



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003450

First-tier Tribunal No: EA/14794/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 2nd of July 2024

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

Bandhan Khan
(NO ANONYMITY ORDER MADE)

Appellant

and

The Entry Clearance Officer

Respondent

Representation:

For the Appellant: Mr Holmes, counsel

For the Respondent: Mr Bates, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 17 June 2024

DECISION AND REASONS

Introduction

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Jepson which was promulgated on 7 June 2022.
2. However, for ease of reference hereafter the parties will be referred to as they were before the First-tier Tribunal.
3. Permission to appeal was granted by First-tier Tribunal Judge J M Dixon on 29 June 2022.

Anonymity

4. No anonymity direction was made previously, and there is no reason for one now.

Factual Background

5. The appellant is a national of Bangladesh now aged forty-two. On 5 October 2021, the appellant made an application under the European Union Settlement Scheme (EUSS) to join her sponsor, Ansar Mahmood, described as her durable partner. That application was refused by way of a decision dated 4 June 2021. Briefly, the reason for refusal was that insufficient evidence had been provided to confirm the family relationship and therefore the appellant did not qualify for settled or pre-settled status. Specifically, the respondent required evidence to be in the form of a valid Family Permit or Residence Card issued under the EEA Regulations or 'evidence which satisfies the Secretary of State.'

The decision of the First-tier Tribunal

6. The First-tier Tribunal judge accepted that the Rules had been met on the basis that the appellant had submitted an application for a Residence Card and the Certificate of Application could be considered to be a relevant document under the Rules.

The appeal to the Upper Tribunal

7. The sole ground of appeal was that the First-tier Tribunal failed to consider, properly or at all, a provision of the relevant rule. The succinct grounds are set out below.

The FTJ arguably misapplied the withdrawal agreement to someone who does not come within its scope. The 'personal scope' of Part 2 of the withdrawal agreement is defined at Article 10 of the withdrawal agreement. Essentially the Appellant cannot come within the scope of the withdrawal agreement (so far as it relates to Citizens Rights) because, amongst other things:

The rule requires a "relevant document" as evidence that residence had been facilitated under the EEA regulations which had transposed Article 3.2(b) of the 2004 Directive.

The Appellant's residence [as a durable partner] was not facilitated by the host state in accordance with national legislation before the end of the transition period, ie 31/12/21 : no such document was held as no application for facilitation had been made. This was not disputed at the hearing.

The FTJ materially erred in accepting the Certificate of Application as a "relevant document" and conflated the ability under the Grace Period to apply **under EUSS** before 30/6/21 with the requirement to hold a relevant document issued pursuant to an application **under the Regulations**. The Grace period did not hold the door open for applications under the Regulations and the requirement for a relevant document reflected the fact that the EFM routes were not incorporated in the Scheme or the Withdrawal Agreement except where facilitation had taken place before 31/12/20 or on a successful application made before that date. It was of no import that the definition of durable partner was or wasn't met, the rule required a relevant document and the appellant did not have a relevant document.

The question of whether and how the relationship was in fact "durable" at any relevant date was of no consequence - Scheme rules could simply not be met by a durable partner whose residence had not been facilitated. This is reflected in Article 10(2) of the Withdrawal Agreement permitting the continued residence of a former documented Extended Family member, with an additional transitional provision in Article 10(3) for those who had applied for such facilitation before 31 December 2020. This appellant had not.

8. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

The respondent's grounds have arguable merit in that it appears to be a clear requirement for a durable partner to have one of the relevant documents listed as per the definitions of durable partner and relevant documents in the definitions annex of Appendix EU. The issues to which this appeal gives rise are not straightforward and, as the judge recognised, guidance from the senior courts would be helpful.

9. This appeal was originally listed for an error of law hearing on 21 June 2023 but the matter was adjourned and stayed pending the decision of the Court of Appeal in *Celik* [2023] EWCA Civ 921. Following the judgment in *Celik*, Upper Tribunal Judge Pickup issued directions issued on 27 July 2023, which expressed his provisional view that the respondent's grounds were bound to succeed and invited the parties to reconsider their positions. The Secretary of State sent a detailed response dated 29 August 2023 in which it was contended that the respondent's appeal should be allowed, and the appellant's appeal dismissed. On 15 December 2023, a draft consent order was subsequently sent to the appellant's solicitors with a view to the disposal of the appeal on the basis that the parties agree to the setting aside of the decision of the First-tier Tribunal and the remaking of the decision, summarily dismissing the appeal. The appellant's solicitors replied on 4 January 2024 to state that they were no longer acting for the appellant. The matter was accordingly set down for a hearing.

The error of law hearing

10. The matter comes before the Upper Tribunal to determine whether the decision of the First-tier Tribunal contains an error of law and, if it is so concluded, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The hearing was attended by representatives for both parties.
11. Mr Holmes informed me that he was unable to resist the Secretary of State's appeal and invited me to set aside the decision of the First-tier Tribunal and to reach a fresh decision, to dismiss the appeal. Mr Holmes further invited me to preserve the factual findings reached by the First-tier Tribunal which were unchallenged by either party. Mr Bates raised no area of disagreement. At the end of the hearing, I announced that I was content with the outcome put forward by Mr Holmes.

Discussion

12. As rightly conceded by Mr Holmes, the judge was wrong to find that the appellant's residence in the United Kingdom was being facilitated prior to the transition period ending on 31 December 2020 and further erred in finding that a Certificate of Application was a relevant document. Those were material errors and it follows that the decision of the First-tier tribunal is set aside. At [13] the judge notes that the respondent made no challenge to the extent and nature of the relationship between the appellant and sponsor. That favourable finding is preserved.
13. It suffices to say that I was invited to dismiss the appellant's appeal by Mr Holmes and, applying *Celik*, I see no reason to do otherwise as the appellant has never been issued with a Family Permit nor Residence Card and cannot invoke the concept of proportionality under the Withdrawal Agreement.

14. The appeal is dismissed.

Conclusions

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision to be re-made.

I substitute a decision dismissing the appeal on the basis that the Secretary of State's decision was in accordance with Scheme Rules.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 June 2024

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent" is that appearing on the covering letter or covering email

