IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003200
First-tier Tribunal No: EA/15950/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 May 2023

Before

UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

BAVANVIR SINGH BATH
(ANONYMITY ORDER NOT MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Z Raza, counsel instructed by Charles Simmons Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

Heard at Field House on 20 February 2023

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Gribble promulgated on 24 May 2022.

2. Permission to appeal was granted by First-tier Tribunal Judge Monaghan on 15 June 2022

Anonymity

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3. No anonymity direction was made previously, no application was made before us, and we could see no obvious reason for making any such direction now.

Background

4. The appellant was born during 2013 in India and he and his parents arrived in the United Kingdom as visitors during February 2020. The appellant and his parents applied for leave to remain under the EU Settlement Scheme based on their dependency on a French national who is married to the appellant’s brother. The appellant’s parents were granted pre-settled status as the family members of a relevant EEA citizen during November 2020. The appellant’s application was refused, by way of a decision dated 7 December 2020, in which he was informed that he could not be granted leave under the EU Settlement Scheme as the dependent relative of a relevant EEA citizen until he held a relevant document. Weblinks were provided for making such an application. An application was then made on the appellant’s behalf for an EEA residence card, on 24 December 2020, but this application was said to have been rejected as invalid, owing to non-payment of fees by way of a decision which was said to have been communicated after the end of the transition period.

5. On 25 June 2021, a further application was made on the appellant’s behalf for leave to remain under the EU Settlement Scheme. The application was based on the appellant’s dependency on his brother’s French national wife.

6. The application under the EUSS was refused by way of a decision dated 9 November 2021. The salient reason for refusal was as follows.

> Home Office records do not show that you have been issued with a family permit or residence card under the EEA Regulations as a relative of an EEA national who was a dependant of the EEA national or of their spouse or civil partner, a member of their household or in strict need of their personal care on serious health grounds, and you have not provided a relevant document issued on this basis by any of the Islands

The decision of the First-tier Tribunal

7. At the hearing before the First-tier Tribunal, the facts of the case were not in dispute. Therefore, it was accepted that the appellant was part of his sponsor’s household and was previously supported by her when he was in India. The judge concluded that the appellant could not meet the requirements of ‘Appendix EU-FP’ because there was no provision for a sibling-in-law to join an EEA citizen in the United Kingdom. The judge found that the Withdrawal Agreement was of no assistance to the appellant because he was not outside the United Kingdom at the end of the transition period. Lastly, the judge found that it was not disproportionate for an application to be made under Appendix FM for the appellant to remain in the United Kingdom with his family.

The grounds of appeal

8. The sole ground of appeal was that the First-tier Tribunal erred in determining whether the decision appealed breached the Withdrawal Agreement. Specifically, it was argued that the judge had erred in referring to Appendix EU (Family Permit) instead of Appendix EU and erred in referring to the provisions of the Withdrawal Agreement which related to direct family members which it was accepted the appellant was not. In terms of materiality, it was contended that it was arguable that owing to the appellant’s timely but invalid application under the 2016

Regulations, he fell within the personal scope of the Withdrawal Agreement. It was further argued that the decision under challenge was disproportionate.

9. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

> The Judge has arguably misapplied Article 10 to the facts, given that Article 10 applies to direct family members whereas it was accepted on the facts that the Appellant is not a direct family member of his sponsor.

10. The respondent did not file a Rule 24 response.

<u>The error of law hearing</u>

11. A skeleton argument was submitted on the appellant’s behalf minutes before the hearing was due to commence. In it, reliance was placed on the decision in *Siddiqa* (other family members, EU Exit) [2023] UKUT 47 (IAC) for the proposition that a claimant who did not come within the scope of Article 10 of the Withdrawal Agreement, could nonetheless invoke Article 18.

12. It was apparent from the skeleton argument that Mr Raza was under the false impression that the Upper Tribunal had previously found a material error of law in the instant case. This was owing to the notice of hearing wrongly stating that this was a remaking hearing. Mr Raza confirmed that he was, nonetheless, prepared to pursue arguments on error of law.

13. There was some discussion as to whether this matter ought to be stayed pending the outcome of the appeal in *Celik* (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC). Mr Raza was resistant to this outcome because the appellant’s case was factually distinct in that he was not a durable partner and in particular, the appellant’s case concerned a rejected application over a fee issue.

14. Mr Raza made the following points on behalf of the appellant. The decision rejecting the application for a residence card was included in the 140-page bundle before the First-tier Tribunal, but it was not raised as an issue before the judge. It was accepted that the judge’s reliance on the incorrect Rules was immaterial as both versions of the Rules require a relevant document and the appellant would not have been able to meet the requirements either way. It was emphasised that the chronology was not in dispute regarding the application made under 2016 Regulations, this had not been considered and it was relevant to proportionality.

15. Mr Whitwell accepted that the facts of this case were not on all fours with that of the claimant in *Celik.* He argued that the decision in *Siddiqa* did not take matters further. He disagreed that the 2016 application was material to proportionality given that this was a matter in control of those representing the appellant, whereas in *Celik*, the impact of the pandemic was a matter not in the control of the Secretary of State. He emphasised that this point was not argued before the First-tier Tribunal, and it was insufficient to expect the judge to infer the point because the application was in the appellant’s bundle. In terms of materiality, the judge had unnecessarily looked at proportionality and had found in favour of the Secretary of State.

16. In response, Mr Raza added the following. In relation to Article 10(3) of the Withdrawal Agreement he was in difficulty in showing that the appellant’s

'residence was being facilitated by the host state. He accepted that the appellant did not fall within the scope of Article 10 but that he could still invoke Article 18, with reference to [78] of *Siddiqa*. Relevant facts were not considered by the judge.

17. At the end of the hearing, we announced that there was no material error of law in the decision of the First-tier Tribunal. We give our reasons below.

Discussion

18. Mr Raza's submissions can be distilled to a single point, that being that the invalid application made on the appellant's behalf under the 2016 Regulations was not considered by the judge as part of her proportionality assessment in respect of Article 18(1)(r) of the Withdrawal Agreement.

19. Mr Raza further maintained that the judge was required to look at proportionality, notwithstanding his, rightly made, concession that the appellant did not fall within personal cope of Article 10(3), referring to [78] of *Siddiqa*, where the panel were 'content to accept' that the appellant could, in principle, invoke Article 18 based on what was said at [62-63] of *Celik*.

> 62. Ms Smyth submitted at the hearing that, since the appellant could not bring himself within Article 18, sub-paragraph (r) simply had no application. Whilst we see the logic of that submission, we nevertheless consider that it goes too far. The parties to the Withdrawal Agreement must have intended that an applicant, for the purposes of sub-paragraph (r), must include someone who, upon analysis, is found not to come within the scope of Article 18 at all; as well as those who are capable of doing so but who fail to meet one or more of the requirements set out in the preceding conditions.
>
> 63. The nature of the duty to ensure that the decision is not disproportionate must, however, depend upon the particular facts and circumstances of the applicant. The requirement of proportionality may assume greater significance where, for example, the applicant contends that they were unsuccessful because the host State imposed unnecessary administrative burdens on them. By contrast, proportionality is highly unlikely to play any material role where, as here, the issue is whether the applicant falls within the scope of Article 18 at all

20. We find that there was no material error of law identified in either the grounds or arguments before us principally because the issue of the 2016 Regulations application was not argued before the First-tier Tribunal. Only a passing reference to such an application being made was in a covering letter dated 25 June 2021, which accompanied the 2021 application under Appendix EU, it being stated that '*this application was rejected due to non-payment of the specified Home Office fees*.' That covering letter, which can be found at page 50 of the appellant's bundle was not listed in the index and was included in items inaccurately referred to in the index as 'Initial application, submissions & refusal letter dated 7 December 2020.' There was no reference to the 2016 Regulations in the appellant's skeleton argument nor was it mentioned in oral submissions. Furthermore, there was no supporting evidence relating to that application such as a notice of invalidity or a copy of the application form.

21. While it is debatable whether the judge was required to consider proportionality in this case, given that the appellant is not in scope of Article 10, this was nonetheless considered at [27] of the decision and reasons. There the judge considered the appellant's relationship to his sponsor and other relatives with whom he lives in the United Kingdom and the absence of relatives in India,

prior to finding that it was not disproportionate for the appellant's parents to make an appropriate application for him under Appendix FM. There was no material error in the approach of the judge finding that Article 18 could be invoked and in considering those factors which were argued before her prior to concluding that the decision under challenge was proportionate.

22. The skeleton argument goes further, arguing that the fee for the 2016 Regulations application was not debited and the delay in notifying the appellant of this prevented him from making a further application for an EEA Residence Card. It that was the case, it begs the question why no steps have been taken to challenge that matter. Lastly, the inclusion of the invalidity issue at this late stage does not, without more, distinguish this case from that of the appellant in *Siddiqa*.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal is upheld.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 March 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email