IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006312

First-tier Tribunal No: EA/05096/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12 January 2024

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHERIF KOUIDER EL OUAHED
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Ms K Anifowoshe, Counsel instructed by Elkattas & Co Solicitors

Heard at Field House on 5 April 2023

DECISION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against a decision of the Secretary of State refusing him permanent residence under Appendix EU of the Immigration Rules on 15 May 2022. In simple terms it is the claimant's case that he is the dependent relative of an EEA citizen and therefore entitled to settlement and it is the respondent's case that he had not given sufficient evidence that he was a dependent relative within the Rules.

2. Although they often distil down to simple points, cases of this kind can become complex and I begin by considering the actual reasons given by the Secretary of State for refusing the application. The important parts of the written decision state:

> "The required evidence of family relationship for a dependent relative of a relevant EEA citizen, where the dependent relative does not have a documented right of permanent residence, is a valid permit (or a letter from

> the Secretary of State, issued after 30 June 2021) confirming their qualification for one, or a residence card under the EEA Regulations ...".

The Secretary of State's letter continued that the "Home Office records do not show that you have been issued with a family permit or residence card" and then went on to say that the definition of a dependent relative under Annex 1 of Appendix EU required him to hold a valid relevant document. The Secretary of State did not think the claimant did have a relevant document. He does not and the Secretary of State refused the application. The claimant exercised his right of appeal.

3. Grounds of appeal dated 27 May 2022 were prepared by the claimant's solicitors. After considering the Secretary of State's reasons for refusal the grounds relied on Section 3(2) of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 which dealt with the grace period. The Regulation relied on by the claimant provided that the provisions of the EEA Regulations 2016 (or rather some of them) continue to apply substantially in the grace period. The grace period, again according to the grounds, is defined at Regulation 3(5) and as: "(a) the grace period is the period beginning immediately after IP completion day and ending with the application deadline". It will be understood, of course, that "IP" means "implementation period")

4. Again, according to the grounds, Regulation 2(a) of the Regulations defines the application deadline and says that for the "first subparagraph of Article 18(1)(b) of the withdrawal agreement the deadline for submission is the end of 30 June 2021".

5. It is contended that the Secretary of State erred by not considering the provisions of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020.

6. The grounds then contend that there was evidence that the claimant was dependent on his sponsor and his sister while he was Algeria and continues to be dependent on them in the United Kingdom, that he is a member of his sponsor's household and he provided documents to show this. The grounds contend that this should have led to the application being allowed.

7. The grounds then relied on the case of **Lim (EEA – dependency) [2013] UKUT 00437 (IAC)** which asserts that "dependency is a matter of fact and reasons are irrelevant". I doubt that this is important to the determination of this appeal which seems to determine more on what Regulations are to be considered.

8. It was further contended that the decision breached the United Kingdom's obligations under the Human Rights Act under Article 8. In summary, the claimant and his sister are each other's only siblings and their parents are dead and the claimant has needed surgery and is generally rather poorly. The Secretary of State, it was contended, at the very least should have exercised discretion outside the Rules.

9. The appeal came before the First-tier Tribunal when Ms Anifowoshe appeared for the claimant but the Secretary of State did not appear. The judge said that she was "assisted by the [claimant's] Counsel's excellent skeleton argument". The judge said at paragraph 16:

> "I find that the [Secretary of State] in making the decision did not consider that there are Rules that pertain to a transition period in place that apply in this appeal. Under Section 3(2) of the Citizen's Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 there is a 'grace period'. I find that the [claimant] submitted his application before the deadline of 30 June 2021 in accordance with Section 3(2) so this application should then have been assessed under the Immigration (EEA) Regulations 2016. This means that there is no requirement for him to have LTR before [he] made his application".

10. The judge went on then to find that the claimant did satisfy the requirements of the Rules that should have been considered and allowed the appeal.

11. The Secretary of State's grounds assert at 1(b):

> "It is submitted that as the [claimant's] application was made under Appendix EU, the right of appeal derives from Regulation 8(2) of **The (Immigration Citizens' Rights Appeals) (EU Exit) Regulations 2020**. This does not permit the [claimant] to appeal on the basis that he would succeed under the 2016 Regulations. Therefore, it is submitted that the FTTJ has disposed of the appeal on an impermissible basis".

12. This is then supported by a decision of this Tribunal in **Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC)** and particularly headnote 2. The Secretary of State's grounds further contend that the First-tier Tribunal Judge misunderstood the "grace period" which ended on 31 June 2021. According to the Secretary of State this did not extend the time period in which the claimant was able to become lawfully resident under the 2016 Regulations. The grace period was the time in which a person could make an application not qualified under the Rules.

13. The Secretary of State's grounds are summed up at paragraph (g) where it says:

> "It is therefore submitted that the FTTJ has materially erred in finding that there was no requirement for the [claimant] to have a 'relevant document' (or LTR as the FTTJ mistakenly makes reference to at [16] of the determination) confirming that the [claimant] had 'facilitated residence' as an Extended Family Member, prior to the UK's exit from the EU on 31/12/2020".

14. This prompted a detailed skeleton argument from Counsel for the claimant. It is the claimant's case that the Secretary of State was wrong not to entertain arguments about the transition period and was wrong to say that the right of appeal derives from Regulation 8(2) and that this does not permit him to appeal on the basis that the application should succeed under the 2016 Regulations. It is the claimant's case that the right of appeal derives from Regulation 8(1), which show that there are grounds of appeal available under Regulation 8(1) and 8(2) and that does provide that an appeal under these Regulations (EU Exit) must be brought on various grounds including that the decision mentioned is not in accordance with the residence scheme Immigration Rules. Nothing turns on this. The claimant had no rights under the 2016 rules when he applied in 2021 unless they were somehow extended and I find that they were not in a way that helped the claimant.

15. The claimant's skeleton argument asserted that Regulation 3(1)(c) of the Regulations provided a right of appeal against decisions relating to leave to enter or remain in the United Kingdom made by virtue of the residence scheme Immigration Rules and enable a person to appeal against a decision made on or after exit day not to grant leave to enter or remain in response to a relevant application.

16. The claimant's skeleton argument contended that the case of **Batool and others** was not concerned with the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020. It was the claimant's case that he made his application in accordance with Regulations 2 and 3 of the Regulations and that the end of 30 June 2021 was the deadline for a submission for application for residence status in certain circumstances which the argument contended existed here. A person qualified was entitled to documents.

17. Turning to the grace period the argument contended that Regulation (5)(a) provides that for the purposes of this Regulation the grace period begins immediately after IP completion day and ends with the application deadline and the benefit of this continued to apply to him until 30 June 2021 because he made his application before the deadline. He did not have leave to remain under the 2016 Regulations.

18. The claimant also contends that the case of Celik **(EU exit, marriage, human rights) [2022] UKUT 00220 (IAC)**, does not apply to his case as it does not consider Reg.3(1) and (2) of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020. An application was made in time and should have been considered. The claimant contended that the respondent's interpretation of the grace period, albeit set out in her guidance, was just wrong.

19. Mr Lindsay's opening submissions were simple. He relied on the Secretary of State's grounds. He said that **Batool** was highly pertinent and clearly showed that the approach urged by the claimant was wrong. It may be that **Batool** was not available when the First-tier Tribunal heard the appeal but it is of course declaratory of the law. He said the case simply cannot succeed.

20. I do not have before me the relevant application but I do have a covering letter which is dated 28 June 2021. This refers to application "that he be granted Leave to Remain under the EU Settlement Scheme".

21. Clearly the application was *not* made under the 2016 Regulations. They ceased to have effect on withdrawal from the European Union on 31 December 2020 and the application was made on 28 June 2021. It follows that the claimant could not have applied under the 2016 Regulations and did not purport to have applied under the 2016 Regulations. The claimant purported to apply under the EU Settlement Scheme and that is how the Secretary of State responded to the application. This is not a case where it is asserted that the application was made under the 2016 regulations, or, in all the circumstances, that is how it should have been treated. It is the claimant's case that the application ought to have been considered under the 2016 Regulations because the application was made before the end of the transition period.

22. It is the claimant's case that he has been living in the United Kingdom since September 2018.

23. The claimant's argument is very far reaching. If Counsel is right the 2016 Regulations extend to far more people than was hitherto believed. This does not mean that Counsel is wrong but it does surprise me that, if there was merit in the point, it was not taken in **Batool**. In my judgment Counsel is not right.

24. There may be many reasons but of particular relevance is the terms of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020. As is plain from Regulation 3(2), the 2016 Regulations extended to "a relevant person during the grace period". The phrase "relevant person" is defined under Regulation 6 and includes a person who has "permanent residence" in the United Kingdom or was "lawfully resident". The claimant had not lived in the United Kingdom long enough to acquire "permanent residence" and any rights he may have had as an extended family member depended on his having a residence card. He does not come with the definition of "relevant person".

25. In short, the Secretary of State is right. The claimant cannot succeed because he does not have the necessary documents.

26. The appeal was not decided on human rights grounds and to issue a document is not a breach of a human right. Removal might be but that is not what has been decided here. For the reasons give in **Celik**, "human rights" grounds are not relevant here.

27. It follows that I find the First-tier Tribunal erred in law and I set aside its decision and I substitute a decision dismissing the appeal.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 January 2024