IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003189
First-tier Tribunal No: EA/13889/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 27 March 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMJAD MUHAMMAD
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr Youssefian, Counsel instructed by Lee Valley Solicitors

Heard at Field House on 23 January 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for convenience I will refer to the parties as they were designated in the First-tier Tribunal.

2. On 24 December 2020 the appellant, who is a citizen of Pakistan, submitted an application for leave under the EU Settlement Scheme, on the basis of being a dependent of his cousin ("the sponsor") who is an EEA citizen. On 6 September 2021 the application was refused. The reason given by the respondent for refusing the application was that the appellant did not have a valid family permit or residence card issued under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") as the sponsor's dependent relative.

3. The appellant appealed and his appeal came before Judge of the First-tier Tribunal Head ("the judge") who allowed the appeal. The respondent is now appealing against this decision.

Decision of the First-tier Tribunal

4. The judge found that the appellant did not have a "relevant document" and therefore could not meet the conditions of Appendix EU. This part of the decision is not challenged.

5. The judge then considered whether the decision to refuse the application was contrary to the Withdrawal Agreement. The judge directed himself that the relevant question was whether the appellant came within Article 10(3) of the Withdrawal Agreement.

6. The judge found that the appellant had applied for residence in the UK before the end of the transition period (31 December 2020) and therefore was covered by Article 10(3). The reason given by the judge for reaching this conclusion was that the appellant and sponsor completed the online application without legal assistance and made a mistake by applying under the EU Settlement Scheme rather than under the EEA Regulations. In paragraph 24 the judge stated:

> From the unchallenged evidence presented, I accept that the appellant made a mistake when selecting the application category when filling the online application

7. The judge stated (in paragraph 32) that the appellant "intended to apply" under the EEA Regulations.

8. The judge also found (in paragraph 32) that because of the appellant's intention to apply under the EEA Regulations:

> Article 18(1)(r) and (o) [of the Withdrawal Agreement] leads me to find that it was incumbent on the respondent to either liaise with the appellant in order to clarify the basis of his application or to treat it as having been made, at least in the alternative, under the 2016 Regulations

9. Having found that the appellant was covered by the EU Withdrawal Agreement the judge proceeded to consider whether he was an extended family member under the EEA Regulations and concluded that he was. The judge allowed the appeal on the basis that the respondent's decision was not in accordance with the Withdrawal Agreement .

Grounds of Appeal

10. The grounds argue that judge erred by failing to appreciate that the appellant was not within the personal scope of the Withdrawal Agreement because he had not made an application under - and his entry and residence in the UK was not being facilitated under - the EEA Regulations before 31 December 2020.

11. There are other submissions in the grounds but it is not necessary to consider them.

Submissions

12. Mr Youssefian's submissions on behalf of the appellant are set out in a helpful skeleton argument. In summary, he submits that the judge found (in a finding that was not challenged) that the application made by the appellant on 24 December 2020 was in fact under the EEA Regulations rather than under a the EU Settlement Scheme. He argues that the consequence of this unchallenged finding is that the appellant had applied for facilitation before 31 December 2020 is within the scope of Article 10(3) of the Withdrawal Agreement.

13. Mr Whitwell argued that the judge did not find that the appellant applied under the EEA Regulations; rather, he found that the appellant intended to apply under the EEA Regulations. He submitted that what matters is what the appellant did, not what he intended to do; and what he did is apply under the the EU Settlement Scheme. He submitted that there would be inconsistent with *Batool and others (other family members: EU exit)* [2022] UKUT 00219 (IAC) and *Celik (EU exit; marriage; human rights)* [2022] UKUT 00220 (IAC) to find that the appellant fell within the scope of the Withdrawal Agreement because he had intended to make an application under the EEA Regulations before 31 December 2020.

Reliance on an unreported decision

14. Mr Youssefian made an application, which was opposed by Mr Whitwell, for permission to cite an unreported case. I refused permission on the basis that there was no need for the case to be cited as Mr Youssefian could adopt and advance the reasoning in the decision as part of his submissions.

Analysis

15. As the appellant is not a "family member" of the sponsor as defined in Article 9 of the Withdrawal Agreement the only way he could potentially come within the personal scope of the Withdrawal Agreement is by operation of Articles 10(2) and 10(3), which provide:

> 2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.
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> 3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of 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 its national legislation thereafter.

16. The central question before the judge was whether the appellant had applied for facilitation of his entry and residence before 31 December 2020, as the making of such an application would potentially bring him within the scope of the Withdrawal Agreement by operation of Article 10(3).

17. An application for facilitation of entry and residence is one that is validly made in accordance with regulation 21 of the EEA Regulations. This is explained in paragraph 53 of *Celik*, where it is stated:

> If the appellant had applied for facilitation of entry and residence before the end of the transition period, Article 10.3 would have brought him within the scope of that Article, provided that such residence was being facilitated by the respondent "in accordance with … national legislation thereafter". This is not, however, the position. For an application to have been validly made in this regard, it needed to have been made in accordance with regulation 21 of the 2016 Regulations. That required an application to be submitted online, using the relevant pages of www.gov.uk, by post or in person, using the relevant application form specified by the respondent; and accompanied by the applicable fee.

18. Mr Youssefian argued that the unchallenged finding of the judge was that the appellant applied under the EEA Regulations. I do not accept that this is what the judge actually found. It is apparent from paragraphs 24 and 32 that the judge found that the appellant intended to apply under the EEA Regulations but by mistake applied under the EU Settlement Scheme; not that he in fact applied under the EEA Regulations. Mr Youssefian therefore cannot rely on the findings of the judge to support his contention that the appellant applied under the EEA Regulations.

19. It is entirely conceivable that the respondent could make a decision under the EU Settlement Scheme even though an applicant has in fact made an application in accordance with the EEA Regulations. In those circumstances the applicant would have made an application for facilitation of entry and residence even though the respondent had not treated it as such. Whether or not such a person has made an application in accordance with the EEA Regulations is a question of fact, which would need to be determined by examining the content of the application form and any accompanying correspondence.

20. In this case, the appellant did not provide the First-tier Tribunal (or the Upper Tribunal) with a copy of his application. There is therefore no evidential basis to justify a finding that the appellant's application, which the respondent understood to be an application under the EU Settlement Scheme, was in fact an application made in accordance with the EEA Regulations.

21. The wording of Article 10(3) makes it clear that to fall within its scope a person must have applied for facilitation of entry and residence before 31 December 2020. The Withdrawal Agreement does not provide any exceptions to this. For example, there is no provision to the effect that if person has a good reason for not applying for facilitation and residence before 31 December 2020 further time should be given. In this case, the judge's findings of fact indicate that the appellant had a good reason, which was that he intended to apply under the EEA Regulations and applied under the EU Settlement Scheme by mistake. The difficulty for the appellant is that his reason for not making a valid application (and his intention to make one) is irrelevant. As submitted by Mr Whitwell, what matters is what he actually did, not what he intended to do. As an application for facilitation of entry and residence was not made before 31 December 2020 the appellant cannot succeed. I therefore set aside the decision of the First-tier Tribunal and remake the decision by dismissing the appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside. I remake the decision by dismissing the appeal.

D. Sheridan
Judge of the Upper Tribunal
Immigration and Asylum Chamber
27 January 2023