Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002737
EA/09930/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 September 2022	**On 15 November 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GODWIN OWUSU-BOAKYE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T. Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr F. Khan, Counsel, instructed by Kenton Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Joshi ("the judge") promulgated on 3 March 2022 allowing an appeal against a decision of the Secretary of State dated 22 January 2021 to refuse the appellant's application for pre-settled status under the EU Settlement Scheme ("EUSS"). The appeal before the judge was brought under regulation 3 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

2. Although this is an appeal brought by the Secretary of State, for ease of reference I will use the term "the appellant" to refer to the appellant before the First-tier Tribunal.

3. At the hearing on 29 September 2022, it was common ground that the judge had erred, and that the decision had to be set aside. I remade the decision, dismissing the appeal. This decision records my reasons for doing so.

Factual background

4. The appellant is a citizen of Ghana was born on 21 October 1989. He arrived in the UK with valid entry clearance as a student in January 2020, valid until 7 January 2021. On 30 November 2020, he applied for leave to remain under paragraph EU14 of Appendix EU to the Immigration Rules, on the basis that he was dependent upon his brother-in-law, Emmanuel Frimpong, a Belgian citizen who is married to the appellant's sister. I shall refer to Mr Frimpong as "the sponsor".

5. By her decision dated 22 January 2021, the Secretary of State refused the appellant's application on the basis that he did not have a valid family permit or residence card issued under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). It was common ground that the appellant had not been issued with any documentation under the 2016 Regulations.

6. The appellant appealed to the First-tier Tribunal. The judge heard the case on 2 February 2022 via CVP. The respondent was not represented. The appellant's then-representative (who was not Mr Khan) submitted to the judge that "the only relevant issue relates to whether the appellant is related to the sponsor" (paragraph 13). The judge, having set out what he considered to be the relevant provisions of the EUSS, disagreed with the appellant's position in that respect. At paragraph 34, the judge appeared to reject that submission, stating that a residence card was "clearly" an "important document", before going on, at paragraph 35, to reach findings of fact that the appellant was dependent upon the sponsor in any event. He found them to be credible witnesses and reached findings that the appellant had been dependent upon the sponsor in Ghana and remained dependent upon him in the UK. That led to the judge allowing the appeal, stating, at paragraph 40:

> "I am satisfied on a balance of probabilities that the appellant was (and continues to be) a dependent family member on the sponsor at the time of the application and meets the requirements of Condition 1 of EU14 of Appendix EU to the Immigration Rules."

Ground of appeal

7. The Secretary of State's sole ground of appeal was that the issue before the judge was not whether the appellant was related to, or dependent upon, the sponsor, but whether he had previously been issued with a valid

family permit or EEA residence card in respect of the claimed relationship of dependence, as required by paragraph EU14.

8. Permission to appeal was granted by First-tier Tribunal Judge Evans.

Submissions

9. Mr Melvin submitted that the requirements of paragraph EU14 may only be met in relation to a situation of claimed dependence in circumstances where the applicant has previously been granted a residence card, or EEA family permit, under the 2016 Regulations on that basis. By focussing on the relationship of claimed dependence in the absence of such documentation, the judge fell into error.

10. Mr Khan initially sought to resist the appeal. He stated that the appellant's understanding of the disputed issues before the First-tier Tribunal was that all he needed to establish was the family relationship. Moreover, under the Immigration (European Economic Area Regulations) 2006, all the appellant would have to have established, he submitted, was that he was related to his brother, with no additional requirement for dependency. However, he accepted that, reflecting on *Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC), the fact the appellant had not been issued with a residence card was fatal to his case. He conceded that there had been an error of law in that respect. Mr Khan therefore accepted that the decision would have to be set aside and the decision remade, but invited the Secretary of State, through Mr Melvin, to consent to the tribunal considering Article 8 of the European Convention on Human Rights ("the ECHR"), concerning the appellant's private and family life.

11. In response, Mr Melvin submitted that the Secretary of State would not consent to the tribunal considering Article 8.

Legal framework

12. The provisions of the Immigration Rules establishing the EUSS are of some complexity. It is not necessary fully to summarise them here. Put simply, for present purposes a person will be eligible for leave to remain under the EUSS (known as "pre-settled status") if he or she meets the requirements of paragraph EU14.

13. EU14 provides, where relevant:

> "EU14. The applicant meets the eligibility requirements for limited leave to enter or remain where the Secretary of State is satisfied, including (where applicable) by the required evidence of family relationship, that, at the date of application and in an application made by the required date, condition 1 or 2 set out in the following table is met:
>
> Condition 1
>
> 1. (a) The applicant is:

> (i) a relevant EEA citizen; or
>
> (ii) **a family member of a relevant EEA citizen**; or
>
> (iii) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or
>
> (iv) a person with a derivative right to reside; or
>
> (v) a person with a Zambrano right to reside…"

I have emphasised condition 1(a)(ii) as the appellant needed to demonstrate that he was a "family member of a relevant EEA citizen".

14. "Family member of a relevant EEA citizen" is a term defined in Annex 1, *Definitions*. Paragraph (e) of the definition of that term is relevant for present purposes:

> "(e) the dependent relative, before the specified date, of a relevant EEA citizen (or of their spouse or civil partner, as described in sub-paragraph (a) above) and the dependency (or, as the case may be, their membership of the household or their strict need for personal care on serious health grounds) continues to exist at the date of application (or did so for the period of residence relied upon)". (Emphasis added)

15. The term "dependent relative" holds the key to resolving these proceedings. It is defined to include a person who is a "relative" (see paragraph (a)(i)(aa)) and who:

> "(b) holds a relevant document as the dependent relative of their sponsoring person for the period of residence relied upon…"

16. The term "relevant document" is defined to include a residence card or family permit.

17. The upshot of these requirements was described in the following terms in the Headnote to *Batool*:

> "(1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.
>
> (2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member."

18. Put another way, to secure leave to remain under the EUSS on the basis of being "dependent" upon an EEA sponsor, it is necessary for the applicant to have had their residence facilitated in that capacity under the 2016 Regulations, through the issue of an EEA family permit or residence

card, before the end of the implementation period, at 11PM on 31 December 2020.

Discussion

19. Mr Khan was right to concede that the judge had erred by focussing his analysis on whether dependency existed as a matter of fact, rather than by addressing whether the appellant had previously been issued with a residence card or an EEA family permit under the 2016 Regulations in that capacity. While the judge said that a residence card was "clearly an *important* document" (paragraph 34, emphasis added), such a document was, in these proceedings, an *essential* document, without which the appellant failed to meet the requirements of the EUSS: see paragraph (1) of the Headnote to *Batool*.

20. The appellant did not have a "relevant document", namely an EEA family permit or a residence card issued to him prior to 11PM on 31 December 2020 as the dependent relative of the sponsor. That being so, the appellant's appeal was incapable of succeeding. The only option open to the judge on the material before him was to dismiss the appeal. It was an error of law to allow the appeal.

21. I therefore set aside the judge's decision.

Remaking the appeal

22. Acting under section 12(2)(b)(ii), I remake the decision in this tribunal.

23. Since Mr Melvin declined to consent to the tribunal considering Article 8 ECHR issues, it follows that the only option open to me was to dismiss the appeal. The appellant has not been issued with a "relevant document", meaning he is incapable of being a "family member of a relevant EEA citizen", and so fails to meet the eligibility criteria under paragraph EU14.

24. I therefore remake the decision and dismiss the appeal.

Notice of Decision

The decision of Judge Joshi involved the making of an error of law.

I set the decision aside and remake the decision, dismissing the appeal.

The remade appeal is dismissed under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

No anonymity direction is made.

I make no fee award.

Signed Stephen H Smith Date 3 October 2022
Upper Tribunal Judge Stephen Smith