IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002403

First-tier Tribunal No: EA/13948/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22 May 2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PADUKKAGE DON BUDDHIKA DE ALWIS
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms S Rushforth, Senior Home Office Presenting Officer
For the Respondent: Mr H Broachwalla of Counsel, instructed by Jein Solicitors

Heard at Field House by remote video means on 2 May 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.

2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Herwald promulgated on 7 March 2022, in which Padukkage Don Buddhika de Alwis' appeal against the decision to refuse his application for settled or pre-settled status under the EU Settlement Scheme (the "EUSS") dated 23 September 2021 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Padukkage Don Buddhika de Alwis as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a national of Sri Lanka, born on 2 July 1985, who first entered the United Kingdom in 2007 as the dependent of a Tier 4 Student. He remained in the United Kingdom following the expiry of that leave, making unsuccessful applications for an EEA Residence Card on 8 February 2017 and 6 November

2017 claiming to be dependant on his sister-in-law, an Irish national in the United Kingdom. The Appellant applied for settled or pre-settled status under the EUSS on 20 August 2020 and it is the refusal of that application on 23 September 2021 which is the subject of these appeal proceedings.

4. The Respondent refused the application the basis that first, there was no sufficient evidence that the Sponsor was a 'relevant person of Northern Ireland' and secondly, there was no sufficient evidence that the Appellant was dependent on the Sponsor in that he did not have a relevant document confirming this, nor was there sufficient evidence of prior dependency (the Appellant having entered the United Kingdom in 2007 and only became related to the Sponosr by her marriage to his brother in 2015) or current dependency.

5. Judge Herwald allowed the appeal in a decision promulgated on 7 March 2022 on the basis that the Respondent's decision was not in accordance with the law and applicable Regulations. In substance, the decision was on the basis that the Appellant could have made an application under the Immigration (European Economic Area) Regulations 2016 (the "2016 Regulations") and that the Respondent failed to observe the niceties of the Withdrawal Agreement in that Article 18(o) of the same requires the Respondent to give a form of assistance to the Appellant and in the present case, the Respondent should have considered and should now consider whether to determine the application under the 2016 Regulations rather than under Appendix EU of the Immigration Rules.

The appeal

6. The Respondent appeals on three grounds. First, that the First-tier Tribunal erred in law in allowing the appeal on a basis upon which it had no power to do, there no longer being any general ground of appeal that the decision is not in accordance with the law. Secondly, that the First-tier Tribunal erred in law in failing to dismiss the appeal on the basis that the Appellant could not meet any of the requirements in Appendix EU of the Immigration Rules. Thirdly, that the First-tier Tribunal materially erred in law in not dismissing the appeal under the Withdrawal Agreement given that the Appellant is not within the scope of Article 10(1)(e) of the same as he was not residing in the United Kingdom in accordance with EU law as at 31 December 2020.

7. On 14 September 2021, I issued directions to the parties indicating a preliminary decision that for the reasons set out in the grounds of appeal and the decision in Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC), there was a material error of law in the First-tier Tribunal's decision which required it to be set aside and that on the facts of this case, it appeared that there was no basis upon which the Appellant could succeed.

8. Whilst the Respondent agreed to the proposed course of action, the Appellant objected on the basis first, that on closer inspection of the application form, it was clear that the Appellant was making an application as an 'extended family member' under the 2016 Regulations and that, as per paragraph 66 of the decision in Batool there is a discretion to have considered the application on that basis. Secondly, the decision in Batool could be distinguished on the basis that the Appellant in the present appeal was already in the United Kingdom.

9. The first of these points was maintained by Mr Broachwalla in his skeleton argument submitted just before the hearing, to which was added a further point, that the Appellant in any event came within the scope of the Withdrawal

Agreement because he had previously made applications for an EEA Residence Card in 2017 and there was no requirement in Batool that an application for facilitation of residence had to be extant.

10. At the hearing, Mr Broachwalla stated that he had only been instructed at 9pm the evening prior to the hearing and prepared his skeleton argument on the basis of instructions without having been provided with a full copy of the relevant documents; in particular, he had not had sight of the cover letter to the application nor the application form itself. The Appellant's solicitors conduct in this regard is woefully inadeaquate, to instruct Counsel at such short notice, on a bank holiday, without providing relevant documents and with instructions which, for the reasons set out below were directly contrary to the relevant documents was neither appropriate nor professional.

11. For Counsel's information, I read the pertinent parts of the cover letter to the Appellant's application, which included the following:

"... I would like to apply to the EU settlement scheme (settled and pre-settled status). I have carefully read the eligibility criteria and believe this is the correct application for me to apply. I have also extracted the relevant criteria confirming my eligibility for this application.

[Extract from the Home Office website as to the eligibility criteria set out, which included circled parts that the Appellant was not an EU, EEA or Swiss citizen but his Sponsor is; that he was a family member of an EU, EEA or Swiss Citizen; a dependent relative and the family member of an Irish citizen. There followed an extract from EU11 of Appendix EU to the Immigration Rules, in which the Appellant had circled that he is a family member who has completed a continuous qualifying period of five years in a relevant category.]

As set out above I have been living as a dependent as well as in the same household with my brother (...), sister-in-law who is also the relevant EEA citizen (...) and two nieces for well over 5 years. I have enclosed address proof for myself and Emma for the past 6 years.

To reinstate my eligibility as a dependent relative, I would also like to kindly point you to the dependent relative definition in annex 1 to appendix EU.

[relevant extract set out]

Continuous qualifying period: Evidence of continuous residence of 5 years for both the relevant EEA citizen and dependent applicant is herewith. I have checked the Annex 1 definition of the continuous qualifying period and I strongly belief that I fit the definition as outlined below.

[relevant extract set out]

I hope this information would help to demonstrate my eligibility and consequently support my application to the EU settlement scheme. I would be grateful if you could consider this application and all the supporting documents. ..."

12. Mr Broachwalla then perfectly properly withdrew the submission on behalf of the Appellant that it was 'crystal clear' that the application being made by the Appellant was one as an extended family member under the 2016 Regulations.

That submission was directly contrary to what is a very clear and unambiguous document from the Applicant that he was applying under the EUSS. If Counsel had been instructed properly with sight of this document, it is unlikely that he would have included the submissions that he did in his skeleton argument. It remains unexplained as to how the Appellant's solicitors could have properly concluded that this point could be made on the documents before the Tribunal.

13. On behalf of the Appellant the second point was maintained, that the Appellant fell within the scope of Article 10(1)(c) and (d) of the Withdrawal Agreement because he had previously made an application for facilitation of his residence as an extended family member in 2017 and that there was no requirement in Batool or elsewhere that such an application must be extant. It was submitted that any application at any time would be sufficient to bring a person within personal scope.

14. Mr Broachwalla initially submitted that the appeal being allowed on the basis that the decision was not in accordance with the law was not a material error because in substance all of the issues had been properly considered in the decision. However, it was then agreed that there was a material error given the decisions in Batool and also Siddiqa (other family members: EU exit) [2023] UKUT 00047 (IAC) in which it was found that there was no requirement upon the Respondent to treat an application under the EUSS as an application made under the 2016 Regulations. However, it was submitted that the Appellant could still succeed in his appeal under Article 18(1)(r) of the Withdrawal Agreement that the decision was disproportionate as he was dependent on an EU national.

15. On behalf of the Respondent, the grounds of appeal were relied upon and in addition, Ms Rushforth submitted that for the purposes of the Withdrawal Agreement, a person is only within scope if they had an extant application for facilitation of their residence (or such residence had been facilitated) and it was not sufficient to rely on a historic application which had been refused.

Findings and reasons

16. In accordance with Regulation 8 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, the grounds of appeal open to a person against a decision to refuse an application under the EUSS (as in the present appeal) are as follows:

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) or 25(2) of Chapter 2, of Title II of Part 2 of the withdrawal agreement,

(b) Chapter 1, or Article 23(2) or 24(2) of Chapter 2, of Title II of Part 2 of the EEA EFTA separation agreement, or

(c) Part 2 of the Swiss citizens' rights agreement.

(3) The second ground of appeal is that –

(a) …;

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

(c) …;

(d) …;

17. As can be seen from the above, there is no ground of appeal open to this Appellant that the decision of the Respondent appealed against 'is not in accordance with the law and the applicable Regulations'. As accepted on behalf of the Appellant, that was a material error of law. The First-tier Tribunal had no power to allow the Appellant's appeal on this basis and the decision must as a result be set aside. The question then is whether the Appellant could succeed on the basis of the substance of the First-tier Tribunal's decision and/or whether he could succeed on either of the grounds of appeal open to him.

18. The first available ground of appeal to the Appellant was that the decision was not in accordance with specific parts of the Withdrawal Agreement. An individual must however fall within the personal scope of the Withdrawal Agreement for any of its provisions to potentially be of benefit, including those set out in Article 18 of the agreement as relied upon by the Appellant and referred to by the First-tier Tribunal. Article 10 of the Withdrawal Agreement sets out the personal scope, which so far as relevant provides:

1. Without prejudice to Title III, this Part shall apply ot the following persons:

(a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside thereafter;
(b) …
(c) …
(d) …
(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;
(ii) …
(iii) …
(f) family members who resided in the host State in accordance with Articles 12 and 13, Article 16(2) and Articles 17 and 18 of Directive 2004/38/EC 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 its national legislation before the end of the transitional period, and whose residence is being facilitated by the host State in accordance with its national legislation 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.

4. …

5. …

19. The Appellant does not fall within the any of the provisions of personal scope for the Withdrawal Agreement. In the submission on his behalf, it was said that it was sufficient that the Appellant had applied for facilitation of his residence in 2017 as there was no requirement for this to be an extant application. That however ignores the second part of the requirement in paragraph 1(3) above, that not only had an application been made, but that residence was actually then facilitated after the transition period in accordance with national legislation, i.e. the application was successful. For the reasons set out below and not disputed by the Appellant, even if a past application was sufficient, he does not meet the criteria for residence now and has not been issued with any documentation at any time to reflect acceptance that he has or does now. On any view, he can not fall within the personal scope of the Withdrawal Agreement.

20. For completeness, I do not in any event accept the submission that any prior application for facilitation of residence, even if refused, is sufficient to fall within the first part of the requirement or the scope of what is said in Batool or Siddiqa. The provions are clearly intended to cover only an extant application, which together with transitional provisions which ensure that even after the transitional period a decision can still be taken and a right of appeal still exists, to protect the rights of those as at 31 December 2020. It would be entirely illogical and out of context of the new scheme and protected rights as at a specific date to encompass anyone who at any stage in the past had made an unsuccessful application for an EEA Residence Card – such persons were not residing in accordance with EU law. The fact that the Upper Tribunal did not specify that it needed to be an extant application is not at all surprising, given the issue did not arise on the facts of Batool and was in any event obvious.

21. In addition, even if the Appellant did fall within the personal scope of the Withdrawal Agreement, that could not have assisted him or led to a successfully appeal in any event. In Batool, the Upper Tribunal confirmed that a person who made an application for settlement as a family member had no right to have that application treated as one for facilitation and residence as an extended/other family member, under Article 18(1)(e) or (f) of the Withdrawal Agreement, nor would it be disproportionate for the Respondent to determine the application made under Article 18(1)(r). In Siddaqa, the Upper Tribunal confirmed that a person who had made an application under the EUSS would not be entitled to a decision under the 2016 Regulations and the First-tier Tribunal was similarly not required to determine any appeal with reference to the 2016 Regulations; nor did Article 18(1)(o) of the Withdrawal Agreement assit a person who made an application under the EUSS as for the same reasons, this provision did not require the Respondent to treat an application under the EUSS under the 2016 Regulations.

22. Ultimately, even if the Appellant's application had been expressly under the 2016 Regulations or the Respondent or Tribunal had considered it by reference to those regulations, he would have still been unsuccessful as on any view of the facts, he could not satisfy the requirements of Reguation 8 of the 2016

Regulations. The submission that the decision was disproportionate because the Appellant is dependent on the Sponsor entirely fails to engage with the requirements of dependency, which include both prior dependency/membership of the same household and current dependency/membership of the same household. The Appellant had not been dependent on the Sponsor nor part of her household prior to his entry to the United Kingdom. In fact they only became related through marriage in 2015, some eight years after the Appellant's entry to the United Kingdom. Any current dependency, even if accepted, is not sufficient.

23. For all of these reasons, there was no basis upon which the Appellant's appeal could have been allowed by reference to the Withdrawal Agreement. Within the body of the decision, the First-tier Tribunal erred in law in relying on Article 18(o) of the Withdrawal Agreement to find that the Respondent should have considered whether to determine the Appellant's application under the 2016 Regulations when there I sno basis upon which the Respondent, or the Tribunal, was required to do so.

24. The second available ground of appeal was that the decision was not in accordance with the residence scheme rules, in this case, Appendix EU of the Immigratoin Rules. However, it is not disputed by the Appellant that he could not meet the requirements set out therein and it is clear that he could not. The Appellant could not satisfy the criteria in either EU11 or EU14 for settled or pre-settled states as he was not a person whose entry or residence in the United Kingdom had been facilitated by the Respondent by the relevant date, in essence he did not have an EEA Residence Card. The Appellant has not at any time resided in the United Kingdom in accordance with EU law. The appeal should therefore also have been dismissed on this second available ground of appeal. The Respondent's decision was entirely in accordance with the EUSS rules.

25. For these reasons, the appeal is remade to dismiss the appeal on all grounds without a need for any further hearing or submissions. There is no basis upon which the Appellant could succeed on either ground of appeal available to him on the facts of his case.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

The appeal is remade as follows:

The appeal is dismissed under Appendix EU of the Immigration Rules.

The appeal is dismissed under the Withdrawal Agreement.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2nd May 2023