IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003493
First-tier Tribunal No: EA/06974/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
21st November 2023

Before

UPPER TRIBUNAL JUDGE LINDSLEY
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN (14th November only)

Between

ABDUL KAREEM MOHAMMED
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Chohan, of Counsel, instructed by Law Lane Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer – 7th November 2023;
Mr T Melvin, Senior Home Office Presenting Officer – 14th November 2023 via video link

Heard at Field House on 7 and 14 November 2023

DECISION AND REASONS

Introduction

1. The appellant is a citizen of India born on 20th August 1989. On 3rd December 2020 the appellant applied for leave to remain as the dependent relative of Maria Veselinova Kocheva, a citizen of Bulgaria and his sister-in-law, under the EUSS. His application was refused in a decision dated 11th April 2021. His appeal against the decision was dismissed by First-tier Tribunal Judge S Taylor in a determination promulgated on the 31st May 2022.

2. Permission to appeal was granted by Upper Tribunal Judge Grubb on the basis that it was arguable that the First-tier judge had erred in law in wrongly deciding the appeal under the Immigration (EEA) Regulations 2016 (henceforth the EEA Regulations) rather than the EUSS Immigration Rules. It was noted however that the appellant may not ultimately be able to succeed in the appeal in light of the decision in Batool and Another (other family members: EU Exit) [2022] UKUT 219.

3. On 7th November 2023 the matter came before Upper Tribunal Judge Lindsley to determine whether the First-tier Tribunal had erred in law, and if so to decide whether any such error was material and thus whether the decision should be set aside. At the end of the hearing the decision was formally reserved, with no oral judgment given, but there was an indication that whilst there was an error of law in the decision which warranted the decision to be set aside when it was remade the appeal would not be allowed.

4. However on 8th November 2023 Judge Lindsley received a collection of documents from the appellant which meant that it was necessary to reconvene the hearing as it appeared possible that information given by the respondent at the hearing may not have been correct. Judge Lindsley issued directions that the respondent should use her best endeavours to check whether the documents filed by the appellant were an application to remain under the EEA Regulations made before 11pm on 31st December 2020.

5. The matter came back before the Panel to determine whether such an application had been made and to remake the appeal on the totality of the evidence.

Submissions- Error of Law & Remaking – 7th November 2023

6. In the grounds of appeal it is argued, in short summary, that the First-tier Tribunal erred in law in not applying Dauhoo (EEA Regulations – reg 8(2)) [2012] UKUT 79, and not finding that the appellant was currently a member of the sponsor's household and had historically been dependent on her whilst she lived in Bulgaria.

7. Mr Chohan did not rely upon these grounds but instead relied upon the grant of permission, which was clearly made on a Robinson obvious basis. He argued that the error of law identified in the grant of permission was material as there was some evidence that the appellant had in fact made an unanswered application, through an immigration consultant, to facilitate permission to remain before the 31st December 2020 under the EEA Regulations. He said that these were his instructions, although he accepted there was no witness statement to this affect. He relied upon a document in the supplementary unindexed and paginated "bundle" lodged with the Upper Tribunal on 6th November 2023. Most of the bundle consisted of letters relating to applications made by the appellant between 2017 and 2019 which had been refused

or rejected by the respondent. The first document in the bundle was however headed "Annex 5 – Documentation Referral" and was dated 30th December 2020. Mr Chohan argued that this was a document relating to an application under the EEA Regulations which showed that it was still outstanding prior to 31st December 2020. He said that he understood that it did not relate to the EUSS application as this was an online process from which the appellant would not have received a handwritten customer receipt such as this one. Mr Chohan appeared as an advocate however and so was not in a position to give evidence on this matter. Mr Chohan was given two short adjournments to take instructions as the appellant maintained there were further documents relating to this application in email form, but it transpired that the attachments to the emails had corrupted and so there was no further evidence available.

8. Mr Chohan applied to adjourn the hearing so that he could seek further evidence to support the contention of an application made under the EEA Regulations but I found that an adjournment was not in the interests of fairness or justice. The appellant was represented by solicitors and had had the issue in the appeal clarified by Upper Tribunal Judge Grubb in his grant of permission for over a year. An additional unpaginated and unindexed bundle of documents relating to past applications between 2017 and 2020 had been filed late, on 6th November 2023, with no application under the Tribunal Procedure (Upper Tribunal) Rules 2008. The Tribunal was entitled to assume that this was the entirety of the evidence the appellant possessed relating to his previous applications. There was no evidence regarding the nature of the "Annex 5- Documentation Referral" document to demonstrate that this related to an EEA Regulations application. There was no witness statement evidence supporting the contention that an EEA Regulations application had been made in 2020 or detailing how this was done, and the evidence of the respondent (as set out below) was very clear that one had not been made. I concluded that there was no realistic prospect of any further evidence being available at a future hearing showing an unanswered application under the EEA Regulations had been made in 2020, and so concluded that an adjournment was not needed for reason of fairness or in the interests of justice.

9. Ms Isherwood's position was that the First-tier Tribunal had erred in the way identified in the grant of permission to appeal but that this was not ultimately a material error because the appeal could not succeed as the appellant had not had his residence facilitated by the respondent, or applied for this in an un-refused application, prior to 31st December 2020. Ms Isherwood said she had checked the respondent's computer system and there were only two applications received from the appellant during 2020: one made on 2nd February 2020 was for leave to remain outside of the Immigration Rules and was rejected; the other was the application made on 3rd December 2020 which was refused in the decision under appeal. There was no 2020 application under the EEA Regulations recorded on the respondent's systems.

Submissions – Error of Law and Remaking – 14th November 2023

10. Mr Chohan clarified that the documents said to relate to a 2020 application under the EEA Regulations made by the appellant did not include the Annex 5 – Documentation Referral document he had referred to in the previous hearing. On closer examination the number on that document was clearly the same UAN reference number as that allocated to the 3rd December 2020 EUSS application. The documents which were put forward as being part of this application were those forwarded by email, namely: a post office receipt dated 18th November 2020 posted in Ilford; a cover letter to UKVI dated 18th November 2020 applying for an EEA residence card for the appellant as a dependent relative of his sister-in-law; and form EEA (EFM) Version 10/2020 completed by the appellant with payment section completed by the appellant's brother, Mr Abdul Rahim Mohammed, paying £65. In addition there was a Lloyds bank statement for the appellant's brother showing Nationality Direct took £65 on 10th December 2020. Mr Chohan argued that this evidence sufficed to show that the appellant made an application for a residence card under the EEA Regulations on 18 November 2020, although he accepted that this had probably not been argued before the First-tier Tribunal (he did not have a precise recollection) and he also accepted that there was no witness statement evidence from the appellant, his brother or sister-in-law that supported this application being made.

11. Mr Melvin expressed concerns at the behaviour of Law Lane Solicitors in submitting documents late with no application and without those documents being properly presented in paginated and indexed bundles. We intimated that we shared those concerns and they are addressed below. Mr Melvin submitted that the new evidence was suspect and should be treated with extreme caution because there was no reason why it had not been previously submitted before the First-tier Tribunal and this new November 2020 application under the EEA Regulations did not form part of the original chronology as according to the note of the Presenting Officer before the First-tier Tribunal. Mr Chohan (advocate for the appellant before the First-tier Tribunal) had conceded that the last application under the EEA Regulations was made by the appellant in 2019. Mr Melvin maintained also that Home Office systems had been checked and there was no evidence of this application.

Conclusions – Error of Law

12. At paragraph 1 of the decision of the First-tier Tribunal it clearly states that the application refused on 13th February 2021 was refused under the EUSS, and at paragraph 2 of the decision that the available grounds of appeal were under the Immigration Rules at Appendix EU or under the Withdrawal Agreement. From paragraph 3 of the decision it is clear that the appellant was refused by the respondent because he did not have a residence card issued under the EEA Regulations and so could not meet the requirements of the EUSS. From paragraph 11 of the

decision it is clear that this was also the submission for the respondent by the Presenting Officer.

13. We find that the First-tier Tribunal materially erred in law by failing to apply either the EUSS or the Withdrawal Agreement in dismissing the appeal but instead reverting to the EEA Regulations at paragraphs 16 and 17, and deciding that the appellant had failed to show on the balance of probabilities that he had past dependency on the EEA extended family member from prior to the sponsor entering the UK.

Conclusions - Remaking

14. The Court of Appeal in Halil Celik v SSHD [2023] EWCA Civ 921 upheld the decision of the Upper Tribunal finding that an extended family member of an EEA citizen in the United Kingdom has no substantive rights under the EU Withdrawal Agreement, unless his or her entry and residence were being facilitated before 11pm GMT on 31 December 2020 or he or she had applied for such facilitation before that time. Further where he or she has no such substantive right he/she cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ("the 2020 Regulations").

15. We find that this appellant clearly did not have a residence card as an extended family member issued prior to 31st December 2020. There is no contention for the appellant that he held such a document. We also find that he has not shown on the balance of probabilities that he had an application outstanding for one at that date. There was no contention to this effect before the First-tier Tribunal. The statements of the three witnesses before the First-tier Tribunal only refer to one application which was refused on 11th April 2021, which was the one made on 3rd December 2020 under the EUSS. There was no evidence before us that it was argued by counsel before the First-tier Tribunal that a separate application had also been made under the EEA Regulations in November/December 2020. There was no receipt from the respondent for such an application, and the respondent had no record of it in the Home Office systems. There was no new witness statement from the appellant explaining how, why and when an EEA Regulations application was made in November/December putting the new documents in context and explaining their significance, and also explaining why the application, if so made, was not chased by the appellant over the past three years. Further it is notable that the application fee paid is indicated to be £65 on the payment details part of the form, the amount for a "single EEA applicant" when the amount payable ought to have been £84.20 the amount for a "single non-EEA applicant" as the appellant is not an EEA applicant but a non-EEA applicant as he is an Indian citizen.

16. We find that the appeal under Appendix EU of the Immigration Rules therefore cannot succeed for the reasons set out in the reasons for refusal letter, namely that the appellant had not facilitated his leave to remain by application for a residence card prior to the 31st December 2020 and so does not have a relevant document as a dependent relative, and as such cannot meet the eligibility requirements for pre-settled or settled status under EU11 or EU14 of Appendix EU. As a result the appeal under the Withdrawal Agreement also fails.

17. Further a Presidential Panel of the Upper Tribunal in Batool found that an applicant had no right to have an application made under the EUSS treated as an application for facilitation as an extended family member. This was also the conclusion reached by a different Upper Tribunal Panel in Siddiqa (other family members: EU exit) Bangladesh [2023] UKUT 00047. We conclude therefore that the EUSS application made on 3rd December 2020 should not have been treated as an application under the EEA Regulations.

"Hamid" Concerns with respect to Law Lane Solicitors

18. Law Lane Solicitors have not conducted this matter to appropriate professional standards. On two occasions evidence has been lodged with the Upper Tribunal without compliance with Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as no application was made to admit it explaining the evidence and why it was not submitted before the First-tier Tribunal. Further the evidence was not even contained in a properly constructed bundle: there was no index and no pagination of the evidence, and on 8th November 2023 one piece of evidence was not included in the emailed collation and had to be photographed and emailed to the presenting officer in the hearing. At the hearing on 7th November 2023 Upper Tribunal Judge Lindsley indicated that a witness statement from the appellant explaining the first set of new evidence was missing, but despite this when further evidence was lodged on 8th November 2023 once again there was no witness statement from the appellant explaining the evidence. As a result judicial time was wasted with counsel for the appellant establishing, amongst other things, that the payment for the putative EEA Regulations application had come from the appellant's brother's account, and not from the appellant's own account, this not being self-evident as both men have bank accounts with the same bank in the same name as their middle names are omitted on the bank statements. If further examples of unprofessional behaviour come to light from Law Lane Solicitors consideration will be given to whether a referral to the SRA is appropriate.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. We set aside the decision of the First-tier Tribunal dismissing the appeal in so far as that was made under the Immigration (EEA) Regulations 2016.

3. We re-make the decision in the appeal by dismissing it under the Withdrawal Agreement and the Immigration Rules.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber
15th November 2023