IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002533

First-tier Tribunal No: EU/54674/2023
LE/01189/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 21 January 2025

Before

UPPER TRIBUNAL JUDGE RASTOGI
DEPUTY UPPER TRIBUNAL JUDGE RIPLEY

Between

Santosh Paudel
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr S. Karim, Counsel instructed by Sarwar Lawford Solicitors
For the Respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

Heard at Field House on 16 December 2024

DECISION AND REASONS

1. The appellant appeals, with permission, the decision of First-tier Tribunal Judge Thorne ("the judge") who dismissed the appellant's appeal by way of a decision dated 13 April 2024 ("the decision"). That appeal was against the respondent's refusal of his application to the European Union Settlement Scheme as contained within Appendix EU of the Immigration Rules ("EUSS"). The respondent's decision was dated 25 July 2023.

Background

2. There is an unusual procedural background and an important factual background to this appeal so we set out the relevant background in a little more detail than might otherwise be the case.

3. The appellant is a Nepalese national who has been in the United Kingdom ("UK") since 2009. He married a French national and on the basis of that marriage he was issued with a residence card under the Immigration (European Economic Area) Regulations 2016, valid from 12 March 2013 to 12 March 2018. At some stage prior to the expiry of that residence card, the appellant's marriage broke down. On 14 January 2021 he applied for leave to remain under the EUSS on the basis of his retained rights of residence. The application was refused on the basis that the appellant had submitted, with his application, an identification document for his wife which had been reported lost or stolen on 12 September 2016, and therefore it was considered invalid. Accordingly, the appellant was unable to satisfy the respondent that he had been the spouse of an EEA national. The respondent also set out a number of occasions when the respondent endeavoured to contact the appellant to ask for the specified evidence but noted no further evidence was received. Finally, the respondent noted the appellant did not appear to meet any of the other eligibility requirements under Appendix EU. Accordingly, the application was refused with reference to paragraphs EU6, EU11 and EU14 of Appendix EU.

4. The hearing before the judge took place on 26 March 2024. The appellant was represented at the hearing. The decision was dated 13 April 2024.

5. At [3] the judge noted that the appellant claimed a retained right to reside as the "ex-husband" of an EEA national. The judge noted that the appellant had applied for an administrative review of the respondent's decision but that the decision had been maintained [9]. At [11] the judge listed the documents with which he had been provided and that included the marriage certificate dated 14 December 2009; some employment records relating to the wife from 2012; a certificate of entitlement issued by the Family Court dated 7 March 2024 "showing that the marriage had broken down irretrievably" and a tenancy agreement in joint names dated 2 January 2013.

6. On the issue of the 'invalid' identification document, the judge noted the appellant's oral evidence at [15] that he could not obtain any other documents from his wife as she was not co-operating with him. The judge also noted the appellant's evidence that he and his wife were now living apart and were in the process of obtaining a divorce, but they had lived as man and wife for a period of 5 years.

7. Nevertheless, at [17]-[20] the judge said:

> "17. For reasons given below I am not satisfied that A has proved on the balance of probabilities that he qualifies under the EUSS. Simply put, A has not provided all of the evidence requested which is necessary for the Appellant to show he can meet the definition of a 'family member who has retained the right to residence'.
>
> 18. In particular I accept R's evidence that the ID relied upon by A as proof of the EEA citizen's identity and nationality is not valid because this ID card 070445201750 is recorded as being invalid by the French authorities since 12/09/2016 when it was reported lost/stolen. A has failed to provide an alternative valid proof of S's identity.
>
> 19. Moreover, A has failed to submit adequate evidence to establish that prior to the initiation of the proceedings for the termination of the marriage,

> it had lasted for at least three years and S&A had been resident for a continuous qualifying period in the UK of at least one year during its duration. The various limited copies of pay slips and utility bills and a one-year tenancy agreement are simply inadequate.
>
> 20. In addition, there is inadequate evidence to establish that the continued right of residence in the UK of A is warranted by particularly difficult circumstances."

8. The appellant appealed the decision. With his original application for permission, he appended a document entitled "Grounds of Reconsideration" dated 30 May 2024 which essentially amounted to a challenge to the respondent's decision on Wednesbury grounds. The document asserted that the appellant's divorce was finalised on 10 May 2024.

9. Permission was refused by the First-tier Tribunal but renewed to the Upper Tribunal where it came before Deputy Upper Tribunal Judge Saini on 20 June 2024. DUTJ Saini granted permission as follows:

> "4. Although the grounds seek to impugn the decision on Wednesbury grounds, I grant permission moreover due to the compelling facts relied on by the representatives seeking permission which may arguably meet the EUSS Guidance in theory, but which neither party appears to have drawn to the judge's attention. The Guidance, entitled, "EU Settlement Scheme: EU, other EEA and Swiss nationals and their family members" Version 23.0, published 4 April 2024 at page 63 under the heading "Alternative evidence of identity and nationality or of entitlement to apply from outside the UK" states as follows:
>
> > "… Likewise, there may be reasons why a non-EEA citizen applicant without a documented right of permanent residence cannot provide the required evidence of the identity and nationality of their EEA citizen (or qualifying British citizen) family member in the form (which can be a copy and not the original document, unless you have reasonable doubt as to the authenticity of the copy submitted) of a valid passport or (for an EEA citizen) a valid national identity card. You may accept alternative evidence of identity or nationality where the applicant cannot obtain or produce the required document due to circumstances beyond their control or due to compelling practical or compassionate reasons".
>
> 5. Given that the facts of the application, that the inability to supply the identity of the EEA national is said to be a matter beyond the control of the appellant (which would appear to be supported by a Final Order from the Family Court dated 10 May 2024 accompanying the application seeking permission to appeal indicating that the Appellant's divorce is now finalised), and bearing in mind that an error of law may be found to have occurred in circumstances where material evidence, through no fault of the FtT, was not considered (see *E & R v Secretary of State for the Home Department* [2004] EWCA Civ 49) and bearing in mind this guidance was not brought to the attention of the Tribunal, and notwithstanding that this is not a *Robinson* obvious scenario; I grant permission to appeal so that this point may be considered in the interests of justice".

10. Thus, whilst the DUTJ made reference to the basis on which he thought permission should be granted, he did not limit the grant.

11. The appellant amended his "Grounds of Reconsideration" on 21 November 2024 to take into account the grant decision and the documents and the caselaw to which DUTJ Saini referred. At paragraph 14 the appellant said that the judge failed to consider the case as a whole; made an error of law and of fact. At [16] the appellant stated that he was unaware of the fact the identification document was lost or stolen till after the date of the respondent's decision. At [19]-[21] he maintained an ability to meet the requirements of the EUSS on grounds of a retained right of residence. At [28] the appellant argues there is no public interest in removing him and at [29] that he tried his best to regularise his status. He maintained at [30] that there has been a clear error of fact and of law although he does not particularise either therein. The remaining paragraphs to which we have not referred either re-state the factual position of the case; set out the Guidance and caselaw or make assertions about the respondent.

12. The error of law hearing was listed before us. We were provided with a 212 page bundle. We noted that the bundle contained material which had not been before the First-tier Tribunal ("FtT") and was not accompanied by a Rule 15(2A) application to admit. It also failed to comply with the standard directions as it did not contain the bundles which were before the FtT. Mr Karim said that he believed all documents before the judge were contained within the bundle (see further below). Mr Whitwell consented to the Tribunal obtaining the respondent's bundle from the FtT's case management system. The respondent had not filed at Rule 24 Notice. At the outset of the hearing, we raised the non-compliance issues and we sought to clarify the issues before hearing submissions on behalf of both parties. At the end of the hearing we reserved our decision.

The Legal Framework

13. The main part of the Rules in issue at the appeal before the judge was whether or not the appellant was able to meet the definition of 'family member who has retained a right of residence'. That definition appears in Annex 1 of Appendix EU as follows:

> "a person who has satisfied the Secretary of State, including by the required evidence of family relationship, that the requirements set out in one of sub-paragraphs (a) to (e) below are met and that since satisfying those requirements the required continuity of residence has been maintained:
>
> (d) the applicant ("A") is an EEA citizen (in accordance with sub-paragraph (a) of that entry in this table) or non-EEA citizen who:
> (i) ceased to be, as the case may be, a family member of a relevant EEA citizen (or of a qualifying British citizen), or a joining family member of a relevant sponsor, on the termination of the marriage or civil partnership of that relevant EEA citizen (or, as the case may be, of that qualifying British citizen or of that relevant sponsor); for the purposes of this provision, where, after the initiation of the proceedings for that termination, that relevant EEA citizen ceased to be a relevant EEA citizen (or, as the case may be, that qualifying British citizen ceased to be a qualifying British citizen, or that relevant sponsor ceased to be a relevant sponsor), they will be deemed to have remained a relevant EEA citizen (or, as the case may be, a qualifying British citizen or a relevant sponsor) until that termination; and

(ii) was resident in the UK at the date of the termination of the marriage or civil partnership; and
(iii) (where A is a non-EEA citizen) one of the following applies:
(aa) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership, the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had been resident for a continuous qualifying period in the UK of at least one year during its duration; or
.....

(dd) the continued right of residence in the UK of A is warranted by particularly difficult circumstances, such as where A or another family member has been a victim of domestic violence or abuse whilst the marriage or civil partnership was subsisting; or
....."

Discussion and Conclusions

14. Before addressing the substantive issues in the appeal, we will make some comments on the procedural aspects of this appeal.

15. The grounds as originally pleaded or as renewed, and then as amended, do not identify or particularise what error of law the judge is said to have made. The judge who refused permission in the FtT noted that the grounds simply rehearse the arguments presented to the judge without identifying an error of law. DUTJ Saini did not identify anything within the renewal grounds which he expressly found arguable. Even the amended grounds, armed with the grant decision, do not expressly identify an error of law. We return to the grant decision below.

16. The standard of preparation of the bundle patently falls short for the reasons already given. We cannot agree with Mr Karim that the hearing bundle contains all documents before the judge. We say that because, for example, the Family Court document the judge referred to at [11] (see [5] above) is not contained within the hearing bundle.

17. Although DUTJ Saini made reference to the respondent's Guidance as being version 23 dated 4 April 2024, the appellant included the version dated 11 June 2024 within the hearing bundle. Accordingly, we do not have the document to which either the grant decision or the amended grounds of appeal referred.

18. It was accepted that the Guidance was not before the judge. The hearing bundle also contains other material not before the judge (for example the divorce certificate dated 10 May 2024; the appellant's witness statement dated 26 November 2024). Applying Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, such material can only be admitted on application. There is no such application, and no oral application was made to admit those documents either.

19. The above, however, was not a factor considered (it seems) at the stage at which permission was granted. We had some difficulty following the rationale of the grant decision. It was predicated on the basis of the Guidance, with the acknowledgement that the Guidance had not been drawn to the attention of the judge, but it did not address why that meant there was an arguable error. It set out the Guidance as to discretion which could be exercised to accept alternative evidence of identity and nationality, yet did not acknowledge that such guidance

is for the respondent and is not binding upon the judge. It referred to "material evidence not being considered through no fault of the FtT" but did not specify what the material evidence was. It is unclear whether the DUTJ meant the divorce certificate (which could not have been before the judge as it post-dates both the date of hearing and the date of the decision) or the Guidance (the version to which the DUTJ referred post-dated the hearing but pre-dated the date of decision). Finally, it said that the scenario outlined was not *Robinson* obvious but did not say in what way it related to the grounds of appeal, so it is difficult to determine how it can be a basis on which permission can be granted. It appears to us that the DUTJ was exercising a degree of latitude when deciding to grant permission, in order perhaps to allow the appellant the opportunity to ventilate the appeal on this and maybe other grounds.

20. Before returning to some of these matters, we also remark upon relevant aspects of the factual matrix and their interplay with the legal framework. Firstly, at all material times including the date of the judge's decision, the appellant was still legally married. It was not argued that the divorce had been finalised. That much was clear from [15] of the judge's decision. On that basis, notwithstanding any other issue raised in the appeal before the judge, it seems difficult, if not impossible, to imagine how the appellant could ever have successfully argued a retained right of residence. The definition set out at [13] above is clear, the marriage must have terminated.

21. Therefore, we started the hearing somewhat perplexed about what grounds we were permitted to consider and what issues the appeal raised.

22. We raised our concerns at the outset of the hearing. On the issue of whether or not the appellant could ever show a retained right of residence, as we understand Mr Karim's response, he argued that the letter accompanying the appellant's original application was ambivalent as to the basis on which the appellant applied to the EUSS. He accepted there was reference therein to retained rights, but he also made reference to having had 5 years leave already and claiming settled status as a result. Accordingly, he submitted the appellant may have applied on a dual basis ("the dual approach").

23. The problem with that submission is that the covering letter is not in the hearing bundle. In any event, there is no evidence that the basis on which the appellant's case was put to the judge was both on grounds of retained rights and, separately, 5 years continuous residence. The judge identified the issue at [3] and this was not challenged in the grounds, notwithstanding what Mr Karim tried to argue before us. The grounds of appeal before the FtT say in terms at paragraph 1 (page 31 of the hearing bundle) that the appellant applied on the basis of his retained right of residence. The grounds of appeal to the Upper Tribunal do not raise continuous residence alone (outside of a retained right to reside) and permission was not granted on this basis. For that reason, we do not find we have jurisdiction to deal with it.

24. Returning to the retained right of residence issue, whatever the whys and wherefores might be, if the appellant could never have succeeded to show a retained right of residence before the judge, then his appeal was bound to fail, and any errors are likely to be immaterial.

25. Leaving aside the fact that the appellant and the sponsor were still married, our preliminary view was that the appellant could not meet the requirements for

leave to remain on the basis of a retained right of residence in light of the judge's findings at [19] and [20] (see [7] above). The effect of these findings are that even if the appellant was able to evidence his relationship to his sponsor or the respondent accepted the relationship, he could not meet the remaining requirements of the EUSS as he needed to establish the retained right. The judge's findings at [18] and [19] are not challenged in the grounds. For this reason, our preliminary view was that even if there is an error in the way the judge dealt with the identity document issue (we deal with this below), it cannot be a material error, in light of these alternative findings, and the undisputed background that the marriage was still subsisting.

26. We raised this with the parties. In response, Mr Karim relied firstly on the same dual approach argument (see [22] above) which we have rejected. Secondly, he argued that the judge made a mistake of fact as to the length of the marriage. He argued that notwithstanding what the judge said at [19] about the appellant's marriage not lasting at least 3 years, the evidence before the judge clearly showed it was contracted in 2009 and was still in existence (as a matter of law not substance) at the date of the hearing. Whilst the grounds did not argue this point in those terms, we are prepared to accept that in continuing to assert in the grounds that he is able to meet the requirements of the EUSS on the basis of a retained right of residence, he was contending that the judge's findings to the contrary were in error and, of course, the grant was not limited.

27. We are satisfied that the judge did fail to take into account material evidence here and made a mistake of fact, as the marriage certificate which the judge recorded as being available to him [11] clearly stated the date of marriage and the judge acknowledged the divorce was not yet finalised [15]. It follows that the judge erred in his conclusion that the appellant had not shown it to have lasted at least 3 years.

28. However, we return to the issue of materiality. The above factor alone is not enough. The appellant would still have to show that he lived with his wife in the United Kingdom for at least a year throughout the marriage (see [13] above). The judge dealt with this at [19]; he did not find the appellant able to prove that and gave his reasons for so finding. The grounds do not specifically challenge that finding but for the same reasons as above, we construe the grounds as just about wide enough to argue it. However, we reject this challenge.

29. We say that because it is well-established that it is for the judge to decide upon the weight to be attached to the evidence. The appellant has not addressed the way in which the judge erred in this respect. The grounds do not address what evidence (if any) was before the judge to which he failed to have regard or failed to attach sufficient weight, and which was capable of showing residence together in the UK for a least a year. It is clear the judge was aware of the evidence which was available to him as he referred to it and said it was not enough. We are not satisfied the judge fell into error here.

30. Given what we say about materiality, we do not find it strictly necessary to deal with whether or not the judge erred at [18] as regards the identity document issue. However, we do so for completeness. The judge was plainly aware of the appellant's explanation. That did not change the fact that a valid document had not been submitted by the appellant. In our judgement, the appellant has fallen short of showing either that it was open to the judge to allow his appeal notwithstanding an inability to meet all of the requirements of the EUSS when it

comes to a retained right of residence, or that the respondent was wrong in the first place not to have exercised discretion to accept an alternative form of evidence to prove the EEA national's identity or nationality. There is no evidence before us that the respondent was asked to exercise discretion on this issue. In fact, the appellant's case before the judge was that he did not know the document was considered invalid till he received the refusal letter. The respondent set out in that letter the attempts made to contact the appellant prior to refusal to see if he could address the issue. It is hard to see what else the respondent could do in these circumstances.

31. We have considered the grant decision and what is said therein. We do not find the submissions made on the appellant's behalf to have advanced his case on this issue. We are not satisfied that the judge erred in law even if the Guidance was before him (the operative Guidance of course being that in force at the date of the respondent's decision and which has never been filed within this appeal). The Guidance represents instructions from the respondent to assist staff to make decisions. A failure to follow it may amount to a public law challenge to the respondent or it may result in a decision which is arguably a breach of the Withdrawal Agreement in EUSS type cases. But, in our judgement, this cannot apply in a situation like the one in this appeal, where the respondent has never been invited to depart from the usual procedure and exercise discretion within the Guidance and where the respondent gave the appellant opportunities to remedy the lack of suitable evidence to prove an essential requirement of the Rules. Furthermore of course, reliance on the Guidance did not form part of the appellant's case before the judge.

32. Finally we turn to what we think were really the thrust of Mr Karim' submissions. They were that the appellant had been granted a 5 year residence card (which Mr Karim described as a relevant document), he has been here ever since and that is enough. This returns to the dual approach raised at [22] above and we adopt what we have said at [23] about that here.

33. Even if we are wrong about that, we note of course that a residence card of itself does not confer a right of residence it simply evidences that one existed at the date on which it was issued. The appellant has fallen short, by some margin, of satisfying us that there is any basis to conclude that the judge erred in law in failing to consider whether or how the appellant was entitled to settled status on the basis solely of his residence in the UK.

34. For all the above reasons, we do not find the appellant able to show that the judge has made an error of law, and certainly not one that was material to the outcome.

Notice of Decision

1. The decision of the FtT does not contain an error on a point of law so the decision stands.

SJ Rastogi
Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 January 2025