Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: UI-2022-003359**
EA/12489/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 15 November 2022

Decision & Reasons Promulgated
On the 07 February 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OBIDIKE CHIJIOKE IKEGWOHA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr M Bhebhe, Legal Representative, Njomane Law Limited

DECISION AND REASONS

1. We shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal. He is a citizen of Nigeria and his date of birth is 30 August 1989.

2. In a decision of 24 June 2022 the First-tier Tribunal (Judge Boyes) granted the Secretary of State permission to appeal against the decision of the First-tier Tribunal (Judge Anthony) to allow the Appellant's appeal against the decision of the Secretary of State on 19 October 2021 to refuse the Appellant's application (on 30 December 2020) under the EU Settlement Scheme (EUSS).

3. The Secretary of State in her decision did not accept that the Appellant was a durable partner in accordance with the Immigration Rules (Appendix EU) because he was undocumented. The Appellant exercised his right of appeal under Regulation 3 of the Immigration (Citizens' Rights Appeals) EU Exit Regulations 2020.

4. The First-tier Tribunal heard evidence from the Appellant and his wife, the Sponsor. The judge accepted the evidence of the Appellant and the Sponsor that they had intended to marry and attempted to do so before the relevant date (31th December 2020). However they were unable to do so through no fault of their own as a result of the pandemic.

5. The judge concluded that the Appellant could not meet the definition of a durable partner defined in Annex 1 of Appendix EU because he was not documented. However, the judge went on to consider the appeal under the Withdrawal Agreement. The judge at [31] set out Articles 10(2) and (3) of the Withdrawal Agreement. At [32] the judge found that it was unclear whether the application was made under the EUSS or under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The judge went on to find that in any event the Appellant had applied for facilitation of residence before the transition period and the two regimes, namely that under the 2016 Regulations and that under the EUSS were running in parallel. The judge went on to state as follows at [34]

> 34. Ms Tasnim states that it is the Appellant who has completed the wrong form. Most unfortunately, the application form has not been provided by the Respondent in the Respondent bundle. It is unclear why. Ms Tasnim could offer no explanation and neither was she able to access the form. It has therefore not been possible to ascertain whether the "wrong form" had indeed been completed. I find a bare assertion from the Respondent that the wrong form had been completed is insufficient to establish the matter before the Tribunal.
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> 35. I take judicial notice that there is no application form as such and that the electronic application form is built based on the answers given by the Appellant to the proceeding question. Therefore, if an Applicant confirms that they are a "close family member of an EEA of Swiss national with a UK immigration status under the EU Settlement Scheme" the electronic system decides that the application is made pursuant to the EU Settlement Scheme even though plainly, the Applicant should be directed down the route of an EEA Regulations 2016 application because of his durable relationship to the EEA citizen Sponsor. I find this is particularly important given the Appellant applied

before the specified date when the two regimes were running in parallel.

6. The judge considered Article 18(o) of the Withdrawal Agreement and with focus on the words "shall help the applicants to prove their eligibility" the judge found that this "places a duty on the Respondent to assist Applicants improving their eligibility". The judge found that "the Respondent's duty to facilitate the Appellant's entry included alerting the Appellants to the fact that the incorrect form was completed e.g. before making the refusal decision". The judge went on to allow the appeal on the basis that the decision breached the Withdrawal Agreement.

The grounds of appeal

7. The grounds of appeal assert that the appeal should have been determined under the EUSS scheme and not the 2016 Regulations because the Applicant made an application under the EUSS. The Appellant does not come within the scope of the Withdrawal Agreement. The grounds rely on the case of Batool and ors (other family members: EU exit) [2022] UKUT 00219 (IAC).

Error of law

8. There was no Rule 24 response. Mr Bhebhe relied on an email that had been sent to the Tribunal the day before the hearing. The email relied did not address relevant case law. It set out the case as argued before the First-tier Tribunal. We asked Mr Bhebhe to focus on the recent reported decisions of Celik (EU exit, marriage, human rights) [2022] UKUT 00220 (IAC) and Batool. However, the thrust of his submissions related to [35] of the judgment.

9. The Appellant's application was made under the EUSS. This was accepted by Mr Bhebhe at the hearing before us. Properly applying the law set out in Batool and Celik, the Appellant had no right to have any application for settlement under the EUSS considered under EU law. This was not an application under the 2016 Regulations and the Appellant had not made an application for facilitation and residence as an extended family member (OFM) under EU law. The Applicant could not succeed under Appendix EU as he was not a durable partner as defined in Annex 1. Moreover the Appellant does not come within the scope of the Withdrawal Agreement.

10. The point made by Mr Bhebhe was that an applicant does not have the opportunity to make an application under the 2016 Regulations. The application process does not allow this. Mr Bhebhe submitted that the Appellant was thwarted in making out this aspect of the case because he was unable to obtain a copy of the application form because the platform used does not enable an applicant to retain a copy of it. It was accepted by Mr Bhebhe that the application was made under the EUSS and therefore it was difficult for us to understand how a copy of it would assist the Appellant. In any event the submission by Mr Bhebhe that the

Appellant was not able to make an application under the 2016 Regulations before 31 December 2020 is unsupported.

11. For the above reasons, we find that the judge materially erred. We set aside the decision of the First-tier Tribunal to allow the Appellant's appeal.

12. We communicated our decision to the Appellant. We gave the parties the opportunity to make further submissions having indicated our intention to remake the appeal. They indicated that they did not have anything further to add. We remade the appeal properly applying the law. This appeal cannot succeed. We dismiss the appeal under Appendix EU properly applying the recent reported decisions of the UT.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed *Joanna McWilliam* Date 30 November 2023

Upper Tribunal Judge McWilliam