IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005698
First-tier Tribunal No: EA/16779/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

30th November 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAMAN KUMAR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Presenting Officer
For the Respondent: Unrepresented and no appearance

Heard at Field House on 14 November 2023

DECISION AND REASONS

Introduction

1. The Secretary of State brings this appeal to the Upper Tribunal. For the sake of continuity I will though refer to the parties as they were before the First-tier Tribunal. Therefore, the Secretary of State is once more "the Respondent" and Mr Kumar is "the Appellant".

2. The Respondent challenges the decision of First-tier Tribunal Judge Isaacs ("the judge"), promulgated on 13 June 2022 following a hearing on 1 June of that year. By that decision, the judge allowed the Appellant's appeal against the Respondent's refusal of his application under the EUSS. That application was made on the basis that the Appellant claimed to be a family member of his partner, a Romanian national resident in the United Kingdom. The application was refused by the Respondent on the basis that he had failed to demonstrate that he was a family member prior to the specified date, namely 31 December 2020, as he did not have a "relevant document". The Appellant appealed to the First-tier Tribunal under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020. The appeal did not involve any consideration of Article 8 ECHR.

The judge's decision

3. Having set out the relevant immigration history, the judge recorded that whilst the Appellant had sought to raise a Zambrano argument in the appeal, this constituted a "new matter" and that the Respondent had refused to give consent for that to be considered.

4. The judge noted the absence of any challenge to the genuineness of the Appellant's relationship with the Romanian national. He concluded that they were in a genuine and subsisting relationship and had been since at least September 2019. In light of this, the judge concluded that the Appellant was a "durable partner". With reference to the couple's young daughter, the judge took account of her best interests.

5. In light of the circumstances as found, the judge allowed the appeal. Whilst not expressly stated, that must have related to the ground of appeal in respect of the Immigration Rules and not in relation to the provisions of the Withdrawal Agreement.

The grounds of appeal

6. The Respondent drafted grounds of appeal which in summary asserted that the judge had not been entitled to allow the appeal because the Appellant could not, as a matter of law, satisfy the definition of "durable

partner" under Annex 1 to Appendix EU. This was because he had never held a "relevant document". He had never been issued with a residence card or indeed applied for one under the Immigration (European Economic Area) Regulations 2016.

7. Permission was granted.

8. Following the grant of permission, this case was stayed pending the judgment of the Court of Appeal in Celik v SSHD [2023] EWCA Civ 921, which was handed down on 29 July 2023. Following the handing down of that judgment the error of law hearing was listed. At the time, the Appellant was represented by Masons Solicitors. By a letter dated 8 November 2023, they confirmed that they were no longer instructed by the Appellant and were taking themselves off the record.

9. At the hearing before me, there was no attendance by the Appellant. Having interrogated the Upper Tribunal's records and indeed contacting Masons Solicitors through the administrative staff, I am satisfied that the Appellant himself was served with notice of hearing via email and post. There is no evidence that the service by way of email was returned undelivered. There is no evidence of any communication from the Appellant to the Upper Tribunal in respect of the hearing. Mr Clarke asked me to proceed in the Appellant's absence. Having regard to the overriding objective, the core issue of fairness, and rule 38 of the Upper Tribunal's Procedure Rules, I decided that it was fair and appropriate to proceed in the Appellant's absence.

Conclusions on error of law

10. The judge was clearly entitled, on the evidence before him, to conclude that the Appellant's relationship with the Romanian national was genuine and subsisting and properly described as durable. However, the judge was not legally entitled to allow the appeal on that basis.

11. It was clear from the Upper Tribunal's decision in Celik and then confirmed by way of binding guidance from the Court of Appeal, that individuals in the Appellant's position had had no rights under EU law

prior to the specified date of 31 December 2020 because they had neither applied for, nor been granted, residence cards by the Respondent. In addition, they could not rely on the provisions of the Withdrawal Agreement. The presence of the Appellant's daughter in this case made no material difference. Applying Celik to the accepted facts in this case, the judge erred in law when concluding that the Appellant could satisfy the definition of "durable partner" under Annex 1 to the EUSS.

12. It follows that the judge's decision was wrong in law and must be set aside.

Re-making the decision in this case

13. I considered whether it was fair and appropriate to go on and re-make the decision in this case based on the evidence before me rather than adjourning for a resumed hearing in due course. As with the error of law issue, I am satisfied that the Appellant had been served with notice of the hearing and there is no explanation for his non-attendance. I am also satisfied that in light of the accepted facts and the current position of the law, there is no conceivable way in which the Appellant could show that his appeal against the Respondent's refusal of his EUSS application could properly be allowed. It is fair and appropriate to re-make decision at this stage: there is no benefit whatsoever in prolonging the inevitable outcome.

14. I reiterate that any Article 8 rights in respect of his relationship with his partner and/or daughter do not arise here. There is no live Zambrano issue. The Appellant cannot rely on the principle of proportionality under the Withdrawal Agreement. Like the judge below, I accept the genuineness of the Appellant's relationship. However, on any legitimate view, he is not a "durable partner" within the meaning of Annex 1 to Appendix EU. Consequently, he cannot satisfy the eligibility requirements under EU14 or EU14A of Appendix EU and his appeal must fail.

Notice of Decision

The First-tier Tribunal erred in law when making its decision and that decision is set aside.

The decision is re-made and Mr Kumar's appeal is dismissed.

H Norton-Taylor

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 20 November 2023