



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-003023

First-tier Tribunal No:
EA/12800/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22nd April 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

And

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

Mr Dumiso Tazibona
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

REPRESENTATION

For the Appellant: Mr Dumisa Tazibona, in person

For the Respondent: Ms R Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 18 April 2024

DECISION AND REASONS

INTRODUCTION

1. The appellant is a national of Zimbabwe. His appeal against the respondent's decision of 26 August 2021 to refuse his application for leave to remain under the EU Settlement Scheme under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 was dismissed by First-tier Tribunal Judge Hawden-Beal ("the judge") for reasons set out in a decision promulgated on 7 April 2022.
2. The judge noted the appellant made an application for pre-settled status or settled status in the UK under the EU Settlement Scheme as the durable partner of a relevant EEA national, Ms Nicolla Alina Ghimis, a Romanian citizen, with settled status in the UK.
3. The judge summarised the appellant's claim at paragraph [3] of the decision, noting the appellant and his partner claim they have been in a relationship akin to marriage since May 2017 and they have a daughter together. The judge heard evidence from the appellant and his partner as set out in paragraphs [5] to [7] of the decision. The judge's findings are set out at paragraphs [15] to [26] of the decision. At paragraph [23], the judge said:

"The appellant does not have the required evidence as specified by Appendix EU to show that he is a family member of the sponsor in order to qualify for settled or pre-settled status because he does not have the residence card, the right of permanent residence or a family permit issued to him before December 31st 2020, as a durable partner as required by Appendix EU and neither can he meet the requirements of Articles 9 and 10 as noted above. There is no discretion within Appendix EU and Articles 9 and 10."

4. At paragraph [26] the judge concluded:

"I am satisfied that the appellant has therefore not discharged the burden of proof and has not met the requirements of EU 11 or 14 of the EUSS in order to be granted either settled or pre-settled status here in the UK. I find that the decision also does not breach the Withdrawal Agreement and is therefore, in accordance with the law and the applicable rules."

5. The appeal was therefore dismissed.

THE APPEAL TO THE UPPER TRIBUNAL

6. Permission to appeal was granted by First-tier Tribunal Judge Froom on 31 May 2022. Judge Froom said:

"2. The FtTJ decided the appellant did not meet the requirements of Appendix EU of the Immigration Rules as a durable partner. She reached this conclusion because the appellant had not been issued with a document under the EEA Regulations so he could not fall within the definition. She found the Withdrawal Agreement did not assist him.

3. The FtTJ appears to accept the appellant and his Romanian partner have been in a long-term relationship and that they have a child together (see [25]). The appellant's representative drew attention to the respondent's guidance which the FtTJ noted in the decision at [11].

4. I grant permission to appeal because it is arguable the FtTJ failed to consider the argument that the appellant fell within the terms of the guidance.

7. The appeal was listed for hearing before us on 31 January 2023. At that hearing we directed that the appeal be stayed pending the decision of the Court of Appeal in respect of the decision of the Upper Tribunal in *Celik (EU exit: marriage; human rights)* [2022] UKUT 0220 (IAC).

8. The appeal was reviewed by Upper Tribunal Judge Canavan on 10 October 2023, and she issued further Directions. She noted the judgement of the Court of appeal in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921 was given on 31 July 2023. She expressed the provisional view:

"2. Having reviewed the First-tier Tribunal decision and the grounds of appeal to the Upper Tribunal, it is my provisional view that the grounds of appeal in this case asserting an error of law by the First-tier Tribunal cannot succeed."

9. The parties were invited to reconsider their respective positions, and if possible, to agree a consent order. The Upper Tribunal received correspondence dated 20 November 2023 from the 'Immigration Advice Service', who had previously represented the appellant. They stated that they have tried contacting the appellant for instructions, to no avail. In the absence of any further update and/or a consent order, the matter was listed for hearing before us.

THE HEARING OF THE APPEAL BEFORE US

10. Mr Tazibona attended the hearing of the appeal before us, and we explained to him the difficulties that the decision of the Court of Appeal in *Celik v SSHD* [2023] EWCA Civ 921 and the decision of the Upper Tribunal in *Hani (EUSS durable partners: para (aaa))* [2024] UKUT 00068 (IAC) present for his appeal. Mr Tazibona submits that there can be no doubt that he is in a genuine relationship and has established a life in the UK with his partner and now, two children. He quite properly and candidly accepts that he did not have a relevant document or an otherwise lawful basis of stay in the UK as at 31 December 2020.

DECISION

11. The Court of Appeal held in *Celik v SSHD* [2023] EWCA Civ 921 that on the proper interpretation of Article 10 of the EU Withdrawal Agreement, a Turkish national who had married an EU national after the end of the post-EU exit transition period, did not have any right to reside in the UK. The fact that their marriage had been delayed due to the COVID-19 pandemic did not alter the interpretation of the Withdrawal Agreement.

12. Lord Justice Lewis (with whom Lord Justice Moylan Lord Justice Singh agreed) said:

"54. Family members are defined to include spouses or civil partners (but not persons in a durable relationship): see Article 9(a) of the Withdrawal Agreement. In order to be resident in accordance with EU law before the end of the transition period, such persons would have to have married (or contracted a civil partnership) before that date and be residing in the United Kingdom on the basis that they were the spouse or civil partner. The wording of Article 10(1)(e)(i) is clear. It does not include persons who married an EU national after the end of the transition period and who were not, therefore, residing in the UK as a spouse or civil partner in accordance with EU law at the end of the transition period. That reflects a rational agreement for the protection of UK and EU nationals, and their families who, in the words of the sixth recital, "have exercised free movement rights before a date set in this Agreement". The date set was the end of the transition period. On the ordinary meaning of the words in Article 10(1)(e)(i) read in context and having regard to the purpose underlying the Withdrawal Agreement, therefore, persons such as the appellant who marry after the end of the transition period do not fall within the scope of that provision.

55. The fact that persons did not, or could not, exercise free movement rights, or did not or could not marry, until after that date does not alter the meaning or purpose of the Withdrawal Agreement. That does not involve any breach of Article 5 of the Withdrawal Agreement. That is an obligation to act in good faith and to take all appropriate measures to ensure "fulfilment of the obligations arising from the agreement". The relevant obligation, in this context, is to ensure that family members defined to include spouses and civil partners of EU nationals (but not unmarried partners in a durable relationship) resident in the United Kingdom at the end of the transition period can continue to enjoy rights of residence after the end of the transition period. The United Kingdom is complying with that obligation. Article 32 of the Vienna Convention does not assist. That permits recourse to supplementary means of interpreting treaties where the interpretation resulting from the application of Article 31 leads to a meaning which is ambiguous or obscure (which is not the position here) or where that leads to "manifestly absurd or unreasonable results". Again, a treaty providing that those exercising certain rights at a particular date should continue to enjoy those rights after that date is not manifestly absurd or unreasonable. It is the agreement reached between the European Union and the United Kingdom as to the appropriate extent of reciprocal protection for their nationals. The fact that unforeseen events meant that certain people were not able to exercise those rights (even if as a result of events outside their control) before the set date does not lead to manifestly absurd or unreasonable results.

56. Further, the principle of proportionality, whether as a matter of general principle, or as given express recognition in Article 18(1)(r) of the Withdrawal Agreement, does not assist the appellant. Article 18(1)(r) is intended to ensure that decisions refusing the "new residence status" envisaged by Article 18(1) are not disproportionate. That status must ensure that EU citizens and United Kingdom nationals, and their respective family members and other persons may apply for a new residence status "which confers the rights under this Title". The principle of proportionality, in this context, is addressed to ensuring that the arrangements adopted by the

United Kingdom (or a Member State) do not prevent a person who has residence rights under the Withdrawal Agreement being able to enjoy those rights after the end of the transition period. The principle of proportionality is not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside. The appellant did not have any rights under Article 10(1)(e)(i) of the Withdrawal Agreement. The refusal to grant residence status is not therefore a disproportionate refusal of residence status which would have conferred rights already enjoyed under the Withdrawal Agreement. Rather, it is a recognition that the appellant did not have any such rights under Article 10(1)(e)(i)."

13. In *Hani (EUSS durable partners: para (aaa))* [2024] UKUT 00068 (IAC) the Upper Tribunal held that the effect of paragraph (b)(ii)(bb)(aaa) of the definition of "durable partner" in Annex 1 of Appendix EU to the Immigration Rules, as inserted by Statement of Changes HC 813 (from 31 December 2020 to 11 April 2023), 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".
14. We have no reason to doubt the claim made by Mr Tazibona that he is in a genuine relationship with Ms Nicolla Alina Ghimis. It is however uncontroversial that he did not have a relevant document or an otherwise lawful basis of stay in the UK as at 31 December 2020. The conclusion reached by the judge at paragraph [26] of her decision was one that was undoubtedly correct in law and open to her.
15. It is clear therefore that there is no material error of law in the decision of the First-tier Tribunal. Although the appellant cannot succeed in this appeal, we simply add that it remains open to him to consider other applications to regularise his immigration status in the UK under the Immigration Rules.
16. It follows that the appellant's appeal must be dismissed.

NOTICE OF DECISION

17. The appeal is dismissed.
18. The decision of First-tier Tribunal Judge Hawden-Beal promulgated on 7 April 2022 stands.

V. Mandalia

Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 April 2024

