



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001712

First-tier Tribunal No: EA/12085/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7th June 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MR BESMIR ZHUPA
(NO ANONYMITY ORDER MADE)}

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

Heard at Field House on 28 May 2024

DECISION AND REASONS

1. This is the second stage of a hearing following an appeal by the Secretary of State for the Home Department against the decision of Judge Raymond, (the judge) promulgated on the 14th March 2022, whereby he allowed the appeal of Mr Besmir Zhupa against the decision to refuse his application for settled status under the European Union Settlement Scheme (EUSS).

Background

2. In a decision promulgated on the 24th February 2023, a differently-constituted panel (Upper Tribunal Rimington and Deputy Upper Tribunal Judge Bowler) set aside the decision of the First-tier Tribunal judge because he had erroneously assumed that the 'grace period' for making applications under the EUSS, which ended on the 30th June 2021, also had the effect of extending the period for the establishment of a right of residence. However, given that the appellant married after the specified deadline for establishing such a right (31st December 2020) the

appellant was unable to establish a right of settlement under the EUSS as the spouse of an EU citizen exercising treaty rights in the UK. Moreover, his application could not be granted on the basis that his residence as the durable partner of an EU citizen was in the process of being 'facilitated' prior to that deadline. This was because he had not been issued with 'a relevant document'; that is to say, an EEA Residence Card. The only avenue left open to him, therefore, was to prove that he had entered into a durable relationship with his EU partner whilst he was resident in the UK on some other lawful basis prior to the 31st December 2020. The matter was accordingly adjourned for a further hearing in order to provide the appellant with an opportunity to do this. Thus the matter came before us.

The hearing

3. There was no attendance by or on behalf of the appellant. We were nevertheless satisfied that the appellant had been served with notice of the time, date and place of the hearing, at the address he provided for service, and that it would accordingly be fair to proceed in his absence.
4. We heard brief submissions from Mr Parvar following which we reserved our decision that we now set out below

Legal analysis

5. The Tribunal previously issued directions requiring the parties to provide detailed skeleton arguments concerning the issue identified at paragraph 4 (above). Neither party complied. Subsequent to the appeal before the Upper Tribunal on the issue of an error of law, the Court of Appeal in *Celik v Secretary of State* [2023] EWCA Civ 921, approved the decision in *Celik* (EU exit, marriage, human rights) [2022] UKUT 00220 which held as follows:

“(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.”

6. We remind ourselves that the burden of proof is upon the appellant and that the standard is a balance of probabilities. As noted above, the appellant’s residence was not facilitated prior to the specified time and he had not applied prior to the specified time for the requisite facilitation.
7. The applicable requirements for a grant of leave to remain under the EUSS are contained within Annex 1 of Appendix EU to the Immigration Rules. This defines the term “durable partner”. Insofar as relevant to the facts of this appeal, that definition includes the following -

(iii) where the person is applying as the durable partner of a relevant sponsor ... and does not hold [a relevant document] and where:
(aa) the date of application is after the specified date; and
(bb) the person:
(aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen on a basis which met the definition of ‘family member of a relevant EEA citizen’ ... at ... any time before the specified date ... unless the reason why ... they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen for that period and they did not otherwise have a lawful basis of stay in the UK and Islands for that period;

8. The effect of this otherwise impenetrable language has been further helpfully explained by the Upper Tribunal in the decision of Hani (EUSS durable partners: para. (aaa)) [2024] UKUT 69 (IAC). The effect is that a person who was in a durable partnership but did not have a “relevant document”, and who did not otherwise have a lawful basis of stay in the United Kingdom at the “specified date” of 31 December 2020 at 11.00PM, is incapable of meeting the definition of “durable partner”. On the facts of this appeal, that means that the appellant would need to prove that he (a) was in a durable relationship, and (b) had a lawful basis of stay in the United Kingdom, in each case prior to the specified date. The First-tier Tribunal expressed some doubts as to the nature of the appellant’s pre-marital relationship with his sponsor, but did not ultimately make a finding in that regard. Given that the appellant has not provided any supplementary evidence since that time, we are unable to make a finding in his favour upon this issue. Moreover, and in any event, the appellant has not provided any evidence at all to suggest he had any other lawful basis of stay in the UK, whether prior to the specified date or at all. He cannot therefore succeed in showing that he was in a pre-marital durable relationship with his sponsor for the purposes of Annex 1 of Appendix EU to the Immigration Rules.

Notice of Decision

The decision of the First-tier Tribunal to allow the appeal is set aside and is substituted by a decision to dismiss it.

David Kelly

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

28th May 2024