Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-001232**
EA/11283/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 30 November 2022

Decision & Reasons Promulgated
On the 07 February 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

LEONARD LACI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Fisher, Counsel instructed by Rashid and Rashid solicitors
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

DECISION

1. By a decision promulgated on 27 July 2022, the Tribunal (myself and Deputy Upper Tribunal Judge Black) found an error of law in the decision of First-tier Tribunal Judge Dineen itself promulgated on 4 January 2022, dismissing the Appellant's appeal against the Respondent's decision

dated 15 June 2021 refusing his application for pre-settled status under the EU Settlement Scheme ("EUSS") as the family member of his Greek national sister-in-law. Our error of law decision is appended to this decision for ease of reference.

2. The directions given in the error of law decision provided for both parties to file skeleton arguments setting out their legal position following the promulgation of two Presidential panel decisions which were, at the time of the error of law hearing, awaiting determination. Those are now reported as Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) ("Celik") and Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC) ("Batool"). Those decisions were promulgated as long ago as 19 July 2012, were published on the Tribunal site on 10 August 2022 and were reported on the National Archive site thereafter.

3. I do not know whether the Respondent complied with the first of my directions to send the decisions to the Appellant when those were promulgated. However, as published and reported decisions, those would have been available to the Appellant and his solicitors at the time when they were published and reported. A hearing notice for the hearing before me on 30 November 2022 was sent out on 4 November.

4. Ms Fisher who appeared for the Appellant also at the error of law stage, attended the hearing. She apologised that no skeleton argument had been filed for the Appellant. She explained that she had been instructed only one week previously and had not been able to meet with the Appellant and his family until the morning of the hearing. I accepted that apology. The Appellant's solicitors should of course have instructed her at least as soon as the notice of hearing was received but no blame can be attributed to Ms Fisher in that regard.

5. Ms Fisher very candidly accepted that she could not make any legal argument in support of the Appellant's case following the decisions in Celik and Batool. She indicated that the Appellant is now considering making a human rights claim, relying on the preserved findings made by Judge Dineen.

6. I enquired whether in those circumstances, she wished me to dismiss the appeal or whether the Appellant wished to withdraw it. Following discussions, it was agreed that it would be better for me to simply dismiss the appeal in the absence of legal argument but make clear that the factual findings made by Judge Dineen below are preserved so that the Appellant may rely on those in any further application.

7. In light of the Appellant's acceptance that he cannot succeed as a matter of law in relation to his appeal against the Respondent's decision refusing him status under the EUSS, I dismiss the appeal. However, I again make clear that there was no challenge by the Respondent to the factual findings made by Judge Dineen which are at [19] and [20] of his decision and which rely on the evidence as set out at [7] to [14] of the decision.

Accordingly, those factual findings and what is there said about the evidence are preserved. As Judge Dineen said at [20] of his decision, the finding of collective dependency as a family may be material to any other application which the Appellant is advised to make.

DECISION

The Appellant's appeal against the Respondent's decision dated 15 June 2021 refusing him status under the EU Settlement Scheme is hereby dismissed. However, I preserve paragraphs [7] to [14] and [19] to [20] of the decision of First-tier Tribunal Judge Dineen promulgated on 16 December 2021 as those findings were not challenged by the Respondent.

Signed: L K Smith Dated: 30 November 2022
Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-001232
EA/11283/2021

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination promulgated**
On Monday 27 June 2022	**27 July 2022**

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE G BLACK

Between

LEONARD LACI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Fisher, Counsel instructed by Rashid and Rashid solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Dineen promulgated on 4 January 2022 ("the Decision"). By the Decision, Judge Dineen dismissed the Appellant's appeal against the Respondent's

decision dated 15 June 2021 refusing his application for pre-settled status under the EU Settlement Scheme ("EUSS") as the family member of his Greek national sister-in-law.

2. The Respondent refused the application on the basis that the Appellant's status as family member had not been recognised by the issue of a family permit or residence card under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

3. The Appellant is accepted to be the brother-in-law of an EEA national. His sister-in-law has pre-settled status as does his brother (her husband) and the Appellant's parents. The Appellant has mental health problems. He is said to suffer from "unspecified non-organic psychosis, being a severe mental disorder" ([11] of the Decision). The Appellant lives with his brother, sister-in-law and parents. His sister-in-law is said to meet the costs of his rent, clothing, food and transport and also provides him with "pocket money" ([12] of the Decision). The Appellant therefore argued that he was a "dependent family member" under Appendix EU to the Immigration Rules ("Appendix EU"). He accepted however that his status as such had not previously been recognised under the EEA Regulations.

4. The Respondent did not accept that the Appellant was dependent on the EEA national but rather said that the dependency was on his parents. In any event, he could not succeed given the lack of a family permit or residence card recognising his status as a family member.

5. The Judge accepted at [19] of the Decision that "there is collective dependency by the appellant on all members of his family with whom he is living". That is said to be "both economic and emotional" as "a natural arrangement to be made in a close-knit and mutually supportive intergenerational family". The Judge went on to note however that Article 8 ECHR was not relevant in the appeal as no claim had been made in that regard. The Judge found that the Appellant could not establish that he is a family member under the EUSS and would need to produce a relevant document in order to do so. On that basis, the Judge dismissed the appeal.

6. The Appellant appeals on one ground only namely that the Decision was not proportionate in light of the finding that the Appellant is dependent and would therefore have qualified as an extended family member under the EEA Regulations. It is said that the Respondent "has a discretion in these matters, which can be exercised to fulfil the broad aims of the Withdrawal Agreement" and, had she done so, the Appellant would have been granted pre-settled status. As Mr Clarke pointed out, this appears to be directed at the Respondent's decision rather than identifying an error of law in the Decision and does not engage with the matters raised in Ms Fisher's skeleton argument (to which we come below).

7. As we pointed out to Mr Clarke, however, permission to appeal was granted by First-tier Tribunal Judge Beach on 1 April 2022 on a slightly different basis as follows (so far as relevant):

> "… 2. The grounds state that the only reason that the appeal was dismissed was because the appellant did not have the relevant residence card. The grounds state that the First-tier Tribunal Judge accepted that the appellant was dependent on the EEA sponsor. The grounds assert that the decision was not a proportionate decision given that the respondent has a discretion which can be exercised to fulfil the aims of the Withdrawal Agreement.
>
> 3. The appellant has submitted a skeleton argument which argued that the decision was not in accordance with the Withdrawal Agreement. The First-tier Tribunal Judge does not refer to this skeleton argument within the appeal decision. It is arguable that the First-tier Tribunal Judge did not consider the submissions regarding the Withdrawal Agreement or that the First-tier Tribunal Judge did not give clear reasons for rejecting those submissions.
>
> …
>
> 5. Permission to appeal is granted."

8. The appeal comes before us to decide whether there is an error of law in the Decision and if we so conclude to either re-make the decision or remit the appeal to the First-tier Tribunal for it to do so. We had before us a core bundle of documents relevant to the appeal to this Tribunal, the Respondent's and Appellant's bundles before the First-tier Tribunal (to which we do not need to refer) as well as the Appellant's skeleton argument before the First-tier Tribunal (as referred to in the grant of permission), Ms Fisher's skeleton argument before us and the Withdrawal Agreement ("WA") and legal authorities produced by Mr Clarke.

DISCUSSION AND CONCLUSIONS

9. At the outset of the hearing, we informed the parties that there were two decisions of Presidential panels pending in relation to the application of the WA and EUSS in appeals involving extended family members. We outlined what we understood to be the broad issues raised in those cases. Both representatives agreed that those cases may have some overlap with the issues in this appeal. We therefore sought submissions whether we should adjourn the hearing of this appeal at the error of law stage or whether we should deal with the error of law and the adjourn the resumed hearing. Unsurprisingly, Mr Clarke preferred the first option while Ms Fisher urged on us the second.

10. We also pointed out to Mr Clarke that Judge Beach was right to say that Judge Dineen had failed to deal with the WA. We therefore sought his submissions whether the error of law in that regard could be conceded. For reasons which we completely understand, he declined to make that concession. Although he accepted, having seen the skeleton argument

for the hearing before the First-tier Tribunal, that this did raise the WA and that the Judge had failed to deal with it, he did not accept that the error was material because he submitted that the WA could not apply.

11. As the Appellant's case was set out in broad terms in Ms Fisher's skeleton argument, we asked Mr Clarke to make his submissions first so that we could deal with the materiality issue. He asked for Ms Fisher's submissions first on one point in relation to the applicability of McCarthy and others v Secretary of State for the Home Department ([C-202/13]). Although we acceded to that request and Ms Fisher did make oral submissions in that regard, we do not need to consider those as we can find no reference to this case in the skeleton argument which was before Judge Dineen. The Judge could not therefore be faulted for not considering it.

12. Turning then to the points regarding the WA, the Appellant relies on the definitions in Article 9 thereof which include at (a) family members as defined in Article 2(2) of Directive 2004/38/EC. As we understand the Appellant's case, it is accepted that the Appellant cannot fall within that part of the definition. However, the Appellant relies also on Article 9(a)(ii) which reads as follows:

> "persons other than those defined in Article 3(2) of Directive 2004/38/EC whose presence is required by Union citizens or United Kingdom nationals in order not to deprive those Union citizens or United Kingdom nationals of a right of residence granted by this Part."

13. The Appellant also draws attention to the reference to Article 10 which sets out the personal scope of the WA in relation to EEA nationals and their family members. Although the Appellant sets out the whole of that Article, we do not understand the Appellant's case to be that he could fall under Article 10(1)(a) to (d). The only sub-sections of Article 10 which could be even potentially relevant are as follows:

> "1 (e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:
>
> (i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> …
>
> 2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.
>
> 3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation

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

13. For reasons we entirely understand, Mr Clarke also relied on Articles 10(2) and (3) which he submitted could not be met in this case as the Appellant has never had a residence card under the EEA Regulations.

14. The Appellant next relies on Article 13 in relation to residence rights. We do not cite that article as its relevance depends on the Appellant falling within the definition of family member and the scope of Article 10. The reference at Article 13(4) to an inability to impose limitations or conditions for obtaining or retaining rights of residence has no purchase if those limitations and conditions are already incorporated within this part of the WA.

15. Ms Fisher also referred to Article 18(1)(r) of the WA in her oral submissions. We cannot find reference to this in her skeleton argument. Nonetheless, we accept, since this is a provision of the WA, that she can raise the argument. Article 18(1)(r) reads as follows:

> "the applicant shall have access to judicial and, where appropriate, administrative redress procedures in the host State against any decision refusing to grant the residence status. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed decision is based. Such redress procedures shall ensure that the decision is not disproportionate."

16. As we understood Ms Fisher's argument, it is that it was not open to the Judge to fail to consider the WA because the WA itself guarantees access to a judicial determination of a decision refusing residence status and the proportionality of that decision which is lacking in this case.

17. Mr Clarke's arguments can be summarised as follows. First, the Appellant is unable to bring himself within the personal scope of the WA because he fulfils neither Article 10(2) nor 10(3). The Appellant had not had his right of residence facilitated prior to the end of the transition period nor had he applied to have his right facilitated before the end of that period. Second, he said that Article 18(1)(r) did not apply because the Appellant had not resided in the UK in accordance with EU law. Accordingly, the Appellant was not one of the "other persons who reside in its territory in accordance with the conditions set out in this Title" under the preamble in Article 18(1).

18. We can see some force in Mr Clarke's arguments in relation to Article 10(2) and (3). However, the issue whether Article 18(1) can apply is more complex because it depends whether the Appellant is a person falling within the scope of that article. That requires consideration of the relevant parts of the WA. It seems to us that this is the Appellant's best point in relation to the WA.

19. Ms Fisher's skeleton argument and Mr Clarke's oral submissions also made reference to the EEA Regulations and Appendix EU. We have not dealt with those arguments because they do not fall within the grounds as pleaded nor the permission grant.

20. Ultimately, we return to where we started. We have to decide whether any of the arguments made by the Appellant might disclose that the error of law made by the Judge in failing to deal with the WA could be material. If that error is not material, there would be no point in setting aside the Decision and proceeding to a resumed hearing. The difficulty with reaching that conclusion though is that as much legal argument would be needed to discover whether the error is material as to decide whether the Appellant's appeal should succeed based on the WA.

21. As we have noted, there are two Presidential panel decisions awaited which may have a bearing and which reflect the complexity of some of the arguments (including ones with which we have here declined to deal because they do not form part of the grounds as pleaded). Ultimately, and largely because of the importance of this appeal to the Appellant, we decline to find that the error in failing to address the WA is not material. We therefore conclude that we should deal with the legal arguments regarding the WA and any other arguments based on the EEA Regulations or Immigration Rules which the Appellant wishes to raise at a resumed hearing. As we indicated at the outset, however, we propose that this resumed hearing should await the outcome of the Presidential panel decisions. Neither party disagreed. We have given directions to that effect below.

22. Both parties agreed that if we were to reach the conclusion we have reached, it would be appropriate to preserve the findings of fact regarding the Appellant's dependency. The resumed hearing will for that reason be limited to legal argument.

DECISION

The Decision of First-tier Tribunal Judge Dineen promulgated on 16 December 2021 involves the making of an error on a point of law. That error is however a failure to consider a legal issue. We do not therefore set aside any of the findings made in the Decision. We give the following directions for the remaking of the decision by this Tribunal.

DIRECTIONS

1. The resumed hearing of this appeal is stayed pending the decisions of the Presidential panels in Celik v Secretary of State for the Home Department [UI-2022-000222] and Batool and others v Secretary of State

for the Home Department [EA/02864/2020; EA/02865/2020; EA/02866/2020; EA/02867/2020].

2. **Within 14 days from the promulgation of the panel decisions in the above cases,** the Respondent shall send to the Appellant a copy of the Tribunal's decisions in those cases.

3. **Within 28 days from the date when the Tribunal's decisions are sent**, the Appellant shall file with the Tribunal and serve on the Respondent a skeleton argument setting out the legal provisions and arguments on which he relies.

4. **Within 28 days from the date when the Appellant's skeleton argument is sent,** the Respondent shall file with the Tribunal and serve on the Appellant a skeleton argument setting out her arguments in reply.

5. The appeal will be relisted for a re-making hearing with a time estimate of one day on the first available date after four months from the date when the decisions of the panel in Celik v Secretary of State for the Home Department [UI-2022-000222] and Batool and others v Secretary of State for the Home Department [EA/02864/2020; EA/02865/2020; EA/02866/2020; EA/02867/2020] are promulgated.

6. **The parties are to file a hard copy of an agreed indexed and paginated bundle of relevant authorities at least 7 days before the resumed hearing.**

Signed: L K Smith Dated: 4 July 2022

Upper Tribunal Judge Smith