



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2022-002022

First-tier Tribunal Nos:
EA/12269/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 20th of March 2024

Before

UPPER TRIBUNAL JUDGE L SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ERJON KULLSI

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: No appearance

Heard at Field House on Wednesday 13 March 2024

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 Freer promulgated on 16 March 2022 (“the Decision”) allowing the Appellant’s appeal against the Respondent’s decision dated 8 August 2021 refusing him status under the EU Settlement Scheme (“EUSS”) as the spouse of an EEA national.
2. The Respondent refused the Appellant’s application on the basis that his marriage was not contracted until after 31 December 2020. Accordingly, the Appellant was not a family member prior to the date of the UK’s departure from the EU and could not benefit as such under either the Immigration Rules relating to EUSS (Appendix EU) or the withdrawal

agreement between the UK and the EU on the UK's departure from the EU ("the Withdrawal Agreement").

3. It was accepted that the Appellant could not establish his case as a family member. It was however argued on his behalf that he was a durable partner prior to 31 December 2020 and could succeed on that basis. Judge Freer accepted that argument and determined the Appellant's appeal in his favour on that basis. The Appellant also sought to rely on his human rights. Judge Freer concluded that he could not determine that issue as it had not been considered by the Respondent. However, he considered that this provided him with a gateway via which he could find the Respondent's decision disproportionate under the Withdrawal Agreement.
4. The Respondent appealed the Decision on the basis that the Judge had failed to have regard to Appendix EU. Had he done so, he would have appreciated that, in order to succeed under Appendix EU (or the Withdrawal Agreement) as a durable partner, the Appellant's residence would have to be facilitated by the Respondent prior to 31 December 2020. There had been no such facilitation.
5. Permission to appeal was initially refused by First-tier Tribunal Judge Hatton on 11 May 2022 in the following terms:

"1. The application is in time.

2. The grounds assert the Judge erred in allowing the appeal. *First*, because the Judge misapplied the applicable Regulations and the Withdrawal Agreement ("WA"). *Second*, because the Judge provided inadequate reasoning on the issue of proportionality.

3. I consider the Judge provided clear and cogent reasons for finding at [19] that the Appellant was prevented from marrying by the specified date (of 31 December 2020) '*due to delays with the Register Office caused by the pandemic*'. Indeed, there is no discernible opposition from the Respondent to this finding. Accordingly, it follows that, but for this issue, the Appellant would have married before the specified date. I am mindful that Article 18(1)(r) of the WA requires a host State's redress procedures to allow for an examination of the facts and circumstances on which a decision is based, and that such redress procedures must ensure a decision is not disproportionate. In failing to have due regard to the unprecedented situation caused by the pandemic, the Respondent arguably adopted an unduly restrictive approach thereby rendering their decision disproportionate within the meaning of Article 18(1)(r). Accordingly, there is no arguable error of law arising from the Judge's conclusion at [33] thereon."

6. On renewal of the application for permission to appeal, permission was granted by Upper Tribunal Judge Jackson on 14 August 2022 for the following reasons so far as relevant:

"..The grounds are arguable. The First-tier Tribunal has failed to set out the relevant legal framework and has failed to give any coherent reasons by reference to that framework for allowing the appeal on either basis suggested, either under Appendix EU or by reference to the Withdrawal

Agreement. In any event, the decision in Celik (EU exit: marriage; human rights) [2022] UKUT 00220 (IAC) which post-dates the decision under appeal shows that the Appellant could not succeed as suggested in the decision under appeal. This decision will need to be addressed by the Appellant in particular at the error of law hearing, as it would appear to be determinative of the appeal.

The First-Tier Tribunal's decision does contain an arguable error of law capable of affecting the outcome of the appeal and permission to appeal is therefore granted."

7. As is pointed out in the grant of permission, the argument on which the Respondent relies was accepted by this Tribunal in Celik (EU exit: marriage; human rights) [2022] UKUT 00220 (IAC) ("Celik"). The Tribunal's guidance in Celik was subsequently upheld by the Court of Appeal ([2023] EWCA Civ 921).
8. This appeal came before me (sitting with Deputy Upper Tribunal Judge Malik KC) on 16 December 2022. The hearing was adjourned as the Appellant failed to attend. The Respondent's representative informed the Tribunal that the Appellant had been granted leave to remain under domestic Immigration Rules on account of his relationship with his EEA national spouse. She also informed the Tribunal that, according to her records, the Appellant had changed solicitors from the firm which had been representing the Appellant in this Tribunal. According to the Tribunal's records, that latter firm (Wimbledon Solicitors) wrote to the Tribunal in November 2022 indicating that they were no longer instructed. For those reasons, the Tribunal could not be satisfied that the Appellant had been notified of the hearing and was not satisfied that the Appellant's failure to attend was intentional.
9. Following that adjourned hearing, and as already noted, the Court of Appeal upheld the Tribunal's decision in Celik. By directions issued on 7 November 2023, Upper Tribunal Judge Pickup invited the parties to set out their respective positions following the Court of Appeal's decision with a view to settlement of the appeal. No response having been received from either party, Judge Pickup then directed on 26 January 2024 that the appeal be listed for disposal after 21 days. So it was that the appeal came before me for disposal.
10. The Appellant did not attend the hearing. The Tribunal office was directed to send a copy of the Tribunal's earlier adjournment decision (following the hearing referred to at [8] above) to the firm of solicitors said to now be instructed by the Appellant (albeit that firm had never informed the Tribunal that it was acting). That had been done but the solicitors had not come on to the record. The Appellant was therefore acting in person.
11. The notice of hearing on 13 March was sent to the address which the Appellant had provided to the Tribunal. Mr Clarke checked the Home Office records and indicated that there had been no recent change of address recorded on the Home Office system. That is unsurprising since the Appellant has leave to remain and would have no reason to update the Respondent as to his address until he comes to renew his leave. The

Appellant was granted 30 months' leave on 9 November 2022 which is therefore still current.

12. I was satisfied based on the information on the Tribunal's system coupled with Mr Clarke's checks that the Appellant was served with the notice of hearing. It is perhaps unsurprising that he would not pursue the appeal given the grant of leave to remain. Whatever the reason for his non-attendance on this and the previous occasion, I was satisfied that he had notice of the hearing and that it was appropriate to continue with the hearing in his absence.
13. The Tribunal in Celik gave the following guidance:

“(1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P's entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.
(2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ('the 2020 Regulations'). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.
(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State.”

That guidance was upheld by the Court of Appeal.

14. The Appellant had not sought facilitation of his residence prior to 31 December 2020. Therefore, although he has been found to be in a durable relationship as at that date, that cannot assist him under either Appendix EU or the Withdrawal Agreement. As Judge Freer rightly concluded, the Tribunal could only consider a human rights ground of appeal where it had the Respondent's consent which it did not have in this case. In any event, the Appellant's human rights are now recognised by the grant of leave to remain under domestic Immigration Rules. Article 18(1)(r) of the Withdrawal Agreement could not avail the Appellant and Judge Freer was wrong so to find.
15. For those reasons, the Respondent has made out his grounds. I am satisfied that the Decision therefore discloses errors of law. I set the Decision aside.
16. The foregoing reasons also show that the Respondent's decision is in accordance with Appendix EU to the Immigration Rules and is not in breach of the Withdrawal Agreement. The Appellant is therefore unable to succeed under the EUSS.
17. I therefore dismiss the Appellant's appeal.

NOTICE OF DECISION

The Decision of Judge Freer promulgated on 16 March 2022 involved the making of an error of law. I therefore set aside that Decision. I re-make the decision by dismissing the Appellant's (Mr Kullsi's) appeal.

L K Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
14 March 2024