Emambux did make an application under the EUSS. There was a clear application form, with clear guidance, compare *Batool* and *Siddiqa*, and the application form under the EUSS was completed by Mr Emambux. The fact that he might have made an application under the 2016 Regulations (although he made two unsuccessful applications in 2017) does not mean that the Secretary of State had to treat the application under the EUSS as an application under the 2016 Regulations.

39. This was not a case such as *ECO v Ahmed* where the FTT and UT found that an application under the 2016 Regulations had, as a matter of fact, been made. Mr Emambux applied under the EUSS and his application was correctly refused.

The Secretary of State was not required to tell Mr Emambux, when rejecting his application under the EUSS, to make an application under the 2016 Regulations – issue two

40. There was no obligation on the Secretary of State to tell Mr Emambux to make an application under the 2016 Regulations. This is because under domestic law the

Secretary of State determines applications and is not bound to advise applicants of applications that can be made. Further, in the particular circumstances of this case, Mr Emambux was maintaining that he was in fact married to an EEA national, a point that he pursued unsuccessfully before the FTT and UT, and a point on which he was refused permission to appeal to the Court of Appeal. Mr Emambux had in fact made two previous applications under the 2016 Regulations which had been rejected. Mr Emambux had not challenged those decisions.

No reference to the CJEU – issue three

41. After the end of the transition period, courts in the United Kingdom can no longer make references for preliminary rulings to the CJEU, unless the matter to be determined falls under one of a few limited exceptions. Article 158(1) of the Withdrawal Agreement is one such exception. It provides:

> "Where, in a case which commenced at first instance within 8 years from the end of the transition period before a court or tribunal in the United Kingdom, a question is raised concerning the interpretation of Part Two of this Agreement, and where that court or tribunal considers that a decision on that question is necessary to enable it to give judgment in that case, that court or tribunal may request the Court of Justice of the European Union to give a preliminary ruling on that question." (underlining added).

42. In my judgment it is not necessary to refer this case to the CJEU to enable this court to give judgment in the case. Mr Emambux does not fall within the scope of Part Two of the Withdrawal Agreement because he does not meet any of the criteria outlined in Articles 10(1)-(5) because he had not made an application for facilitation of entry and residence before the end of the transition period.

Other matters

43. As noted above Mr Emambux sought again to raise the issue of the validity of his marriage to Ms Emambux under the law of England and Wales. There are two answers to this point. First he was refused permission to appeal on this matter. Secondly there was nothing in the materials before this Court to show that Mr Emambux's Islamic marriage was a marriage recognised by the laws of England and Wales.

44. Further, Mr Emambux claimed that he has been improperly treated by the police, the Secretary of State, the courts and tribunals. This was not a ground of appeal. In any event there was no evidence before us of any impermissible treatment of Mr Emambux. It is apparent from the documents that the second day of the hearing in the UT took place remotely, but that was because of issues with Mr Emambux's behaviour recorded by the UT. The fact that the Secretary of State, the courts and tribunals have not agreed with representations or submissions made by Mr Emambux does not mean that they are acting together to harm Mr Emambux.

Conclusion

45. For the detailed reasons set out above I would dismiss this appeal.

Lord Justice Singh

46. I agree.

Lord Justice Moylan

47. I also agree.