



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002850

First-tier Tribunal No: EA/12103/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 5 December 2023

Before

UPPER TRIBUNAL JUDGE FRANCES
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

FATBARDH SHIQERUKAJ
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person

For the Respondent: Ms S McKenzie, Senior Home Office Presenting Officer

Heard at Field House on 10th November 2023

DECISION AND REASONS

1. The appellant is an Albanian national born on 9 May 1996. He appeals against the decision of First-tier Tribunal Judge M R Hoffman ('the judge') promulgated on 14 February 2023 dismissing his appeal against the refusal of pre-settled or settled status under the EU Settlement Scheme ('EUSS').
2. The appellant made his application on 30 April 2021 and the respondent refused it under Appendix EU on 27 July 2021 on the grounds that there was insufficient evidence that the appellant was a family member of an EEA citizen prior to 31 December 2020 and the appellant did not have a relevant document.
3. The appellant came to the UK in 2017 and remained here illegally. He met an Italian national, the sponsor, in December 2019 and they moved in together in May 2020. The appellant proposed marriage on 9 May 2020 and they were due to be married in December 2020. The marriage had to be postponed because the sponsor did not bring her passport. The appellant and sponsor were unable to

marry until 30 April 2021 because of Covid restrictions. It is accepted the appellant does not have a relevant document and the sponsor has leave to remain under the EUSS.

The Grounds of Appeal

4. The grounds of appeal mirror the appellant's skeleton argument and the submissions made at the hearing before the First-tier Tribunal. It is submitted the judge erred in law in finding that:
 - (i) There was no jurisdiction to determine the appellant's human rights claim;
 - (ii) Regulation 8(8) of the Immigration (EEA) Regulations ('2016 Regulations') did not apply;
 - (iii) The appellant required a relevant document issued under the 2016 Regulations.
5. Permission to appeal was granted by First-tier Tribunal Judge Fisher on 10 May 2022 for the following reasons:

"2. The grounds seeking permission have been drafted by Counsel who appeared at the hearing. In summary, they assert that the Judge erred in law by excluding consideration of issues under Article 8 of the ECHR, that he ought to have found that Regulation 8(8) was extant at the time of the application, that he failed to consider the Appellant's argument in relation to the decision in Metock, and that he erred in failing to correctly interpret the Immigration Rules and the Respondent's policy.

3. The provisions of Appendix EU of the Immigration Rules are complex and the threshold for granting permission to appeal is relatively low. In my judgement, the issues raised in the grounds are all arguable, relating to the interpretation of the provisions and policy. Accordingly, I grant permission to appeal."

Application for an adjournment

6. The appellant appeared in person and was assisted by a friend who interpreted. He applied for adjournment on the basis he had recently changed solicitors and they were unable to attend the hearing. He stated his previous solicitors had come off the record due to lack of funds. He accepted he had not paid his current solicitors.
7. We refused the adjournment because on the evidence before us it was unlikely that legal representation would be available to the appellant at an adjourned hearing. In addition, this case was stayed following the Court of Appeal decision in Celik v SSHD [2023] EWCA Civ 921. This decision is binding on the Upper Tribunal and the appellant's appeal had no prospect of success because the agreed facts of the appellant's case are the same as in Celik. The grounds of appeal repeat the arguments made before the First-tier Tribunal. The grounds were drafted by counsel and every point which could have been argued had been made. There was ample written material to enable us to determine the appeal.

Submissions

8. On behalf of the respondent, Ms McKenzie initially relied on a rule 24 response which related to a different case and was irrelevant. For reasons unknown, she had been given and prepared a different appeal. Ms McKenzie was given time to

read the papers in the appellant's appeal and she made the following submissions. There was no error of law following the Court of Appeal decision in Celik. The appellant and sponsor were married after the 31 December 2020 and it was accepted the appellant did not have a residence card (relevant document). The appellant could not rely on the Withdrawal Agreement.

9. The appellant submitted that he would have married the sponsor before 31 December 2020 but was unable to do so because of Covid. His relationship was genuine and durable and the situation he found himself in was no fault of his own.

Conclusions and Reasons

Ground 1 - the judge failed to consider Article 8

10. We are not persuaded by the arguments in the grounds of appeal that the decision is not an EEA decision but one under the immigration rules and therefore Article 8 applies. The appellant applied under Appendix EU of the immigration rules not Appendix FM. He has not made a human rights claim. It is open to the appellant to make an application under Appendix FM: see [66] Celik.
11. The appellant was not served with a section 120 notice and his section 120 statement is not a human rights claim. The appellant's Article 8 claim is a new matter and the respondent has not given consent. Following Celik [2022] UKUT 00220 (IAC) at [95], the appellant cannot raise a human rights claim on appeal. There was no error of law in the judge's finding that he had no jurisdiction to consider Article 8.
12. In any event, the judge considered the appellant's human rights claim at [45] and concluded the refusal of leave was proportionate. This finding was open to the judge on the evidence before him. There was no material error of law in relation to ground 1.

Ground 2 - the judge failed to consider the 2016 Regulations

13. The appellant applied under the EUSS not the 2016 Regulations. His application was made under Appendix EU and the respondent was not required to consider the 2016 Regulations following Siddiq (other family members: EU exit) Bangladesh [2023] UKUT 47 (IAC).
14. The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 provide a grace period for applications made after 31 December 2020 and before the 30 June 2021 if the EEA national and the family member meet certain requirements. The EEA national must not have leave to remain under the residence scheme immigration rules and the family member needs to establish that immediately before 31 December 2020 they were in a durable relationship under Regulation 8(5) of the 2016 Regulations.
15. The appellant cannot benefit from the grace period because the appellant was not lawfully resident under the 2016 Regulations immediately before the specified date (31 December 2020) and/or the sponsor has leave to remain under the EUSS. Therefore, the appellant is not a relevant person under Regulation 3(6) Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020.

16. There was no error of law in the judge's finding at [43] that Regulation 8(8) of the 2016 Regulations did not apply. Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform C-127/08 has no bearing on the issues before us because Article 10(2) of the Withdrawal Agreement ('WA') requires those who seek to rely upon Article 3(2) (a) and (b) of the Directive 2004/38/EC should show that they had their residence "facilitated" by the host state.

Ground 3 - the judge failed to correctly interpret the immigration rules.

17. Contrary to the grounds of appeal, the judge properly interpreted the definition of durable partner in Appendix EU. The appellant could not satisfy paragraph b(i) because it is accepted the appellant does not have a relevant document issued under the 2016 Regulations. The appellant could not satisfy b(ii)(bb)(aaa) because he was in the UK unlawfully. The judge's finding at [40] was consistent with the respondent's policy.
18. It is not in dispute the appellant was not a family member at the material time. He had not married an EU national before 11 p.m. on 31 December 2020. He was not a durable partner within the meaning of Annex 1 to Appendix EU as he did not have a residence card as required and he did not have a lawful basis of stay in the United Kingdom. The appellant did not qualify for leave to remain under Appendix EU.

Summary

19. On the facts, the appellant's residence was not facilitated before 31 December 2020 and he was not a family member. The appellant cannot rely on the Withdrawal Agreement and his appeal cannot succeed under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. We find there was no material error of law in the judge's decision to dismiss the appeal.
20. Having considered all the evidence and the submissions by both parties we find there is no material error of law in the judge's decision to dismiss the appeal promulgated on 14 February 2023. We therefore dismiss the Appellant's appeal.

Notice of Decision

Appeal dismissed

J Frances

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 November 2023