IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003752
First-tier Tribunal No:
EA/16462/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 13 February 2023

Before

UPPER TRIBUNAL JUDGE OWENS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMAROLDO SHEHU
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Melvin, Senior Presenting Officer
For the Respondent: Mr Malik, K.C leading Counsel and Mr Mavrontonis, Counsel, instructed by Waterstone Legal Solicitors

Heard at Field House on 2 December 2022

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of Judge of the First-tier Tribunal Wyman dated 8 July 2022, allowing Mr Shehu's appeal against a decision to refuse him pre-settled status under the EU Settlement Scheme ("EUSS").

2. The factual matrix is not in dispute. In summary, Mr Shehu is a citizen of Albania who began cohabiting with an EEA national, Ms Kasa, a national of Greece, ("the sponsor") in September 2018. He married the sponsor on 14 September 2021. Mr Shehu and sponsor had intended to marry sooner (before the end of 2020) but because of the Covid-19 pandemic did not manage to do so. Mr Shehu did

not apply for a residence card under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") prior to the revocation of the EEA Regulations on 31 December 2020. He applied for pre-settled status on 13 October 2021.

3. On 5 December 2021 the Secretary of State refused Mr Shehu's application for pre-settled status under the EUSS on the basis that (i) he was not married prior to 31 December 2020; and (ii) he could not succeed as a durable partner because he had not been issued with a residence card or family permit under the EEA Regulations.

4. The judge found that the couple were in a durable relationship because they had been living together for a period of two years prior to 31 December 2020 and allowed the appeal.

Documentation

5. I had before me the original decision and grounds of appeal as well as skeleton arguments prepared by both parties and a bundle of authorities.

Grounds of appeal

6. The Secretary of State asserts that the judge made a material misdirection in law by failing to properly indicate the basis on which the appeal was allowed. The judge did not state whether the appeal was allowed in accordance with Appendix EU or pursuant to the Withdrawal Agreement.

7. The Secretary of State also asserts that the judge failed to address the requirements of Appendix EU when allowing the appeal. It is said that the appeal manifestly could not have succeeded on this ground because Mr Shehu did not possess the "relevant document" and that the judge overlooked this requirement when allowing the appeal.

8. It is further submitted that it is immaterial whether Mr Shehu was in fact in a durable relationship with the sponsor at the relevant date because Mr Shehu's residence had not been "facilitated" prior to 31 December 2020.

9. The Secretary of State's grounds submit that the judge erred by failing to appreciate that the Withdrawal Agreement was not applicable to a person in Mr Shehu's circumstances. He does not fall under the personal scope of the Withdrawal Agreement because he had not "applied for facilitation" pursuant to Article 10 (3) of the Withdrawal Agreement.

10. Mr Melvin's submission is that the judge made a material error of law. The decision should be set aside and remade by dismissing the appeal.

Mr Shehu's case

11. Mr Malik expanded on his skeleton argument in submissions. In summary, his argument is that, whether Mr Shehu falls within the personal scope of the Withdrawal Agreement turns on the meaning of the wording "was facilitated" at Article 10 (2). He submits that the meaning of "was facilitated" was not decided by the Presidential panel in Celik (EU exit; marriage; human rights) [2022] UKUT 00220. It should be interpreted in accordance with the Grand Chamber authority of Secretary of State v Rahman [2021] EUECJ C-83/11 [2013] QB 249. There

should be a broad interpretation which should be read as "conferring an advantage". The wording "was facilitated" should not be read as "having acquired the right to reside" nor should it be read as "having made an application for the right to reside". A person such as Mr Shehu who was as a matter of fact in a durable relationship with an EEA national prior to 31 December 2020 falls within the personal scope of Article 10(2) or Article 10(3). This was how the appeal was put to the judge and the judge properly allowed the appeal under the Withdrawal Agreement. There is no material error of law in the decision.

Discussion

12. Regulation 8 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 regulations") sets out the grounds on which a person may appeal to the First-tier Tribunal against a relevant decision made under the EUSS. The relevant ground in this appeal was that "the decision breaches any right which that person has under Chapter 1 or Article 24(2) or 25(2) of the Chapter 2 of Title II of Part 2 of the Withdrawal Agreement".

13. It was not argued before the judge that the appeal could succeed on the basis that the decision was not in accordance with the residence scheme immigration rules which was the other alternative ground of appeal available.

14. Article 13(3) of the Withdrawal Agreement, which is in Chapter 1 provides:

> "Family members who are neither Union citizens nor United Kingdom nationals shall have the right to reside in the host state under Article 21 TFEU and as set out in Article 6(2), Article 7(2), Article 12(2) or (3), Article 13(2), Article 14, Article 16(2). Article 17(3) or (4) or Article 18 of Directive 2004/38/EC, subject to the limitations and conditions set out in those provisions.

15. Article 3(2) of the Directive 2004/38/EC states:

> "2.Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host member state shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (b) the partner with whom the Union citizen has a durable relationship with, duly attested.
>
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people"

16. The phrase "family member" is defined in Article 9 of the Withdrawal Agreement by reference to the persons "who fall within the personal scope provided for in Article 10".

17. Article 10(2) of the Withdrawal Agreement in turn provides:

> "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 Member state thereafter".

18. Article 10(3) provides:

> "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 end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter.

19. It is common ground that Mr Shehu fell within the scope of Article 3(2)(b) of Directive 2004/38/EC before 31 December 2020 because he was in a "durable relationship" with Mrs Saka. By that date they had been living together as a couple for two years.

20. Pursuant to Article 3(2) of Directive 2004/38/EC the United Kingdom had an obligation to facilitate entry and residence of Mr Shehu. This is uncontroversial.

21. Mr Malik's starting point is that the meaning of the wording "shall facilitate" was considered by the Grand Chamber in Secretary of State for the Home Department v Rahman [2012] EUECJ C-83/11 [2013] QB 249.

22. At [21] the Grand Chamber held:

> [although]"Article 3(2) of Directive 2004/38/EC does not oblige the Member States to accord a right of entry and residence to persons who are family members, in the broad sense, dependent on a Union citizen the fact remains as is clear from the use of the words "shall facilitate" in Article 3(2) that that provision imposes an obligation on the Member state to confer a certain advantage compared with applications for entry and residence of other nationals of third states on applications submitted by person who have a relationship of particular dependency with the Union Citizen".

23. At [22] the Grand Chamber added that, in order to meet this obligation, the Member State "shall make it possible for persons envisaged in the first subparagraph of Article 3(2) to obtain a decision on their application that is founded on an extensive examination of their personal circumstances and in the event of refusal is justified by reasons".

24. Mr Malik's first submission is that the wording "shall facilitate" has a "broad meaning" in accordance with Rahman which goes further than regularising a person's stay by granting a residence permit. His focus is on the words "make it possible".

25. I have considered the wording of Rahman above and I find that the "certain advantage" referred to at [21] is in the context of applications being made. There is a comparison between the applications of persons who have a dependence on a union citizen and the applications of other third country nationals.

26. At [22] of Rahman the "certain advantage" is in relation to obtaining a decision on the application that is founded on an extensive examination of their personal

circumstances and to have a decision justified by reasons. Again, the focus is on having an application properly considered and the decision justified. Inherent in this "certain advantage" is the fact of making an application. Further, it is not submitted that Mr Shehu did not have the possibility of making an application prior to 31 December 2020. This option was open to him.

27. There is nothing in Rahman that suggests that the "certain advantage" arises from the mere presence of a person living in a durable relationship with an EEA national with the possibility of making an application to obtain a residence card. It is trite law that an extended family member did not have a right to reside by direct effect. The "advantage" they had over other third country nationals was to have their application considered by way of an extensive examination. It was in the discretion of the Secretary of State to decide whether to confer the right to reside in the form of a relevant document after an extensive examination of all of the relevant factors. I am not satisfied that Rahman assists Mr Shehu because the discussion in relation to "shall facilitate" in Rahman is in the context of making an application.

28. This is confirmed in Aibangbee [2019] EWCA Civ 339, which at [36] quotes with approval [15] to [20] of Macastena v SSHD [2018] EWCA Civ 1558 where it is said at [20]:

> "Likewise in the present case there was, in my judgement, no duty on the Secretary of State to take into account, when considering whether Mr Macastena should be deported, the fact that he could have applied for a residence card pursuant to regulation 17(4) during his durable relationship with Ms L and would have been entitled to an extensive examination of his personal circumstances which might have resulted in the issue of a residence card to him. Not only is the definition of extended family member in regulation 8(5) expressed in the present tense, so also is regulation 17(4)" (my emphasis)

29. Mr Malik argued that the wording of Article 10(2) of the Withdrawal Agreement also has a broad meaning. He submitted that the Secretary of State is seeking to re-write the provision by reading the words "whose residence was facilitated by the host state in accordance with its national legislation" as "who were granted residence rights by the host state in accordance with its national legislation". He submits that the Withdrawal Agreement is a carefully drafted instrument. Had the parties to the agreement wanted to restrict the residence rights to those who were granted residence rights or issued with residence documents prior to 31 December 2020 this would have been expressly stated. If that was the intention, one would have not have expected the drafters to use a wording as broad as "was facilitated "in Article 10 (2). He submits that it is inconceivable that the parties intended to give the wording "was facilitated" a meaning that was different from the meaning given to it for the purpose of Article 3(2) of the Directive 2004/38/EC.

30. I am not in agreement. The use of the wording "was facilitated" at Article 10 (2) and indeed the wording "to have applied for facilitation of entry and residence" at Article 10(3) is used precisely because "shall facilitate" is the wording of Article 3(2) of Directive 2004/38/EC. Article 3(2)(b) refers explicitly to the obligation being to "undertake an extensive examination of the personal circumstances and …justify any denial of entry or residence to these people". It

is not possible for the Member State to undertake an extensive examination without the person asking for their entry or residence to be facilitated by making some kind of assertion of that the obligation applies to them which logically would be by way of an application which is the point made in Macastena.

31. This is also apparent from the wording of Article 10(2) and Article 10(3) of the Withdrawal Agreement which draws a distinction between those whose residence "was facilitated" and those "who have applied for facilitation of entry and residence".

32. The different wording of Article 10(1)(e) and Articles 10(2) and 10(3) of the Withdrawal Agreement reflect the different status of "direct family members" as defined in point 2 of Article 2 of Directive 2004/38/EC who had a substantive right to reside and whose residence documentation was declaratory of their rights as opposed to confirmatory, and "other family members" at Article 3(2) who did not have substantive rights by way of direct effect but who had a procedural advantage against other third country nationals because they had a specific relationship with an EU national. The issuing of the documentation is the procedural mechanism which confers the right of residence and confirms the right to reside. The purpose of the Withdrawal Agreement is to protect existing rights, not to create new ones after the UK has left the EU.

33. Mr Mavrontonis submitted in front of the First-tier Tribunal that it was perverse to read the Withdrawal Agreement any other way because it would have the effect of preventing individuals in a durable relationship who later marry their partners from applying to remain with their partners in the UK. He did not submit that the EU Regulations were inconsistent with Article 3(2) of the Directive. The judge characterised this submission at [34] of her decision stating; "If the respondent's position is correct, then a sponsor could never marry a non-EEU spouse, unless that marriage took place before 31 December 2020. This would be a legal perversity."

34. This is manifestly not the case. There was nothing to prevent an EEA sponsor marrying a non-EEA national after 11pm on 31 December 2020. Indeed, Mr Shehu did get married to his EEA national partner in the UK after this date. Further a non-EEA national who marries an EEA national after this date is able to make an application to join their partner in the UK in the same way as any other individual who is not a British citizen. They will need to meet the requirements of the immigration rules which are more stringent because individuals with this type of connection to an EEA national no longer benefit from EU rights of free movement.

35. Finally, Mr Malik argued that the Presidential panel in Celik did not consider the meaning of the wording "facilitate" because the panel was considering a different issue altogether. In Mr Celik's case, it was agreed by all parties that he was not in a durable relationship by 31 December 2020 and did not fall within the personal scope of the Withdrawal Agreement, the issue was whether he could rely on the concepts of "proportionality" and "fairness" to assist him. The panel did not look specifically at the issue of the meaning of the wording "facilitate" and did not refer to the decision in Rahman at all. Mr Malik argues that since Mr Celik was not in a durable relationship there was no obligation on the UK to "facilitate" his residence. Mr Shehu is in a different category because he was in a durable relationship and therefore the obligation arises.

36. Mr Malik submits that headnote 1 of Celik does not undermine his argument.

37. It states as follows:

> (1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P's entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.
>
> (2) Where P has no such substantive right, P 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"). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.

38. Mr Melvin submitted that the presidential panel covered this issue in detail. The headnote applies to Mr Shehu.

39. On careful reading of the headnote itself there is no distinction between a person who was not accepted to be in a durable relationship prior to 31 December 2020 and a person who is. The headnote refers to "A person (P) in a durable relationship in the United Kingdom". I am satisfied that Mr Shehu falls directly into this category of person because he was found to be in a durable relationship by the judge. In order to come under the scope of the Withdrawal Agreement, he needed to demonstrate that his "residence was facilitated" … before the end of the transition period in accordance with Article 10(2) or that he had "applied for facilitation of entry or residence" before the end of the transition period in accordance with 10(3). In practice this means that he needed to demonstrate that he had made an application for a residence document or that he had been granted a residence document. It is not possible to read into headnote (1) in Celik the concept of having a "possibility" of applying for a residence permit without taking any action to do so.

40. Although the Tribunal in Celik did not address the meaning of "shall facilitate", it did discuss the issue of "facilitation" at [52] and [53] as follows:

> 52. There can be no doubt that the appellant's residence in the United Kingdom was not facilitated by the respondent before 11pm on 31 December 2020. It was not enough that the appellant may, by that time, have been in a durable relationship with the person whom he married in 2021. Unlike spouses of EU citizens, extended family members enjoyed no right, as such, of residence under the EU free movement legislation. The rights of extended family members arose only upon their residence being facilitated by the respondent, as evidenced by the issue of a residence permit, registration certificate or a residence card: regulation 7(3) and regulation 7(5) of the 2016 Regulations.
>
> 53. 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.

41. Mr Shehu had no substantive rights under the Withdrawal Agreement by virtue of his mere presence in the UK and his durable relationship with his EEA partner. His "certain advantage" was his entitlement to make an application to the Secretary of State to carry out an extensive examination of his circumstances and for her to make a decision whether to exercise her discretion to grant him a residence document and, if not, to justify her decision. He did not utilise his advantage and offers no explanation for his failure to apply as a durable partner under Regulation 8 of the EEA Regulations 2016 which option was open to him up to 31 December 2020. Had he submitted his application before that date he would have fallen under the personal scope of Article 10 (3) and he would have acquired protection under the Withdrawal Agreement.

42. Mr Malik also argued that Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC) applied to a completely different scenario as it was concerned with applications for entry clearance. Mr Melvin submitted that Batool is on point because it is concerned with "other family members" and a person in a durable relationship is an "other family member" in the same category as those family members in Batool who were third country nationals dependent on their EEA sponsor. I agree with Mr Melvin. Both categories of third country nationals fall to be dealt with under Article 3(2) of Directive 2004/38/EC.

43. The "possibility" of Mr Shehu obtaining residence rights, were he to make the relevant application, does not mean that his residence "was facilitated" by the host state in accordance with its national legislation before the end of the transition period. The wording "was facilitated" at Article 10(2) of the Withdrawal Agreement means that the individual had been granted a residence permit, registration certificate or residence card conferring a right of residence. The wording "to have applied for facilitation of entry and residence" at Article 10(3) of the Withdrawal Agreement means that an individual must have applied to the Secretary of State to undertake an extensive examination of their circumstances with a view to obtaining a document conferring a right of residence.

44. The judge has misdirected herself in law by allowing Mr Shehu's appeal. He could neither satisfy Appendix EUSS nor could he demonstrate that he fell within the personal scope of the Withdrawal Agreement because his entry was not "facilitated" by the host state in accordance with its national legislation before the end of the transition period and he had not "applied for facilitation of entry and residence" to the host state in accordance with its national legislation before the end of the transition period.

45. Accordingly, the decision of the First-tier Tribunal is set aside.

Notice of decision

46. I remake the decision of the First-tier Tribunal by dismissing the appellant's appeal against the respondent's decision to refuse his application for pre-settled status.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 February 2023