Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: UI-2022-001778**
EA/08667/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 20th October 2022

Decision & Reasons Promulgated
On the 24th January 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD FIAZ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Lecointe, Home Office Presenting Officer
For the Respondent: Mr A Chohan of Counsel

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I have referred to the parties as they were described before the First-tier Tribunal, that is Mr Muhammad Fiaz as the appellant and the Secretary of State as the respondent.

2. The Secretary of State appealed against the decision of First-tier Tribunal Judge Dixon ("the judge") who allowed the appeal of the appellant, a 36 year old national of Pakistan, who on 30th December 2020 was said to have applied under the EU Settlement Scheme as a dependent relative dependent of his cousin and sponsor Tariq Hussain Choudhry.

3. The appellant appealed the decision of the Secretary of State, who considered the appellant had not provided evidence that he was related to the EEA citizen.

4. At [25] the judge found the evidence before him to be credible and reliable and that the appellant and sponsor both gave evidence in a clear and straightforward manner. The judge found at [26] that the appellant and sponsor were related as claimed on the basis of the witness statement and oral evidence as well as the evidence which appeared at AB39 to 49.

5. At [28] the judge turned to the consideration of whether the requirement for the appellant to hold a relevant document breached the Withdrawal Agreement and whether that was a proportionate measure. At [29] the judge recorded the following:

> "29. The appellant's application was made on the 30th of December 2020 and he *could therefore have also made* an application under the EEA regulations 2016 as an extended family member under regulation eight (sic) of those regulations. This appears to be what is envisaged by Appendix EU in requiring an applicant to hold the relevant document.
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> 30. *Had the appellant done that, the respondent would have had to decide that EEA Regulations 2016 application and would have had to undertake an examination of the appellant's circumstances including*, of course, whether he was dependent on the sponsor or not, pursuant to regulation 12(5) of those regulations. It also follows that the respondent would not have been able to decide an application under the EUSS until such application under those regulations had been decided including any possible appeal because the document issued under those regulations was a document required in the EUSS application." [my emphasis]

6. At [32] the judge noted that he had set out the relative provisions under the Immigration (European Economic Area) Regulations 2016 (" the 2016 Regulations") and the rules under the EU Settlement Scheme ("EUSS") because both demanded similar elements to be considered. The judge stated "It is true that in respect of the EUSS application there was an additional element of the relevant document being needed but, in substance, there was the same underlying condition which had to be met that the relevant relationship continued". The judge concluded at [33] that the appellant's case did fall within the scope of the Withdrawal Agreement as he had applied for the facilitation of his residence before the end of the transition period. As a result, the judge concluded that the respondent had failed to facilitate the applicant's residence in the refusal of his EUSS application and therefore he needed to consider whether the

basis of that was proportionate. In the light of his considerations at [35] the judge concluded that the refusal was not proportionate.

Grounds for permission to appeal

7. The grounds of permission to appeal on behalf of the Secretary of State set out as follows:

8. The judge materially misdirected himself in law. The appellant applied under the *EUSS Immigration Rules Appendix EU* as a dependent relative of a Spanish national said to be his cousin. The "personal scope" of Part 2 of the Withdrawal Agreement was defined at Article 10 of the Withdrawal Agreement. The judge only made reference to Article 10 in the broadest of terms at [20].

9. Essentially the appellant could not come within the scope of Article 10 of the Withdrawal Agreement (so far as it relates to citizen's rights) because amongst other things:

   (i) the appellant's residence [as a dependant family member as per 3(2)(a) of Directive 2004/38/EC] was not facilitated by the host state in accordance with national legislation before the end of the transition period (see Article 10(2));

   (ii) an application for residence (as a dependant family member as per Article 3(2)(a) of the Directive 2004/38/EC which was facilitated subsequent to the transition period was never made. See Article 10(3); and

   (iii) Article 10(4) only applies to durable partners.

10. The appellant does not come within the personal scope of Part 2 of the Withdrawal Agreement and therefore the judge erred in applying Part 2 to the appellant.

11. This is revealed at [21] onwards where the judge relies on Article 18(r) (this should read 18(1)(r). Article 18(1) relates to the issuance of residence documents and provides "the host state may require union citizens or United Kingdom nationals their respective family members and other persons who resided in its territory in accordance with the conditions set out in this title, to apply for a new residence status which confers the rights under this title and a document evidencing such status which may be in a digital form".

12. The appellant had never resided in accordance with any conditions in the title (Article 13 of the title). He is an illegal entrant who has never had leave to enter or remain or any other right to reside.

13. The appellant is not a union citizen or United Kingdom national and has never been a "family member" (see Article 13(3) who can rely upon either the EEA Regulations or the Directive 2004/38/EC.

14. Because the appellant cannot come within the scope of the Withdrawal Agreement by showing residence in accordance with the conditions specified in the Withdrawal Agreement the judge could not consider the proportionality in relation to the appellant.

15. At 35 the judge refers to those entitled to rights under EU Treaties but these are not rights the appellant has.

16. At 35(1) the judge considered the Immigration Rules Appendix EU and holds that they breach the appellant's rights under the Withdrawal Agreement but the judge has manifestly failed to show or indicate anything in the Withdrawal Agreement that is not consistent with (or to the appellant's detriment) when compared to the Immigration Rules Appendix EU or vice versa.

17. In **Syed, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 984 (Admin)** Holman J rejected an argument on proportionality of the Immigration Rules as this was incapable of supporting an alternative construction of those Rules which are clear.

18. The Withdrawal Agreement and the Immigration Rules Appendix EU are clear and consistent and is not possible to reconstruct them and to achieve an outcome the decision maker may view as more fair or proportionate.

The Hearing

19. At the hearing Ms Lecointe submitted that the grounds were very clear in terms of the sponsor's assertions that he did not have the required form of settled status before making the application and had not resided in accordance with any of the conditions of the Withdrawal Agreement. The appellant had never been a family member as per the EEA Regulations.

20. Mr Chohan submitted that the basis of the grounds was incorrect. Factually it stated the appellant had never resided in accordance with any conditions in Article 13 and he was an illegal entrant who had never had leave to enter or remain or any other right to reside. That was incorrect. He entered as a visitor. The application for permission to appeal also asserted a misdirection on the basis that the appellant had made no application for facilitation as a dependent family member pursuant to Article 3(2)(a) of the Directive 2004/38/EC. That was also incorrect. The appellant had contacted the Secretary of State and had been advised to make both a written application under the EEA Regulations and also an application under the EUSS. Mr Chohan referred me to the application made by the appellant under the 2016 Regulations and made on a specified EFM form. This form showed that the application was made on 28th December 2020 under the 2016 Regulations and additionally an electronic application was made under the EUSS. Mr Chohan stated that

both would have been sent to same team in Liverpool. He submitted that the grounds were misconceived.

21. Mr Chohan submitted that there appeared to be a merged decision from the respondent which considered both the EUSS and the applicant's status under the 2016 Regulations. Mr Chohan submitted that the appellant was relying on the Withdrawal Agreement and came within the auspices of its protection. The judge's decision should be left alone, particularly as the Secretary of State had got the facts wrong. The facilitation application was with the Secretary of State and it was open to the judge to consider proportionality.

22. In response Ms Lecointe accepted that the grounds were in error when stating that the appellant had no valid leave and she accepted that there was a valid application under the EEA Regulations. She conceded that it would appear that there was no error, the appellant entered a visitor from Italy to come to the UK and the applicant had made an application under the EEA Regulations.

Analysis

23. The headnote of **Batool and ors (other family members) [2022] UKUT 219 (IAC)** reads as follows:

> "(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.
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> (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."

24. I note that the appellant had, however, indeed made an application under the EEA Regulations for facilitation. That fact appeared to escape the judge. As Mr Chohan pointed out the refusal appeal to be a synthesis of a refusal under the 2016 Regulations and the EUSS.

25. Nonetheless, the judge found the evidence given by the appellant and his sponsor credible and reliable and found at [27] that the appellant had been dependent on the sponsor for his essential needs prior to coming to the UK and continues to be so.

26. Although the judge stated at [29] that the appellant's application was made on 30 December 2020 and "he *could therefore have also made an application under the EEA Regulations 2016* as an extended family member under Regulation 8 of those Regulations", I repeat as above, the appellant had in fact done so.

27. In essence the judge found that the appellant had satisfied the required *elements* under the EEA Regulations and the element that was required under the EUSS was the "additional element of the relevant document being needed" [32].

28. It was, therefore, open to the judge at [33] to find that the case "does fall within the scope of the Withdrawal Agreement as he [the appellant] had applied for the facilitation of his residence before the end of the transition period".

29. The judge found at [35(1)] that it was not a requirement "to hold the relevant document under the EUSS" to meet the test of proportionality, and that the basis of the refusal was predicated on the requirement of the appellant to make an application under the 2016 Regulations and thereby obtain the necessary document. The judge reasoned that with either application under the EUSS or the 2016 regulations, the respondent would have to examine the facts, suggesting that the requirement for a 2016 application was unnecessary, which from **Batool** can be seen to be incorrect. That, however, was not a material error on the correct facts of this case. As can be seen, an application under the 2016 Regulations had indeed been made. Although the judge appeared to fail to appreciate the application under the 2016 Regulations and proceeded on the basis of the EUSS application only, he was unwittingly correct to conclude that the appellant would fall within the personal scope of Article 10.

30. The judge proceeded to find that the refusal breached the appellant's rights under the Withdrawal Agreement having found that the elements of the EEA Regulations and a EUSS application (relationship [26] and dependency [27]), save for the documentation, would have been fulfilled if an EEA application had been made. I agree with the respondent that it is not possible to reconstruct the rules under the EUSS but because it is evident that an EEA application had been made there was no error in the judge's conclusion albeit his reasoning would have been incorrect had no such application under the EEA regulations been made.

31. When the facts in this case are properly cast, I find no material error in the judge's decision and although the judge may have laboured under a misapprehension, the appellant did fall within the personal scope of Article 10 and could pray in aid the protection of the Withdrawal Agreement. As such, I find no error of law in the judge finding the respondent's decision disproportionate and the decision shall stand. I note Ms Lecointe accepted that the grounds were based on a misunderstanding of the facts.

No anonymity direction is made.

Notice of decision

The decision of the FtT contains no material error of law and will stand. Mr Fiaz's appeal remains allowed.

Signed Helen Rimington Date 22nd November 2022
Upper Tribunal Judge Rimington