



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003558
First-tier Tribunal No:
EA/02267/2022

THE IMMIGRATION ACTS

Heard at Bradford IAC
On the 28 November 2022

Decision & Reasons Promulgated
On the 08 February 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GENTIAN MEMA

(Anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr Diwnycz, a Senior Home Office Presenting Officer.

For the Respondent: Ms Chaudhury of Council.

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Latta ('the Judge'), promulgated on the 14 June 2022, in which the Judge allowed Mr Mema's appeal against the refusal of his

- application made under the EU Settlement Scheme (EUSS) on the basis that he is the spouse of a relevant EEA citizen.
2. Mr Mema is a citizen of Albania born on 3 October 1999.
 3. The Judge's findings are set out from [11] of the decision under challenge. The evidence showed that Mr Mema and his EU national partner started a relationship in May 2018 and that they began cohabiting in March 2020. A marriage certificate confirming they were married on 21 May 2021 is also referred to in the decision.
 4. At [18] the Judge finds that it is more likely than not that Mr Mema and his partner had been in a durable relationship and had resided together since March 2020 and, at [19], that it had been established that the durable relationship existed before the specified date of 31 December 2020.
 5. Even though Mr Mema was unable to produce a relevant document showing his entry had been facilitated as the durable partner of the relevant EEA citizen the Judge finds he meets the eligibility requirements for pre-settled status under the EUSS [25].
 6. At [26] the Judge considers, in the alternative (in case the interpretation of Appendix EU is incorrect), the Withdrawal Agreement. The Judge finds that as there is evidence to establish the durable partnership with the relevant EEA citizen it was reasonable to expect the Secretary of State to have assisted Mr Mema as per Article 18 (o) of the Withdrawal Agreement.
 7. The Secretary of State sought permission to appeal which was granted by another judge of the First-tier Tribunal, on 18 July 2022, on the basis the Judge erred in finding the relationship of itself qualified Mr Mema under Appendix EU or the Withdrawal Agreement.

Discussion

8. The appeal was considered by the Judge on the papers. Since the decision was promulgated the Upper Tribunal has provided guidance on the law to be found in the Withdrawal Agreement in Celik [2022] UKUT 00220, the head note of which 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.
 - (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.

- 9.** The Withdrawal Agreement did not create new rights for extended family members, as Mr Mema must have been at 11 pm on 31 December 2020 prior to the date he married but preserved by freezing in time those rights under EU law that existed at that date.
- 10.** It was settled case law under the previous regime that an extended family member (EFM) of an EEA national had no right under EU law unless such was granted by the Member State in accordance with its domestic provisions. In the UK those were to be found in the Immigration (EEA) Regulations 2016 (as amended). An individual was required to establish their connection with EEA national exercising treaty rights, that they could satisfy the relevant test of dependency and/or membership of the EU national's household, and not be refused following the exercise of the discretionary power held by the Secretary of State as to whether a residence card was to be issued or not to the EFM.
- 11.** The finding in Celik reflects the situation which previously existed in that the issue is not whether a person is in a durable relationship with the EU citizen but whether their entry and residence had been facilitated, i.e. that they had made an application for a residence card as an extended family member before the relevant date. If such application had been made it could be considered after 31 December 2020 but if it had not been made prior to that date there was no opportunity to make an application later as extended family members were excluded from making future applications by the Withdrawal Agreement and Appendix EU.
- 12.** One issue that arises from the determination is the Judge considering the immigration rules and Appendix EU without appearing to consider or understand the terms of the Withdrawal Agreement which sets out the relevant law. This should have been considered first as it provides the foundation for Appendix EU.
- 13.** In this appeal Mr Mema had made no application for his entry and residence to be facilitated prior to 31 December 2020. As no application had been made he had not established that he came within the personal scope of the Withdrawal Agreement as outlined in Article 10(3) as his residence had not been facilitated by the UK in accordance with its national legislation and so was unable to rely on Article 18.
- 14.** Mr Mema married after the relevant date and so could make no application on that basis other than under domestic law. There is no evidence of an Article 8 ECHR application being before the Judge to which the Secretary of State had given consent to be considered as a new matter.
- 15.** I find the Judge has erred in law for the reasons set out in the application for permission to appeal, grant of permission to appeal, proper interpretation and application of the Withdrawal Agreement and Appendix EU, and in accordance with the guidance provided by the Upper Tribunal in Celik.
- 16.** I set the decision of the Judge aside. As no basis for concluding Mr Mema came within the personal scope of the Withdrawal Agreement is

made out on any of the material filed in this appeal, or any basis of entitlement to the remedy he sought in the application established on the facts, there is only one outcome which is that the appeal must be dismissed. I therefore substitute a decision to dismiss the appeal.

Decision

- 17. The Judge materially erred in law. I set the decision aside.**
- 18. I substitute a decision to dismiss the appeal.**

Anonymity.

- 19.** 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 30 November 2022