IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Ce-File Number: UI-2022-003412
First-tier Tribunal No:
EA/00304/2022

THE IMMIGRATION ACTS

Heard at Bradford IAC
On the 19 December 2022

Decision & Reasons Promulgated
On the 27 February 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SIFT ULLAH
(Anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr Diwnycz, a Senior Home Office Presenting Officer.
For the Respondent: Ms Siddique of Orwell Solicitors.

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Ali ('the Judge') who in a determination promulgated on 6 June 2022 allowed Mr Ullah's appeal against the refusal of an Entry

Clearance Officer (Sheffield) ('the ECO') of his application made under Appendix EU, - the EU Settlement Scheme (EUSS).

2. The Judge noted Mr Ullah entered the United Kingdom on 31 July 2010 lawfully with a student visa and that his leave had been extended until 22 August 2014. On 12 February 2018 he applied for a Residence Card as an Extended Family Member of an EEA national, an unmarried partner, although this application was refused on 26 April 2018 as he had only been living with his unmarried partner for a period of three months at the date of the application. Mr Ullah applied for permission to bring Judicial Review against that decision and states that decision was pending when he applied for settled status under the EU Settlement Scheme on 30 December 2020, which was refused on 30 November 2021.

3. Mr Ullah claimed that he met his unmarried partner in August 2017, that their relationship began on 1 November 2017, and that they started living together in 2017. It was claimed before the Judge that as his relationship as a durable partner application was made before the 'specified date' it should have been granted.

4. Having reviewed the evidence the Judge sets out findings of fact from [16] of the decision under challenge. At [19] the Judge finds "*It is uncontroversial that the appellant has not held a family permit or residence card*".

5. Applying the facts to the law the Judge writes at [21 – 24]:

> Ground Argued under the EUSS:
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> 21. Turning to the definition of a family member of a relevant EEA Citizen as defined in Annex 1. I accept that the appellant meets this definition for the following reasons.
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> 22. The Appellant is the unmarried partner of a relevant EEA citizen ad that relationship was formed before the specified date (which is 31st December 2020) and the provisions allow for such circumstances within the definition. In light of my findings, I accept that before the 31 December 2020 that the appellant was a durable partner by 31 December 2020 because the partnership was formed and durable before the specified date and the partnership was durable at the date of the application (see (a) (ii) and (b) of Annex 1 Family member of a relevant EEA citizen).
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> 23. There is an issue raised by the Respondent that the Appellant did not hold a 'relevant document'. The Appellant does not suggest that he held a family permit or residence card. I refer back to my finding at paragraph 22 that there is provision within the definition of durable partner (Annex 1 durable partner) for those that do not hold a 'relevant document' ((b) (ii)). The application was made before the specified date and the Appellant accepts that he did not hold a residence permit to show he was in a durable relationship however if the Appellant had held such a document he would have met the definition of 'family member of a relevant EEA citizen' ((b) (ii) (bb) (aaa). For completeness, Appeal Reference: EA/00304/2022 7 there is no suggestion he would have had any other lawful basis upon which to stay.

24. Drawing these strands of evidence together. I am satisfied that the appellant has demonstrated that he meets condition 1 of EU14. Put another way the Appellant meets the eligibility requirements for pre-settled status. As this was the only issue raised in the RFRL, the appeal is allowed on the basis that the requirements of Appendix EU are met (Regulation 8 (3) 2020 Regulations).

6. The Secretary of State sought permission to appeal on the following grounds:

1. Ground One - Making a material misdirection of law on any material matter.

a) It is respectfully submitted that the First Tier Tribunal Judge (FTTJ) has materially erred in law by failing to properly consider the provisions of Appendix EU of the Immigration Rules.

b) The Appellant's application for status under the EU Settlement Scheme was as the family member of a relevant EEA national.

c) The rule requires a "relevant document" as evidence that residence had been facilitated under the EEA regulations which had transposed Article 3.2(b) of the 2004 Directive. No such document was held as no application for facilitation had ever been made by the Appellant [13]

d) It is submitted that the question of whether and how the relationship was in fact "durable" at any relevant date, as is found by the FTTJ at [22,23] of the determination, is of no consequence.

e) The Immigration Judge in finding that the appellant has met the requirements of the definition found at (b)(ii)(bb)(aaa) has materially misdirected, in order to meet condition 6 in the table in paragraph EU11 of this Appendix (or condition 3 in the table in paragraph EU11A), the above requirements are to be met with reference to the period immediately before the death of the relevant EEA citizen (or, as the case may be, of the relevant sponsor) rather than to the date of application.

f) It is submitted that this provision is to support the applications of those persons who were durable partners of EEA nationals who had died and that (b)(ii)(bb)(aaa) cannot apply to the appellant as he cannot meet condition 6 of EU11 or EU11A.

g) It is further submitted that as the appellant is not able to meet the definition of durable partner under either (a) or (b)(i) or (ii) the appeal should have been dismissed.

7. Permission to appeal was granted by another judge of the First-tier Tribunal on 28 June 2022 on the basis it was said the grounds have arguable merit in that it appears to be a clear requirement for a durable partner to have all of the relevant documents listed as per the definitions of durable partner and relevant documents in the definitions Annex of Appendix EU. It was noted the appellant appeared to have confined his appeal to the resident scheme as opposed to relying on a breach of the Withdrawal Agreement as well.

8. Orwell Solicitors have filed a Rule 24 response in which they assert:

1. The Respondent to this appeal is Mr. Sift Ullah. Documents relating to this appeal should be sent to the Respondent's legal representative, at the following address: Orwell Solicitors, City View House, 1 Dorset Place, Stratford, London, E15 1BZ.

2. The Respondent opposes the appellant's appeal. In summary, the Respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately.

3. It is admitted that the Respondent has not held a relevant document as evidence that residence had been facilitated under the EEA regulations. The Appellant states that the Respondent had never made any application for facilitation. However, this is incorrect as the Respondent has made applications under the EEA regulations to facilitate his stay in the UK.

4. The Respondent made an application as the unmarried partner of his EEA partner in 2017, however, that was refused with no right of appeal. The Respondent applied for a Judicial Review against the said decision and a consent order was drawn which stated that the Respondent would provide further documents in respect of his application and his application would be reconsidered.

5. The Appellant has relied on the case of Celik in his appeal. It should be noted that Celik judgment was promulgated on 19th July 2022. The Respondent's appeal was promulgated on 06th June 2022. The Appellant is relying on a case which was promulgated after the Respondent's appeal and thus little weight, if any, should be assigned to this ground.

6. It should be further noted that an application to the Court of Appeal has now been made on the Celik case. This appeal should thus be stayed behind Celik.

7. The Respondent is in a durable relationship with his unmarried partner in the United Kingdom. He has a substantive right under the EU Withdrawal Agreement, as he had applied for facilitation before 11pm GMT on 31st December 2020, regardless of whether such an application was granted or refused.

8. As the Respondent has such a right, he can invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement and the principle of fairness.

9. In any case, it is submitted that the Respondent meets condition 3 in the table in paragraph EU11 and is eligible for indefinite leave to remain as a relevant EEA citizen or their family member.

10. As per condition 3, the Respondent is a family member of a relevant EEA citizen (as also accepted by the FtT Judge), and the Respondent has completed a continuous qualifying period of five years in this category and since then no supervening event has occurred in respect of the Respondent.

11. The Appellant is incorrect to say that the Respondent does not meet condition 3.

12. The Respondent requests the Appellant withdraw its appeal as the Respondent meets the criteria under Appendix EU. Alternatively,

> the Respondent requests that this appeal be stayed until a decision is reached on Celik.

Error of law

9. In light of a number of issues that arose in cases of this nature the Upper Tribunal provided two reported determinations with the aim of giving guidance in relation to the proper interpretation of the Withdrawal Agreement and its relevant provisions. One of these is the case of Celik (EU exit, marriage, human rights) [2022] UKUT 00220. The other is Batool and others (other family members: EU exit) [2022] UKUT 00219. These decisions were promulgated in June and July 2022 after the date of the Judge's decision although directly relate to the proper interpretation of the law considered by the Judge.

10. There is no merit in the submission contained in the Rule 24 response that this tribunal should somehow ignore a reported decision of the Upper Tribunal on this important issue. Even if an application has been made to the Court of Appeal in relation to the decision in Celik there is no evidence that that application has been granted or that the Court of Appeal has made an order staying the guidance provided by the Upper Tribunal in either case. The challenge to the Secretary of State's grounds does not establish it is not appropriate to consider that guidance.

11. The headnote of Celik, which properly reflects findings made within the body of the determination, reads:

> (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.
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> (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.
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> (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.

12. It is not disputed that Mr Ullah made an application in 2017 which was the subject of the judicial review proceedings, but it was confirmed before the Upper Tribunal that that application was not extant as of 31 December 2020. Had it been there would have been no need for Mr Ullah to make the application he did under Appendix EU.

13. The difficulty for Mr Ullah in this case is that even if he was in durable relationship with an EU citizen he could not establish substantive rights under the EU Withdrawal Agreement as his application for a

residence card/grant of leave to remain in the UK had not being facilitated before 11 PM on 31 December 2020 and he had not applied for such facilitation in an application that was outstanding at that time. That reflects the situation which existed prior to the Withdrawal Agreement in that a person had no automatic right to enter or remain in the UK under EU law as a durable partner per se. It is settled law as shown in cases such as Rahman that whether a person is entitled to a residence card as an extended family member is a matter for domestic law. Unless a person was able to establish financial dependency necessary to meet their essential needs or membership of the EU national's household, and that the Secretary of State's discretionary power had been exercised in their favour, they had no right to enter or remain under the Immigration (EEA) Regulations 2016 or relevant Directive. That is important as the Withdrawal Agreement did not create any new rights for extended family members and merely preserved the rights under EU law that existed as of 31 December 2020. As an extended family member had no such right under EU law under the 2016 Regulations no EU right was carried over. Suggesting that Mr Ullah was entitled to succeed on the facts of this appeal is effectively rewriting the Withdrawal Agreement which is not permissible.

14. The application made by Mr Ullah under the EUSS was as a family member of an EU national exercising treaty rights in the United Kingdom. He could not, however, satisfy the definition of a family member as set out in Appendix EU.

15. Mr Ullah may have intended to make the application as an extended family member in which case, before 31 December 2020, he should have made a further application under the 2016 Regulations. If he had done so that application would still stand to be considered after 31 December 2020 in accordance with Celik.

16. The headnote in Batool reads:

> (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.
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> (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. The reasoning for headnote (2) is the extensive publicity that was available in the public domain explaining the changes that will be occurring as a result of Brexit and the guidance to those who intended to make applications around this time.

18. I find the Judge erred in law for the reasons set out in the application for permission to appeal, grant of permission to appeal, reported authorities of the Upper Tribunal, and proper application of the law.

The application specifically refers to provisions considered by the Judge which have no practical application of the facts of this appeal.

19. There is a great deal of sympathy for the Judge in this appeal as the determination was written at a time when the complexities of the drafting of Appendix EU and the problems that that caused were being worked through by both legal advisers and the judiciary. Guidance is, however, now available which clearly establishes the extent of the material legal error in allowing the appeal of an extended family member who did not apply for facilitation of the same before 31 December 2020 or who was in the possession of the relevant document facilitating such entry or leave to remain.

20. I find the Judge materially erred in law and set the decision aside. Other than Mr Ullah's immigration history, relationship history, and the finding of the Judge at [19] set out above, there shall be no preserved findings.

21. As on a proper application of the law to the facts Mr Ullah has no realistic prospects of succeeding with his appeal against the refusal of his application made under Appendix EU, I substitute a decision to dismiss the appeal.

Decision

22. The Judge materially erred in law. I set the decision aside.

23. I substitute a decision to dismiss the appeal.

Anonymity.

24. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated: 22 December 2022