IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003423
First-tier Tribunal No:
EA/15070/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 3 May 2023

Before

UPPER TRIBUNAL JUDGE LESLEY SMITH

Between

ANTHONY SALAMI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No attendance or representation
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 11 April 2023

DECISION AND REASONS

1. By a decision promulgated on 12 October 2022, I found an error of law in the decision of First-tier Tribunal Judge Hosie allowing the Appellant's appeal. I set aside the First-tier Tribunal's decision in consequence and gave directions for written submissions to be filed with a view to re-making the decision on the papers. My error of law decision is annexed to this decision for ease of reference.

2. In accordance with my directions, the Appellant should have filed and served written submissions by 9 November 2022 and the Respondent should have filed and served written submissions in reply by 23 November 2022.

3. No submissions were filed by the Appellant. Instead, on 15 November 2022, the Appellant's solicitors sent to the Respondent (but did not file

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with the Tribunal) an email simply stating that "[t]he client has withdrawn the continuity of the appeal". In the circumstances, the Respondent wrote to the Tribunal on 16 November 2022 indicating that in the absence of submissions from the Appellant, she did not propose to file any submissions as there was nothing to which she could reply.

4. The email from the Appellant's solicitors came to my attention when it was sent to the Tribunal by the Respondent. As indicated, the Appellant's solicitors did not send this email to the Tribunal and there has therefore been no formal notice of intention to withdraw the appeal. Furthermore, it was not entirely clear to me what was meant by the email and whether the Appellant did indeed wish to withdraw his appeal. Accordingly, I directed that the appeal be relisted for re-making so that the Tribunal could ensure that the Appellant had the opportunity to make submissions if he wished to continue the appeal or could otherwise confirm his intention to withdraw the appeal.

5. The hearing was listed for 11 April 2023. The hearing notice was sent to the parties on 1 March 2023. On 6 April 2023, the Respondent filed a skeleton argument. There is nothing on the Tribunal's file to indicate any response to the hearing notice from the Appellant's solicitor.

6. At the start of the hearing, Mr Melvin was in attendance for the Respondent. There was no attendance by the Appellant or his solicitors. The Tribunal therefore contacted the solicitors and was informed that the Appellant wished for the appeal to be determined on the papers and the solicitors had emailed the Tribunal to that effect. As above, the Tribunal has no record of any such email. Accordingly, the solicitors were asked to re-send the email. An email was received at 10:06 hours. That appears to be a new email and not an earlier email which had been forwarded. It reads as follows:

> "Good morning,
>
> As for the above appellant's matter. The case has been agreed that it will proceed straight to a remarking [sic] on the papers.
>
> The case was allowed therefore we are still relying on our First Tier Tribunal Argument. In this regard we are happy that the Judge thrown the case and allowed the First Tier Tribunal decision to stand."

7. This email makes little sense. It shows no engagement with my earlier error of law decision and the reasons I gave for finding that the First-tier Tribunal had erred when allowing the Appellant's appeal. I assume that the email was inviting me to reinstate the First-tier Tribunal's decision for the reasons that the First-tier Tribunal Judge had previously given, but the solicitors failed to explain why I should do so and why the reasoning in my error of law decision was said to be wrong as a matter of law.

8. The Respondent's skeleton argument urged me to re-make the decision in the Respondent's favour following the reasoning in my error of law decision. I had read that skeleton argument prior to the hearing. Since I had received no legal arguments put forward by the Appellant to counter that submission and the reasoning as set out in my error of law decision, I did not consider it necessary to hear from Mr Melvin.

9. I therefore indicated to Mr Melvin that I would be dismissing the Appellant's appeal and would provide my decision in writing for the benefit of both parties. I therefore turn to do that.

10. I do not need to repeat what is said in my error of law decision. I draw attention in particular to paragraphs [18] to [22] of the error of law decision, which set out the relevant legal provisions.

11. The Appellant is accepted to be the brother of his Italian national sister ("the Sponsor"). As such, he is, under EU law, an extended family member of the Sponsor. He is not and cannot be her "family member" in EU law unless and until he has his right of residence as such facilitated by the Respondent. He could have sought that facilitation prior to 31 December 2020 under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") but after that date the EEA Regulations were revoked. As noted at [4] and [5] of my error of law decision, the Appellant's former solicitors had apparently made an application under the EEA Regulations but although that was said to have been sent with a covering letter dated 27 July 2020, it was not in fact received by the Respondent until 3 February 2021 by which time the EEA Regulations had been revoked. For that reason, the application was declared to be void.

12. The Appellant made the application which led to the decision under appeal on 30 March 2021. That was an application under the EU Settlement Scheme ("EUSS"). The application was refused on 5 May 2021. As is pointed out by the Respondent in her skeleton argument, under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, the Appellant can only appeal against the Respondent's decision on the grounds that it is not in accordance with the Immigration Rules which apply to the EUSS ("Appendix EU") or that it breaches the Appellant's rights insofar as they are protected by the agreement between the EU and UK on the UK's withdrawal from the European Union ("the Withdrawal Agreement").

13. I have set out at [18], [20] and [21] of my error of law decision the provisions of Appendix EU which might apply. The Appellant does not fall within the categories of person set out at EU14. He is not an EEA national. He is not and has never been recognised as the family member of an EEA national. He is related to the Sponsor as a member of her family but that is not the same thing as a "family member" as that term is understood in EU law. The Appellant does not have and has never had a derivative right to reside or "Zambrano right to reside" as the primary carer of a British citizen.

14. As I explained at [22] of my error of law decision, in order to be recognised as a family member, the only category which the Appellant might have met is that of a "dependent relative". However, he could not do so because he never held a "relevant document" for the period of residence relied upon. In essence, that would be a residence card issued under the EEA Regulations. That could only be obtained by an application

made under those regulations before 11pm GMT on 31 December 2020. As above, the Appellant did not make such an application in time.

15. For those reasons, the Appellant cannot meet the requirements of Appendix EU. The Respondent's decision is in accordance with the Immigration Rules which apply.

16. Turning then to the Withdrawal Agreement, I do not need to do more than refer to this Tribunal's decision in Batool and others (other family members: EU Exit) [2022] UKUT 00219 (IAC) ("Batool"), the headnote of which reads as follows:

> "(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."

17. Although Batool was an appeal against an entry clearance decision, the reported guidance makes clear that it applies as much to residence as to entry. In short, because the Appellant did not make an application for facilitation of his residence under the EEA Regulations as an extended family member before 11pm GMT on 31 December 2020, he cannot rely on the Withdrawal Agreement or Appendix EU in order to succeed in his appeal. Permission to appeal the decision in Batool has been refused by the Court of Appeal.

18. As the Respondent points out in her skeleton argument, the decision in Batool is a complete answer to the Appellant's appeal.

19. For those reasons, I dismiss the Appellant's appeal.

NOTICE OF DECISION

The Appellant's appeal is dismissed.

L K Smith

Upper Tribunal Judge Lesley smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 April 2023

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003423
[EA/15070/2021]

THE IMMIGRATION ACTS

Heard at Field House, London
On Wednesday 21 September 2022

Determination Promulgated
...**12 October 2022**.....

Before

UPPER TRIBUNAL JUDGE SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANTHONY SALAMI
[ANONYMITY DIRECTION NOT MADE]

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr C Sultan, Counsel instructed by Brightway Immigration and Asylum Practitioners

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Hosie promulgated on 10 June 2022 ("the Decision"). By the Decision, the

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Judge allowed the Appellant's appeal against the Respondent's decision dated 5 May 2021 refusing him status as the extended family member of his EEA national (Italian) sister ("the Sponsor") under the EU Settlement Scheme ("EUSS").

2. For reasons which will become apparent, before considering the Decision and the Respondent's grounds of appeal, it is necessary to go back to the Respondent's decision under appeal and the immigration history of this Appellant.

3. The Appellant is a Nigerian national who has been living in the UK since 2018. He currently has no lawful status, having overstayed his visa. He says that he has been financially dependent on and living with the Sponsor since his arrival in the UK.

4. Within the Respondent's bundle for the appeal (at [RB/C1-2]) is a covering letter from the Appellant's then solicitors (Chris Solicitors) dated 27 July 2020 purporting to make an application under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). That is not an application under the EUSS. I therefore asked the parties to address me whether the decision under appeal was one under the EUSS as I (and Judge Hosie) understood the position to be or under the EEA Regulations.

5. Although Mr Whitwell did not produce documents in this regard, he informed me by reference to the Home Office's database that the application made with the covering letter at [RB/C1-2] was not in fact received by the Home Office until 3 February 2021. By that date, applications under the EEA Regulations had closed. For that reason, on 23 March 2021, that application was declared by the Respondent to be void and notification was sent out to that effect. That notification must have been received by those then representing the Appellant because, on 30 March 2021, the application under EUSS was made. That an application was made on that basis is confirmed by the documents in the Respondent's bundle at [RB/B1-5].

6. Unfortunately, the Respondent's decision under appeal is not as clear as it might have been. I set out the relevant part of that decision because that is necessary in order to understand why the Appellant took the course he did and why the Judge was led into making the decision as she did. The decision also draws attention to the relevant section of the Immigration Rules ("the Rules") which applies. Having confirmed that the application was made under the EUSS, the decision (dated 5 May 2021 – at [RB/A3-5]) continues as follows:

> "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 EU14 of Appendix EU to the Immigration Rules. You have applied with your Sister Evelyn Salami as your sponsor. Ms Salami is an Italian national. You state that you are a dependent relative of a relevant EEA citizen. However, you have not provided 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 registration certificate, family permit or residence card issued under the EEA Regulations…. as the durable partner of that EEA citizen and, where the applicant does not have a documented right of permanent residence, 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 registration certificate, 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…In order to meet the definition of a durable partner as set out in Annex 1 of Appendix EU to the Immigration Rules, you need to demonstrate that you are a relative of your sponsor as claimed and that you hold a valid relevant document. Therefore, you do not meet the requirements for pre settled status as a family member of a relevant EEA citizen.
>
> It is considered that the information available does not show that you meet the eligibility requirements for pre-settled status set out in rule EU14 of Appendix EU to the Immigration Rules. This is for the reasons explained above. Therefore, your application has been refused under rule EU6."

7. As Mr Whitwell fairly conceded, the decision wrongly referred to the application being as a durable partner whereas the Appellant was claiming to be an extended family member of his sister. As I will come to, though, he submitted that the reason for refusal remained the same and valid. As a statutory appeal, the issue for the Tribunal Judge is not whether the decision is itself unlawful in public law terms but whether the decision breaches the Appellant's rights under the relevant Rules and/or legislative provisions (in this case the relevant appendix to the Rules – see below – and/or the Withdrawal Agreement signed between the UK and EU on the UK's exit from the EU ("the Withdrawal Agreement").

8. Unfortunately, those representing the Appellant (not it appears his current representatives) misunderstood the reasoning and thought that the reason the application was refused was because the Respondent did not accept that the Appellant was related as claimed to his sister. For that reason, the Appellant provided DNA evidence and little else.

9. The Respondent was unfortunately not represented before Judge Hosie. Mr Whitwell informed me that an earlier hearing had been adjourned as the Judge had recognised that there were some factual issues which required to be explored (not least whether the application was under the EEA Regulations or the EUSS). That hearing was therefore converted to a case management review. However, it appears that this did not come to Judge Hosie's attention.

10. Unfortunately, due no doubt to the misunderstanding under which the Appellant's representative was labouring, the Judge understood the "only issue before [her] in terms of the notice of refusal" to be whether the Appellant and Sponsor were related as claimed ([18] of the Decision). She noted that the DNA evidence had not been challenged. She went on to find as follows:

> 21. Taking all of the evidence in the round in the light of the refusal, I find that a thorough examination was not carried out by the Respondent of the evidence provided by the Appellant which I have now considered. The Appellant has provided sufficient evidence to show that on the balance of probabilities the Appellant and the sponsor are related as claimed. The Appellant is the family member of a relevant EEA Citizen. He has satisfied the burden of proof that he meets the requirements of Appendix EU (Family Permit) to the Immigration Rules and his appeal therefore succeeds under the EU Exit Regulations."

The Judge therefore allowed the appeal.

11. The Respondent appeals on the basis that the Judge had failed to consider the relevant Rules. It is said that the Judge had misapplied the terms of the Withdrawal Agreement and that the Appellant was not in scope. It is submitted that the Appellant could not meet the definition of a dependent relative as he had not previously held a document on that basis prior to the specified date of 31 December 2020. Reference is made to Article 3 of Directive 2004/38/EC and to Article 10(2) of the Withdrawal Agreement. The Respondent submits that the Appellant cannot meet Article 10(2) as his residence had not been facilitated before 31 December 2020.

12. Permission to appeal was granted by First-tier Tribunal Judge Boyes on 6 July 2022 for the following reasons:

> "… 3. Having considered the grounds, I grant permission. I imagine that there are a significant number of other cases raising the same point and it is prudent and sensible that the UT has a chance in the near future to resolve this matter.
>
> 4. Permission is granted."

13. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to consider whether to set it aside. If the Decision is set aside, it is then necessary for the decision to be re-made either in this Tribunal or on remittal to the First-tier Tribunal.

ERROR OF LAW

14 At the start of my list, I identified the factual issues which I have outlined above and allowed Mr Whitwell to explain the position. Mr Whitwell also informed me that he had clarified the position with Mr Sultan. Mr Sultan had also been made aware of the guidance given by this Tribunal in the cases of Celik (EU Exit; marriage; human rights) [2022] UKUT 00220 (IAC) ("Celik") and Batool and others (other family members: EU exit) [2022] UKUT 00219 ("Batool"). Mr Sultan informed me that he had only recently been instructed. The Appellant's representatives before the First-tier Tribunal were not those who now represent the Appellant and I therefore agreed that Mr Sultan should be given some time to take instructions in relation to the facts and to consider the Tribunal's guidance which may well be relevant to this appeal. I therefore put this case to the back of the list.

15. When he returned, Mr Sultan did not seek to persuade me that the Judge was entitled to reach the Decision she did. He accepted that there was an error of law. I set out below why he was right to do so.

16. As Mr Whitwell pointed out, the Judge was wrong to refer to Appendix EU (family permit) ([6] of the Decision). That appendix concerns entry clearance and not in-country applications for settled or pre-settled status. The relevant appendix is Appendix EU to the Immigration Rules ("Appendix EU"). So much is clear from the Respondent's decision under appeal.

17. This might not have mattered if the Appellant were indeed a family member as the Judge found. However, he was not. Even the definition section under Appendix EU (family permit) as set out at [6] of the Decision does not bring the Appellant within the scope of that definition. The Appellant is not a direct descendant of the Sponsor.

18. As the Respondent's decision under appeal makes clear, the Appellant needed to meet Appendix EU. The Respondent relies on EU14 which reads as follows so far as relevant to this appeal:

> "Persons eligible for limited leave to enter or remain as a relevant EEA citizen or their family member, as a person with a derivative right to reside or with a Zambrano right to reside or as a family member of a qualifying British citizen
>
> EU14. The applicant meets the eligibility requirements for limited leave to enter or remain where the Secretary of State is satisfied, including (where applicable) by the required evidence of family relationship, that, at the date of application and in an application made by the required date, condition 1 or 2 set out in the following table is met:
>
> | **Condition** | **Is met where:** |
> |---|---|
> | 1. | (a) The applicant is:
(i) a relevant EEA citizen; or
(ii) a family member of a relevant EEA citizen; or
(iii) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or
(iv) a person with a derivative right to reside; or
(v) a person with a Zambrano right to reside; and
(b) The applicant is not eligible for indefinite leave to enter or remain under paragraph EU11 of this Appendix solely because they have completed a continuous qualifying period of less than five years; and
(c) Where the applicant is a family member of a relevant EEA citizen, there has been no supervening event in respect of the relevant EEA citizen
…" |

19. I do not need to consider at this stage whether the Appellant could meet any of this definition. I am considering whether the Decision contains an error of law. The Judge did not consider this provision at all. That is an

error. The Judge was required to consider whether the Respondent's decision breached the Appellant's rights under the Rules and/or the Withdrawal Agreement. She could not do that without considering the relevant rule.

20. Although I am not at this stage re-determining the appeal, since the Appellant needs to understand the case which he has to answer, it is appropriate for me to set out the relevant provisions. The Appellant is neither an EEA national nor someone with a retained EU right of residence nor does he have an existing derivative right of residence or a "Zambrano" right of residence. As I have already pointed out, the Appellant is not and does not claim to be the durable partner of an EEA national.

20. The issue therefore is whether the Appellant can be said to be a "family member of a relevant EEA citizen". Although the Respondent does not dispute that the Appellant is related as claimed to the Sponsor and is therefore a member of her family, that is not the issue under Appendix EU nor under the Withdrawal Agreement. The only part of the definition of family member in Appendix EU which the Appellant could even potentially meet is as follows:

> "(e) the dependent relative, before the specified date, of a relevant EEA citizen (or of their spouse or civil partner, as described in sub-paragraph (a) above) and the dependency (or, as the case may be, their membership of the household or their strict need for personal care on serious health grounds) continues to exist at the date of application (or did so for the period of residence relied upon)"

21. One needs to look then at the definition of "dependent relative". That reads as follows so far as relevant:

"dependent relative	The person: (a)(i)(aa) is a relative (other than a spouse, civil partner, durable partner, child or dependent parent) of their sponsoring person; and (bb) is, or (as the case may be) for the relevant period was, a dependant of the sponsoring person, a member of their household or in strict need of their personal care on serious health grounds; … and (b) holds a **relevant document** as the dependent relative of their sponsoring person for the period of residence relied upon …; for the purposes of this provision, where the person applies for a relevant document (as described in sub-paragraph (a)(i)(aa) or (a)(ii) of that entry in this table) as the dependent relative of their sponsoring person before the specified date and their relevant document is issued on that basis after the specified date … they are deemed to have held the relevant document since immediately before the specified date in addition, 'sponsoring person' means:

> (a) (where sub-paragraphs (a)(i) and (b) above apply):
> (i) a relevant EEA citizen (in accordance with the applicable entry in this table); or …"

22. As is there made clear, in order to meet the definition of a "dependent relative", the Appellant must be in possession of a "relevant document". That is also underlined by the opening sentence of EU14 which requires the Respondent to be satisfied by "required evidence of family relationship" that the conditions are met. In relation to a dependent relative, in addition to evidence of the relationship, that person is required to hold "a relevant document as the dependent relative of their sponsoring person". A "relevant document" is defined as "a family permit, registration certificate, residence card, document certifying permanent residence, permanent residence card or derivative residence card issued by the UK under the EEA Regulations on the basis of an application made under the EEA Regulations before (in the case, where the applicant is not a dependent relative, of a family permit) 1 July 2021 and otherwise before the specified date". The Appellant is claiming to be a dependent relative and therefore required a residence card issued following an application under the EEA Regulations made before 31 December 2020 (which is the "specified date").

23. The Judge did not consider any of those requirements or the relevant definitions and accordingly has fallen into error in her conclusion that the Appellant could qualify as a family member merely because he is related as claimed.

24. This brings me back to the Respondent's decision. Although the Respondent wrongly referred to the application being made on the basis that the Appellant was the durable partner of the Sponsor, there is no difference in terms of the requirements which apply. In particular, once the appropriate rule is considered, it is clear that the issue is whether an appellant is a family member and, due to the definitions which apply, must demonstrate that by a relevant document issued prior to the specified date. The same would be true of a durable partner (as to which see the relevant provisions of EU14 as set out in Section C of the decision in Celik).

25. I therefore indicated to the parties at the hearing that I found there to be an error of law. The submissions made thereafter concerned what should happen in relation to the re-making of the decision.

26. Mr Sultan argued that I should require the Respondent to issue a corrected decision. As Mr Whitwell pointed out, this would have the effect of generating a second appeal which he said would be pointless on the facts of this case as the Appellant could not succeed. It could only be a delaying tactic. It would also lead to increased legal costs to the Appellant.

27. I declined to accede to this suggestion not least because, as I have pointed out above, there is no difference between the legal treatment of

a person who would be an extended family member under the EEA Regulations and a durable partner. As I have already pointed out, the issue for this Tribunal when re-making the decision in the appeal is not whether the Respondent's decision is unlawful in public law terms but, here, whether the decision breaches the Appellant's rights under Appendix EU and/or the Withdrawal Agreement.

28. I also consider that the fault for what has gone wrong in this appeal to date does not lie solely with the Respondent. The Appellant's (former) representatives had their part to play. They had wrongly understood the Respondent's decision to challenge the genuineness of the relationship whereas once the decision is read with some modicum of knowledge of immigration law, it becomes apparent that the real issue was the lack of a relevant document issued under the EEA Regulations. I make clear that I do not criticise the Appellant himself. It is his previous representatives who are at fault.

29. Equally, however, now that the basis of the Respondent's decision has been clarified, I did not consider it fair simply to proceed to a re-making without giving the Appellant the opportunity to consider whether he has any argument which would allow him to succeed. Mr Whitwell suggested that it was appropriate to proceed immediately to a re-making as the Appellant could not succeed. The Appellant ought though to have the opportunity to consider his legal position.

30. Mr Sultan was content with my alternative suggestion that I should allow both parties to make further written submissions before re-making the decision. Either party could then seek a further hearing if that were considered necessary. Otherwise, the decision could be re-made on the papers. I therefore gave directions which I set out below. The Appellant will need to consider the provisions which I have set out above and the guidance given by the Tribunal in Celik and Batool which also provide a detailed explanation of the relevant provisions and may assist those representing him.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Hosie promulgated on 10 June 2022 is set aside. I give the following directions for the re-making of the decision in this appeal

1. **Within 28 days from the date when this decision is sent, the Appellant shall file with the Tribunal and serve on the Respondent (for the attention of Mr Whitwell) written submissions setting out what he contends should be the outcome of the re-making of this decision and the legal provisions and case law relied upon in that regard.**

2. **Within 14 days from the date when the Appellant serves his submissions, the Respondent shall file with the Tribunal and serve on the Appellant's solicitors her written submissions in reply.**

3. Unless either party requests a further hearing to make oral submissions, the decision will be re-made on the papers after eight weeks from the sending of this decision.

Signed L K Smith Dated: 27 September 2022
Upper Tribunal Judge Smith