Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2023-000386**
EA/51554/2022
EA/10437/2022
EA/04230/2022
EA/50473/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued
On the 13 November 2023

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

MEFAIL GERBOLLI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S. Saifolahi, instructed by Oaks Solicitors.
For the Respondent: Ms S. Cunha, Senior Home Office Presenting Officer.

Heard at Field House on 26 July 2023

DECISION AND REASONS

1. The appellant has made a number of applications to the Secretary of State following his arrival in the United Kingdom in 2006. This appeal concerns one of them only, which was an application for a residence card pursuant to the Immigration (European Economic Area) Regulations 2016, made on 11 December 2020 and refused on 22 February 2021. The appellant appealed to the First-tier Tribunal against that decision. The file number in the First-tier Tribunal was EA/50473/2021.

2. The application had been made on the basis of the appellant's family life with his partner, a national of Romania. It was refused because the Secretary of State considered that there was not sufficient evidence of the

durability of the partnership. On 12 April 2021 the appellant and his partner were married. On 26 April 2021 the appellant applied under the European Union Settlement Scheme (EUSS) for leave to remain as the spouse of an EEA national. On the same date his solicitors submitted a notice to the First-tier Tribunal withdrawing his appeal against the earlier decision refusing his application as a partner. The following day, a Tribunal caseworker confirmed that the appeal was withdrawn.

3. Almost a year later, on 13 April 2022, the EUSS application was refused on the basis that the appellant and his partner had married after the specified date, and that the appellant did not hold a relevant document as the durable partner of an EEA national. That refusal was the subject of a further appeal to the First-tier Tribunal, which is still pending. Starting in September 2022, the appellant, through his solicitors, sought to reinstate the earlier appeal. The application was given the file number EA/51554/2022.

4. The matter came before Judge Shiner in the First-tier Tribunal on 17 November 2022. He heard argument from Counsel on behalf of the appellant that the application to reinstate should be heard, and should be granted. He was content to hear the application, and no further issue arises in relation to that. He summarised Counsel's submissions as follows:

> "[18] Ms Bayati submitted that the appellant was advised that he "should make an application under the EUSS Scheme and it [the EEA appeal] was withdrawn on that ground." She said that the appellant followed the advice of his lawyer. She said that he made an application as an EEA application before the specified date and only withdrew it on advice. She submitted that the legal landscape was not clear at that time and the issue was not flagged until 2022 to the solicitors by her and a reinstate application was made. She said "it was a mistake in law the appellant wrongly withdrew". I was referred to the grounds drafted as to the reinstatement application. Counsel said "we are not saying that the intention was not clear, it was made on legal advice [and] the solicitors accept that it was a mistake made by them". She referred me to Anwar (rule 17(1): withdrawal of appeal) v SSHD [2019] UKUT 125… [and] … AP (withdrawals, nullity assessment) [2017] UKAIT 22. Counsel submitted that there is a question mark over the meeting of minds between the lawyer and the appellant. She said there was a meeting of minds but the reasons were clearly wrong. It was a decision based on a mistake of legal advice."

5. After considering the material before him, Judge Shiner concluded that the appellant's solicitors had advised him to withdraw, that the appellant had accepted that advice and that the appeal was withdrawn. He had made a deliberate and informed decision. There was no misunderstanding of the appellant's instructions or of his advice. The fact that the advice in hindsight turned out to be wrong did not affect the validity of the withdrawal. He concluded his consideration of this matter as follows:

> "[22] … I have to decide whether the withdrawal was validly given, the appellant knew that he was withdrawing the appeal

> and why he was doing so, and he knew that the affect was that the appeal would be withdrawn. I cannot find on the position that is presented to me by Ms Bayati that the withdrawal was invalidly given. It was not. As such the EEA appeal proceedings ended on 27 April 2021."

6. He accordingly concluded that the application to reinstate (EA/51554/2022) should be refused, and that the appeal EA/50473/2021 was not before the Tribunal. He gave directions for the further progress of the EUSS appeal.

7. The appellant sought permission to appeal against his decision in relation to the withdrawal. Permission was refused by the First-tier Tribunal but granted by Judge Perkins in this Tribunal, who elegantly summarised the position as follows:

> "1. The appellant withdrew an appeal that might have succeeded in the belief, reinforced by clear advice from solicitors, that he had a different more certain route.
> 2. It is now apparent that the advice was wrong. The new route cannot succeed and the appellant wanted to undo his decision to withdraw the earlier appeal. This can only be done on the basis that the decision to withdraw was a nullity. The Tribunal was referred to Anwar.
> 3. The First-tier Tribunal ruled that the decision to withdraw was not a nullity. It was the result of a clear and informed decision by the appellant which he now regrets. It ruled that a change of mind does not vilify a regretted decision.
> 4. The grounds argued that a hopelessly misinformed decision to withdraw is not a proper decision at all."

8. In making her submission that Judge Shiner erred in law, Ms Saifolahi summarised the facts. She asserted that the solicitor's acknowledgment that the advice was mistaken was crucial in demonstrating that the withdrawal was not validly made. This is, it is fair to say, not a case in which the underlying facts are in any doubt, save for those protected by privilege to which we shall refer shortly.

9. There is formidable authority against the appellant, not only in the decisions of the Tribunal and its predecessor to which Judge Shiner referred, but also in one of the authorities upon which those decisions were based, a decision of a five-member Court of Appeal (Criminal Division) R v Medway [1976] QB 779. That was, of course, a criminal case, but we see no reason to differ from the Tribunal's in Anwar and SM (withdraw of appeal decision: effect) Pakistan [2014] UKUT 64 in regarding its conclusion as being of general application. In that decision, after surveying a large number of authorities, Lawton LJ (who gave the judgment at the Court) said at 798:

> "In our judgment the kernel of what has been described as the "nullity test" is that the Court is satisfied that the abandonment was not the result of a deliberate and informed decision; in other words, that the mind of the applicant did not go with his act of abandonment. In the nature of things it is impossible to foresee when and how such a state of affairs may come about; therefore it

> would be quite wrong to make a list, under such headings as mistake, fraud, wrong advice, misapprehension and such like, which purports to be exhaustive of the types of case where this jurisdiction can be exercised."

10. Then, considering the specific arguments put to the Court in that case, including an argument that the applicant had acted under a fundamental misapprehension as to the law, shared by his legal advisors, Lawton LJ continued as follows at 800:

> "Even if we accepted the factual basis for this contention, which we do not, we do not think that a deliberate decision to abandon, taken as a result of advice which is founded on a mistaken view of the law is in itself capable of vitiating the effectiveness of a notice to abandon so as to enable the Court to treat it as a nullity."

11. Those observations are, as we have said, made in a criminal case, where the jurisdiction being examined by the Court was, as the Court held in that case, purely statutory. There was, however, nothing in the statute itself that, in our judgment, should be read as restricting the principle to criminal cases.

12. That might be sufficient to deal with this appeal, were it not for the observations of Judge Cannan in a decision of the First-tier Tribunal (Tax Chamber) [2015] UKFTT 404, which was cited to us. In dealing with the issue raised in this case, Judge Cannan said this at [18]:

> "I was not referred to any authority bearing on the significance of a party relying on professional advice in withdrawing an appeal or discontinuing proceedings and subsequently forming a different view as to the merits. I am not aware of any general principle to be applied, but it does seem to me that where a party applies to reinstate in such circumstances it will be relevant to consider whether the advice was such that no reasonably competent professional advisor could have given it. I would emphasise that I view that simply as one relevant factor and not as a test to be applied as such."

13. A judgment of the First-tier Tribunal is of course not binding on us, particularly where the observation is expressly made without reference to the authorities. Judge Cannan's observation is, however, worth examination in the context of this appeal. In the present case, the appellant has not commenced any proceedings against his solicitors; indeed he continues to retain them. The communications between him and his solicitors which led to the decision to withdraw the appeal are governed by the principles of legal professional privilege and are accordingly not the subject of any evidence before us or before the First-tier Tribunal. What is clear is that the appellant does not say that his solicitors are not reasonably competent by their professional standards; nor is there (or, without waiver of privilege could there be) any full account of all the considerations that went to the withdrawal. The legal position at the time of the withdrawal may have been somewhat uncertain; but it seems to us that even if a Court could say that "no reasonably competent professional advisor could have given" advice to withdraw, a Court or

Tribunal would want to pause carefully before determining that the withdrawal was based on that advice and not on some other undisclosed instructions. After all, if the heart of the Court's decision is to be that the advisor was not "reasonably competent", that would be a matter on which the advisor would have to be heard, unless there had already been a relevant decision of a professional regulatory body.

14. So far as this case is concerned, the position is that the appellant withdrew his appeal on the basis of advice from his solicitors. There is no reason to suppose that he did not accept that advice. The fact (if it be a fact) that the withdrawal of his appeal was based on advice which may have been mistaken does not render the withdrawal a nullity. We therefore dismiss the appellant's appeal against Judge Shiner's decision.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 13 November 2023