Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002844
EA/14387/2021

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 28 October 2022	**On 4 December 2022**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHARREM BRAHAJ
(Anonymity direction not made)

Respondent

Representation:
For the Appellant: Ms Z. Young, a Senior Home Office Presenting Officer.
For the Respondent: Mr G Brown, instructed by Norton Folgate Solicitors LLP.

DECISION AND REASON

1. The Secretary of State appeals with permission a decision of a judge of the First-tier Tribunal (IAC) ('the Judge'), promulgated on 11 April 2022, in which the Judge allowed Mr Brahaj's appeal against the refusal of his application made under the EU Settlement Scheme (EUSS).

2. The application was refused on 27 April 2021 for the following reasons:

Careful consideration has been given as to whether you meet the eligibility requirements for settled status under the EU Settlement Scheme. The relevant requirements are set out in rule EU 11 of Appendix EU to the Immigration Rules.

You state that you are a spouse of a relevant EEA citizens, Nicoleta Seba. However, you have not provided sufficient evidence to confirm this. The reasons for this are explained below.

You have provided a marriage certificate dated 05 June 2021 as evidence that you are the spouse of an EEA citizen. However, to qualify as a family member of a relevant EEA citizen relationship must exist by the 'specified date' which means (as defined in Annex 1 to Appendix EU and where the applicant is not a family member of a qualifying British citizen to whom a different date applies) 11 PM Greenwich Mean Time (GMT) on 31 December 2020. As your marriage certificate is dated after the 31 December 2020 you do not meet the requirements of being the spouse of an EEA [national] by the specified date.

Further consideration has been given as to whether you qualify as the durable partner of Nichola Seba. However, there is not sufficient evidence to confirm this. The reasons for this are explained below.

The required evidence of family relationship for a durable partner of a relevant EEA citizen is a valid family permit or residence card issued under the EEA Regulations (or by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man) as a durable partner of that EEA citizen and, evidence which satisfies the Secretary of State that the durable partnership continues to subsist.

Home Office records do not show that you have been issued with a family permit or residence card under the EEA Regulations as the durable partner of the EEA national and you have not provided a relevant document issued on this basis by any of the islands.

Therefore, you do not meet the requirements for settled status as a family member of a relevant EEA citizen.

Careful consideration has been given as to whether you meet the eligibility requirements for pre-settled status under the EU Settlement Scheme. The relevant requirements are set out in rule EU 14 of Appendix EU to the Immigration Rules.

However, for the reasons already explained above, you have not provided sufficient evidence to confirm that you are a spouse or durable partner of a relevant EEA citizen by the specified date. Therefore, you do not meet the requirements for pre-settled status on this basis.

It is considered that the information available does not show that you meet the eligibility requirements for settled status set out in rule EU 11 or for pre-settled status set out in rule EU 14 of Appendix EU to the Immigration Rules. This is for the reasons explained above. We have also considered whether you meet any of the other eligibility requirements and the Appendix BU. However from the information and evidence provided, or otherwise available, you do not meet any of the other these other eligibility requirements. Therefore, your application has been refused under rule EU6.

3. Mr Brahaj sought permission to appeal on two grounds under the Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020 namely that the decision was not in accordance with the Withdrawal Agreement and/or not in accordance with Appendix EU.

4. In relation to the first ground, compatibility with the EUSS, the Judge finds that Mr Brahaj is the durable partner of an EEA citizen, for although they had not lived together for two years the fact they had decided to marry was found to be a demonstration of their commitment together [18]. The Judge notes that it was accepted by Mr Brahaj that he did not hold a relevant document but referred to the 'durable partner' definition in Appendix 1 of Appendix EU and the provision at (b) (ii) for scenarios where a durable partner, spouse or civil partner may not be in possession of a relevant document.

5. It was accepted by the Judge that the application leading to the decision under challenge was made on 30 June 2021 and therefore after the specified date of 31 December 2020. The Judge notes it was accepted Mr Brahaj did not hold a family permit/residence card to show that he was in a durable relationship but concluded that, notwithstanding the lack of relevant documentary evidence, the relationship was durable [20]. The Judge therefore concluded that Mr Brahaj was a family member of an EEA citizen and that as eligibility under condition 1 was the only issue raised in the appeal, allowed the appeal pursuant to regulation 8(3) of the 2020 Regulations.

6. The Judge found consideration of the second ground, that relating to the Withdrawal Agreement "somewhat academic" but did consider it and finds it [24] that Mr Brahaj was a durable partner under the EEA treaties and the TFEU and provisions of Directive 2004/38/EC which are preserved by the Withdrawal Agreement.

7. The Judge also finds that Mr Brahaj should not have been denied residence in the UK without an extensive examination of his personal circumstances and that Article 18(1)(o) applied in the appellant's case. The Judge finds that Mr Brahaj was not able to marry before 31 December 2020 due to the Covid restrictions and that they would have married before the specified date [25].

8. The Judge goes on to find that even if she was wrong in the assessment in relation to the first ground of appeal, the EUSS, the appeal will be allowed on the basis the decision was not in accordance with the Withdrawal Agreement [26].

9. The Secretary of State sought permission to appeal arguing:

1. Making a material misdirection of law on any material matter.

   a) It is respectfully submitted that the First Tier Tribunal Judge (FTTJ) has materially erred in law by failing to properly consider the provisions of the Appendix EU contained within the Immigration Rules.

   b) The Appellant's application for status under the EU Settlement Scheme was as the family member of a relevant EEA national. It Is submitted that the Appellant could not succeed as a spouse, as the marriage took place after the specified date (31 December 2020), and so the application

was considered under the durable partner route where it was also bound to fail. The rule requires a “relevant document” as evidence that residence had been facilitated under the EEA regulations which had transposed the requirements of Article 3.2(b) of Directive 2004/38/EC. No such document was held as no application for facilitation had ever been made by the Appellant, in accordance with national legislation.

c) It is submitted that the question of whether and how the relationship was in fact “durable” at any relevant date, as is found by the FTTJ at [18] of the determination, is of no consequence. The scheme rules could simply not be met by a durable partner whose residence had not been facilitated. This is reflected in Article 10(2) of the Withdrawal Agreement permitting the continued residence of a former documented Extended Family Member, with an additional transitional provision in Article 10(3) for those who had applied for such facilitation before 31 December 2020. This appellant had not made any such application and therefore could not satisfy the requirements of Appendix EU.

d) It is further asserted that the FTTJ has erred in allowing the Appellant’s appeal under the Withdrawal Agreement. It is submitted that the Withdrawal Agreement provides no applicable rights to a person in the Appellant’s circumstances. Article 10(1)(e) of the Withdrawal Agreement confirms that Beneficiaries are those who were residing in accordance with EU law as of 31 December 2020. The appellant was not, and therefore did not come within the scope of the Withdrawal Agreement. Accordingly, there was no entitlement to the full range of judicial redress including the Article 18(1)(r) requirement that the decision was proportionate. As no such right being conveyed by the relevant parts of the Withdrawal Agreement there was no conceivable breach of the Appellant’s rights.

e) In the alternative, it is respectfully submitted that the Judge’s consideration of proportionality is wholly inadequate in the context of an applicant who did not meet the applicable Immigration rules. It is submitted that any issues as to whether the relationship was in some way durable by 31 December 2020, due to the Appellant’s subsequent marriage, are in any event irrelevant as the rules are simply not met by a durable partner without a relevant document. Whilst a subsequent marriage may have been some indication that a relationship which preceded it had been durable at a certain point, this – so far as it was relevant – could only flow from a more careful consideration of the facts. f) It is submitted that the FTTJ appears to find that the delay in marrying attributed to Covid-19 would in any circumstances have rendered an inevitable refusal disproportionate. This is despite the appellant not acquiring any protected rights under EU Law prior to 31 December 2020. In any event, it is submitted that the appellant would have been fully aware of the significance of the specified date when the UK left the EU and the need to be documented prior to that date. It is submitted that the

FTTJ has incorrectly accepted the Appellant's inability to marry as being determinative of the proportionality exercise and has therefore failed to provide adequate reasons for why the decision to refuse leave to remain under Appendix EU is disproportionate under the Withdrawal agreement.

10. Permission to appeal was granted by another judge of the First-tier Tribunal on the basis it is said to be arguable that the Judge had materially erred in law in determining Mr Brahaj met the definition of durable partner under Annex 1, Appendix EU and that it was also arguable that Mr Brahaj does not come within the scope of the Withdrawal Agreement.

Error of law

11. The Upper Tribunal has since the promulgation of this determination handed down two reported determinations of Presidential panels with the aim of providing guidance.

12. In Celik [2022] UKUT 00220 it was found :

(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.

(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State.

13. In Batool [2022] UKUT 00219 it was found:

(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.

(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.

14. The Judge's primary finding was that Mr Brahaj had neither applied for nor obtained a document relating to his durable relationship and was

also not married to Nicoleta Seba on the 31st December 2020. As such he cannot succeed in this appeal as he has no substantive rights under the EU Withdrawal Agreement, and further he cannot therefore invoke the concept of proportionality. In finding in the alternative I find the Judge has erred in law in a manner material to the decision to allow the appeal.

15. The definition of a durable partner in Appendix EU also requires an application to be made before the specified date, which was not made in this case, which is fatal on the specific facts. The impact of the Judge's finding is to find that a person who under the Immigration (EEA) Regulations 2016 would not have succeeded prior to signing the Withdrawal Agreement, as they would not have had the requisite period of cohabitation to establish a durable relationship or had entry facilitated in accordance with the Regulations and/or case law, somehow acquired a right to remain under the post-Brexit provisions.

16. A fundamental aim of the Withdrawal Agreement was to effectively freeze in time, at 11.00pm on 31 December 2020, the rights of EU nationals or their family members that existed at that time under European Law including Directive 2004/38/EC. The decision of the Grand Chamber in Rahman made it clear that extended family member have no rights of entry unless granted by an individual satisfying the requirements of the relevant domestic provisions, in the UK to be found in the 2016 Regulations pre- 31 December 2020.

17. Mr Brown did not seek to argue the error in relation to the Withdrawal Agreement on the facts as found but raised the issue of the relationship between the finding in Celik so far as it related to the Withdrawal Agreement and the status of the Immigration Rules in Appendix EU, and the guidance provided by the Secretary of State. That matter is discussed separately below.

Discussion

18. In relevant provisions are set out in Appendix EU of the Immigration Rules.

19. The purpose of those provisions is set out in EU1 which reads: "*This Appendix sets out the basis on which an EEA citizen and their family members, and the family members of a qualifying British citizen, will, if they apply under it, be granted indefinite leave to enter or remain or limited leave to enter or remain*".

20. The available grounds of appeal to challenge a relevant decision, under the Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020, are:

> **Grounds of appeal**
>
> **8.** —(1) An appeal under these Regulations must be brought on one or both of the following two grounds.
>
> (2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of—

(a) Chapter 1, or Article 24(2) **[F1**, 24(3), 25(2) or 25(3)**]** of Chapter 2, of Title II **[F2**, or Article 32(1)(b) of Title III,**]** of Part 2 of the withdrawal agreement,

(b) Chapter 1, or Article 23(2) **[F3**, 23(3), 24(2) or 24(3)**]** of Chapter 2, of Title II **[F4**, or Article 31(1)(b) of Title III,**]** of Part 2 of the EEA EFTA separation agreement, or

(c) Part 2 **[F5**, or Article 26a(1)(b),**]** of the Swiss citizens' rights agreement **F6**.

(3) The second ground of appeal is that—

(a) where the decision is mentioned in regulation 3(1)(a) or (b) or 5, it is not in accordance with the provision of the immigration rules by virtue of which it was made;

(b) where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules;

(c) where the decision is mentioned in regulation 4, it is not in accordance with section 76(1) or (2) of the 2002 Act (as the case may be);

(d) where the decision is mentioned in regulation 6, it is not in accordance with section 3(5) or (6) of the 1971 Act (as the case may be).

(e) where the decision is mentioned in regulation 6A, 6B, 6C or 6D, it is not in accordance with regulation 9, 11, 12, 14, 15(1)(a) or 15(1)(c) of the 2020 Regulations (as the case may be);

(f) where the decision is mentioned in regulation 6E, it is not in accordance with section 3(5) or 3(6) of the 1971 Act, or regulation 15(1)(b) of the 2020 Regulations (as the case may be).

(g) where the decision is mentioned in regulation 6G(1)(a) or (1)(b) or 6H, it is not in accordance with the provision of the immigration rules by virtue of which it was made;

(h) where the decision is mentioned in regulation 6G(1)(c) or (1)(d), it is not made in accordance with Appendix S2;

(i) where the decision is mentioned in regulation 6I, it is not made in accordance with the provision of, or made under, the 1971 Act (including the immigration rules) by virtue of which it was made;

(j) where the decision is mentioned in regulation 6J, it is not in accordance with section 3(5) or (6) of the 1971 Act, or Appendix S2 (as the case may be).**]**

(4) But this is subject to regulation 9.

21. It is accepted that there are therefore two separate grounds of appeal, that the decision is not in accordance with the Immigration Rules and not in accordance with the Withdrawal Agreement.

22. This distinction may appear unnecessary if the provisions of the Immigration Rules are the same as those within the Withdrawal Agreement, but they do differ as noted below.

23. In relation to the status of the immigration rules, the Supreme Court in Ahmed Mahad, Sahro Ali, Malyun Ismail, Khadra Abdillahi, Sakthivel and Muhumed v ECOs [2009] UKSC 16 said this:

> "The Rules are not to be construed with all the strictness applicable to construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the SSHD's administrative policy.....The question is what the SSHD intended. The rules are her rules. But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the SSHD's intention to be discovered from Immigration Directorate's Instructions".

24. In Odelola v SSHD [2008] EWCA Civ 308 the Court of Appeal held that the Immigration Rules were statements of executive policy at any particular time and not rules of law a finding which was essentially confirmed by the House of Lords in Odelola v SSHD [2009] UKHL 25

25. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 Lord Reed said that the "Immigration Rules are not law (although they are treated as if they were law for the purposes of section 86(3)(a) of the 2002 Act), but a statement of the Secretary of State's administrative practice: see Odelola v Secretary of State for the Home Department [2009] UKHL 25...They do not therefore possess the same degree of democratic legitimacy as legislation made by Parliament: Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167, para 17. Nevertheless, they give effect to the policy of the Secretary of State, who has been entrusted by Parliament with responsibility for immigration control and is accountable to Parliament for her discharge of her responsibilities in this vital area. Furthermore, they are laid before Parliament, may be the subject of debate, and can be disapproved under the negative resolution procedure. They are therefore made in the exercise of powers which have been democratically conferred, and are subject, albeit to a limited extent, to democratic procedures of accountability.

26. The law is set out in the Withdrawal Agreement as identified within Celik to which reference must be made in cases of this nature. The Immigration Rules Appendix EU cannot override the agreed legal provisions set out in the Withdrawal Agreement.

27. A lot of the difficulty in this area is that identified by the Judge based upon the complexity and poor drafting of the provisions of the rules and guidance. In Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304(IAC) the Tribunal held, inter alia, applying Philipson (ILR – not PBS: evidence) [2012] UKUT 00039 (IAC), that where the provisions in question are ambiguous or obscure, then it is legitimate to interpret the provisions by assuming that Parliament is

unlikely to have sanctioned rules which (a) treat a limited class of persons unfairly; and (b) disclose no policy reason for that unfairness.

28. I find it is also a fair assumption that Parliament would not have sanctioned provision of the Immigration rules or Guidance suggesting a course of action or procedure contrary to the Withdrawal Agreement.

29. There is no ambiguity however in the fact that EU free movement rights lost both their direct effect and enforceability in the UK from 11 PM on 31 December 2020. The Immigration and Social Security Co-ordination (EU withdrawal) Act 2020 revoked the 2016 Regulations from that point and prevents them along with relevant rights deriving from the provisions of the treaties to the extent that they are not implemented in domestic law, from continuing to have the effect as retained EU law pursuant to sections 2 and 4 of the European Union (Withdrawal) Act 2018. It follows therefore that whatever interpretation some may place upon the Rules or guidance that since 1 January 2021 the Secretary of State has not been able to consider an application for a residence card as an extended family member other than where a valid application was made before that date. For such application to be valid it would have to be made in accordance with regulation 21 of the 2016 Regulations requiring it to be submitted online, by post or in person, using the relevant application form specified by the Secretary of State, and accompanied by the applicable fee.

30. Article 18 of the Withdrawal Agreement allows Member States to introduce “constitutive residence schemes”, which means that EU citizens and their direct family members (where they are in scope of Article 10) can now be required to apply for residence rights, as opposed to enjoying them simply by virtue of their status and activities in the host Member State. It also applies to extended family members where they are within the scope of Article 10 even though under EU law they did not have a declaratory right of admission or residence.

31. The EUSS is the EU’s resident scheme under Article 18 which enables EU and other EEA Swiss citizens resident in the UK by the end of the transition period and their family members to obtain the necessary immigration status and to reside lawfully in the UK following the UK’s exit from the EU.

32. A reading of the relevant provisions suggests that the EUSS is more generous than the rights conferred by the Withdrawal Agreement in two key aspects, in that (a) it permits any EU citizen residing in the UK by the end of the transition period to apply, together with their eligible family members. It does not require residence in accordance with EU law save in limited circumstances in which the applicant relies on other criteria, based on the Directive, for obtaining settled status without having accrued five years continued residence, or having retained the right of residence in line with criteria based on the Directive, and, (b) The EUSS is available to EU and non-EU citizens who do not have Withdrawal Agreements rights but are relying on: (i) rights derived from wider EU law rather than the Directive, for

example, the *"Surinder Singh"* right to reside which relates to the family members of citizens returning to their home state following the exercise of free movement rights in another state and (ii) provisions which are purely a matter of domestic law for example the family members of "*relevant persons of Northern Ireland"* in line with the UK government's commitment regarding the immigration of family members certain persons born in Northern Ireland who are British, Irish or dual British Irish citizens have rights under the Belfast (Good Friday) Agreement.

33. It may also be possible to make an application under Appendix EU by a person who is not directly impacted by the terms of the Withdrawal Agreement although whether such cases exist is fact specific. A person claiming to be in such category will have the burden of establishing such entitlement.

34. In relation to the guidance, it is merely that, guidance, not a statement of the law, and cannot override the obligations set out in the Withdrawal Agreement.

35. I find therefore that the interpretation of the Immigration Rules and related guidance requires an initial consideration of the determinative position in law under the Withdrawal Agreement with the exception of those matters which are not provided for within the Withdrawal Agreement in relation to which the guidance provided above regarding how the immigration rules are to be interpreted applies.

Decision

36. I find the Judge erred in law in allowing the appeal for the reasons set out above. I set the decision aside. As on a correct reading of all the evidence and relevant legal provisions Mr Brahaj is unable to establish any entitlement to the remedy he claims under either the Withdrawal Agreement, the Immigration Rules, or on another basis, I substitute a decision to dismiss the appeal.

Anonymity.

37. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated 31 October 2022
28 October 2022