IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003628

First-tier Tribunal No:
EU/55034/2023
LE/01735/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 4 February 2025

Before

UPPER TRIBUNAL JUDGE KAMARA
UPPER TRIBUNAL JUDGE KHAN

Between

GC
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr R Khubber, counsel instructed by Fragomen LLP
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

Heard at Field House on 27 January 2025

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. This decision should be read in conjunction with the decision issued on 14 November 2024 in which the Upper Tribunal found that the First-tier Tribunal had materially erred in law. The First-tier Tribunal decision was set aside with no preserved findings and the appellant's appeal was adjourned to be re-heard by the Upper Tribunal.

Anonymity

2. An anonymity direction was made previously in connection with the error of law hearing and is continued for the same reasons.

Factual Background

3. The following summary of the background is taken from the agreed statement of facts and issues prepared by the appellant's solicitors for this appeal.

4. The appellant is a dual citizen of Hungary and USA who lived and worked in the UK from 2004 until December 2012 inclusive. She was first issued with a Hungarian passport on 20 April 2006. The appellant left the UK on 28 December 2012 and next returned in April 2018 as well as in 2022. The appellant currently lives in the USA.

5. On 19 May 2023, the appellant applied for settled status under Appendix EU, relying upon a continuous qualifying period (CQP) from 28 December 2008- 28 December 2013. In her application she explained that she had departed the UK in December 2012 and stayed in the USA until 2018 due to serious illness (colitis, Crohn's disease) and included a detailed witness statement and medical documents relating to the period in question.

6. The respondent refused the application by decision set out in a letter dated 7 August 2023, accepting that there was evidence that the appellant had lived in the UK for a historical period of 8 years but observed that there was subsequently an absence exceeding 12 months, and which was not related to a Crown service posting. The respondent concluded that the requirements for settled status 'on the basis of a continuous qualifying period of 5 years' was not met. Pre-settled status was refused on the same grounds. No credibility issue was taken regarding the appellant's account.

7. The chronology of this appeal and the outcomes of the previous hearings are set out in the error of law decision and need no repetition. Save that owing to the lack of recent authority on the application of *Babajanov (Continuity of residence - Immigration (EEA) Regulations 2006) Azerbaijan* [2013] UKUT 513 (IAC) to cases concerning Appendix EU along with the respondent's previously expressed view that this authority has no application here, the Tribunal considered it appropriate to retain the matter in the Upper Tribunal for remaking.

The remaking hearing

8. The matter comes before the Upper Tribunal to determine whether the decision of the respondent refusing to grant the appellant leave to remain under Appendix EU was not in accordance with the applicable rules or whether it breached her rights under the Withdrawal Agreement (WA).

9. A series of bundles were submitted by the appellant containing, inter alia, the core documents in the appeal, including the appellant's and respondent's bundles before the First-tier Tribunal as well as up to date evidence including a further witness statement from the appellant. Also submitted on behalf of the appellant was an agreed statement of facts and issues, a skeleton argument and an authorities' bundle.

10. The respondent also submitted a skeleton argument with substantially different arguments advanced to those set out in the decision letter.

11. The hearing was attended by representatives for both parties as above. Both representatives made submissions and the conclusions below reflect those arguments and submissions where necessary.

12. We would add that we granted Mr Deller permission to raise the new points made in the skeleton argument on behalf of the Secretary of State, on the proviso that Mr Khubber would have an opportunity to respond to them, including by way of further written submissions. As it transpired, it sufficed for Mr Khubber to rely on his response in his skeleton argument as the respondent's case changed direction once more.

13. At the end of the hearing, we reserved our decision and give our reasons below.

Discussion

14. The appellant's case can be explained quite simply. She relies on a CQP from 28 December 2008 until 28 December 2013 to support her claim that she has acquired a permanent right of residence in the UK. That calculation includes a 12-month period of absence between 28 December 2012 and 28 December 2013, relying on the principles identified in the case of *Babajanov.*

15. The appellant further relies on the fact that from 28 December 2013, she was not absent from the UK for more than five consecutive years and there had not been a supervening event. In particular, it is argued that the appellant avoided the loss of her rights because her short visit to the UK during April 2018 interrupted her period of absence. In summary, the appellant considers that the decision under challenge is

not in accordance with Appendix EU and that it breaches her rights under the WA.

16. In advance of the hearing, the parties put together a list of agreed issues which we set out here:

i. Does the guidance in *Babajonov* apply to the EUSS?
ii. If so, does the guidance in *Babajanov* apply to this case?
iii. If so, does the appellant have the benefit of the *Babajanov* guidance such that she meets the requirements of EUSS?
iv. If not, can the appellant rely on proportionality under EU law for the provision of the status that she has sought i.e. is the decision made disproportionate as a matter of EU law and which the appellant can rely on?

17. Addressing the first of the four issues, there was no difference between the parties respective positions. Indeed at paragraph 10 of the respondent's skeleton argument, it is stated that the Secretary of State saw 'little wrong' with the *Babajanov* principle. We reproduce the relevant passage from [17] of *Babajanov* here.

> We consider that the right of permanent residence under regulation 15 of the Immigration (European Economic Area) Regulations 2006 is capable of being established whilst a national of a Member State or a family member of that national is outside the host country provided the reasons for the absence come within Article 16(3) (and reg 3(2)). The reasons in these provisions are not exhaustive in the light of the reference to "such as" (reg 3 (2)(c)) but the absence must be for an important reason. For the interpretation of that phrase, regard needs to be had to the purpose giving rise to the absence. The purpose needs to be of a kind comparable to those illustrated which embrace compelling events and/or an activity which by implication, is linked to the exercise of treaty rights in the UK. The reason should be sufficiently compelling to require the Union citizen (or family member) to leave the host Member State for a purpose connected with his continued integration in that Member State or for a reason that is triggered by considerations of importance that need to be met notwithstanding that integration.

18. We can see no reason to reject Mr Khubber's submission, with reference to the source material, that Babajanov has equal relevance to the interpretation of Appendix EU, given that the language used in the 2006 Regulations as well as Appendix EU is derived from Article 16(3) of Directive 2004/38/EC. The latter makes specific reference to absences of a maximum of twelve months for 'important reasons' which include 'serious illness.'

19. As can be seen from the extract from *Babajanov* set out above, the right of permanent residence is capable of being established while a person is outside of the host country including for a period exceeding twelve months

20. The Secretary of State's response to the remaining three questions can be summarised as, 'no,' albeit the reasons given for this stance varied between the skeleton argument and Mr Deller's submissions.

21. At this juncture, it is worth setting out the respondent's evolving position on the appellant's claim. The decision under challenge, that of 7 August 2023, made the following points:

- That the appellant had not completed a continuous qualifying period of five years
- The appellant's absence from the UK exceeded 12 months
- That absence was not for a Crown service posting
- No evidence had been provided that the appellant came to the UK in 2018
- The appellant's CQP had been broken and not resumed.

22. The respondent's review dated 14 April 2024, relied on the decision letter and reiterated the same points.

23. The respondent's skeleton argument dated 20 January 2025, which was drafted by Mr Deller, addressed the issues in this case from a completely different perspective.

24. In the said skeleton argument, the respondent contended that the appellant had acquired a permanent right of residence earlier than the period she sought to rely upon owing to being a beneficiary of the 2004 Citizens' Directive following Hungary's accession to the European Union on 1 May 2004. It was suggested that the question of the appellant acquiring a permanent right of residence during her absence did not arise as she already had it and furthermore, she would, in any event, have lost her right of permanent residence after a period of two years' absence owing to regulation 15(3) of the Immigration (European Economic Area) Regulations 2016.

25. During the remaking hearing, the respondent's position changed again and it was somewhat hard to follow what her position was. Mr Deller accepted that he had 'gone out on a tangent' in his skeleton argument with the reference to Hungary's accession. He accepted that he had raised the wrong question in relation to the appellant being absent for more than two years and he effectively resiled from his reliance, in the skeleton argument on the cases of *Abdullah & Ors (EEA, deportation appeals, procedure)* [2024] UKUT 66 (IAC) and *Ali, R (On the Application Of) v Secretary of State for the Home Department* [2023] EWHC 1615 (Admin), describing them as having 'vanishing relevance.'

26. Mr Deller accepted that there was a serious illness component to the appellant's absence. Essentially, Mr Deller argued that the appellant had an absence of six years which took her into supervening event territory rather than having completed a CQP. He argued that the appellant's CQP came to an end when she left the UK in 2012. He disagreed with the argument that the period from December 2012 until

December 2013 enabled the appellant to meet the CQP despite her absence from the UK, contending that this was not a single absence of twelve months or less but a long-term absence of over five years. As for the integration arguments advanced on the appellant's behalf, Mr Deller acknowledged that the appellant's was not the weakest of cases in that she was integrated and there were compassionate circumstances but argued the appellant was outside the scope of the WA owing to the supervening event criteria.

27. Ultimately, Mr Khubber had no need to request an adjournment to address the respondent's position courtesy of the skeleton argument as Mr Deller's submissions on the day were markedly different and in any event caused him no difficulty.

28. The panel conclude that the decision refusing the appellant leave to remain was unlawful in that she met the requirements of Appendix EU for the following reasons.

29. It is not in contention that on 19 May 2023 the appellant applied for indefinite leave to remain under Appendix EU as an EEA citizen. We have had reference to the Rules in force at the time that application was made.

30. EU2 of Appendix EU sets out three requirements for leave to be granted;

- A valid application has been made in accordance with paragraph EU9;
- The applicant meets the eligibility requirements for indefinite leave to enter or remain in accordance with paragraph EU11 or EU12; and
- The application is not to be refused on grounds of suitability in accordance with paragraph EU15 or EU16.

31. No issues have been raised as to validity or suitability, leaving only the eligibility requirement in contention. For eligibility, the appellant relies on condition 3 of EU11

(b) The applicant has completed a continuous qualifying period of five years in any (or any combination) of those categories; and
(c) Since then no supervening event has occurred in respect of the applicant

32. A CQP is defined at Annex 1 of Appendix EU – as a period of residence in the UK and Islands

(b) during which none of the following occurred: (i) absence(s) from the UK and Islands which exceeded a total of six months in any 12-month period, except for:
(aa) a single period of absence which did not exceed 12 months and was for an important reason (such as pregnancy, childbirth, serious illness, study, vocational training or an overseas posting, or because of COVID19); or

33. In the appellant's case, reliance is placed on the reason for absence being 'serious illness.' It is not disputed by the respondent that the appellant's physical health issues amounted to serious illness. As indicated above, we heard no real submissions on behalf of the respondent as to why the appellant could not rely on a continuous five-year period which concluded with a 12-month period when she was absent from the UK owing to serious illness.

34. Also relevant is (c) of the definition of CQP, which stipulates that the period of residence continues at the date of application unless,

(ii) (aa) the person acquired the right of permanent residence in the UK under regulation 15 of the EEA Regulations.

35. We find that the appellant had acquired the right of permanent residence courtesy of the CQP of 28 December 2008 until 28 December 2013.

36. We further find that the appellant meets the definition of a relevant EEA citizen set out in Annex 1 where the date of application is on or after 1 July 2021, specifically at b(i).

(b)(i) an EEA citizen (in accordance with sub-paragraph (a) of that entry in this table) resident in the UK and Islands for a continuous qualifying period which began before the specified date; and

37. A supervening event, as far as relevant to the appellant's case, is defined thus.

at the date of application: (a) the person has been absent from the UK and Islands for a period of more than five consecutive years (at any point since they last acquired the right of permanent residence in the UK under regulation 15 of the EEA 491 Term Definition Regulations,…

38. It is clear from the definition of a supervening event that the period of absence is counted from when the appellant last completed a CQP, that date is 28 December 2013. We were referred to no requirement of physical presence being mandated by Appendix EU. Indeed, to repeat what was said in *Babajanov*, the right of permanent residence is capable of being established during an absence from the host country. Given that the first twelve months of the appellant's absence from the UK can, and we conclude does, contribute to the requisite CQP, we find she would be entitled to settlement unless there was a supervening event.

39. We note that the appellant returned to the UK during April 2018, a period of over four years but less than five. It follows that we are satisfied that there was no supervening event in this case.

40. While we heard detailed submissions from Mr Khubber in relation to the WA, the appellant's second ground of appeal, we see no utility in

addressing those as the appellant succeeds on the basis that the decision of the respondent did not comply with the EUSS.

Notice of Decision

The appeal is allowed.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 January 2024

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email