



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-006235

First-tier Tribunal No:
EA/15392/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 5th March 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE COTTON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SOHAIB AHMED KHAN
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mrs A Nolan, Senior Presenting Officer

For the Respondent: Mr A Jafar, Counsel, instructed on a Direct Access basis

Heard at Field House on 21 February 2024

EXTEMPORE DECISION AND REASONS

1. For the sake of continuity we will refer to the parties as they were before the First-tier Tribunal; therefore the Secretary of State is once again the Respondent and Mr Khan is the Appellant.

2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Maurice Cohen (the Judge), promulgated on 20 October 2022 following a hearing on 28 July of that year. By that decision the Judge allowed the Appellant's appeal against the Respondent's refusal of his EUSS application. That application was based on the claimed relationship between the Appellant and his now wife, a Slovakian national.
3. In light of the evidence before him, the Judge found that the Appellant was in a durable relationship and to all intents and purposes had been since July 2020 with cohabitation beginning in August of that year and continuing thereafter. The couple had had a child born to them in June 2021.
4. Both the Appellant's partner and child had and, as we understand it, continue to have, pre-settled status in the United Kingdom.
5. The Judge deemed the EUSS Rules, particularly those contained within Appendix EU, as being "impenetrable" (a description which has been noted by other Judges in the Upper Tribunal and one which to some extent may appear apt). He then proceeded to allow the appeal, describing the Respondent's decision as being "not in accordance with the law".
6. The Respondent appealed on the basis that the Judge had misdirected himself as to Appendix EU to the Immigration Rules and in particular had erred by allowing the appeal in a situation where the Appellant had not possessed a relevant document at the specified date, namely 31 December 2020.
7. Following the grant of permission, this case was stayed pending the judgment of the Court of Appeal in Celik v Secretary of State for the Home Department [2023] EWCA Civ 921. That judgment was handed down at the end of July 2023. As the Appellant had been a litigant in person at that time the matter was set down for an error of law hearing.

8. At the hearing before us, and following a constructive discussion at the outset, Mr Jafar acted in a commendably professional manner and sought to take further instructions from the Appellant. Having done so he acknowledged the obstacles in the Appellant's way, both in respect of the issues of error of law and the re-making of any decision.
9. In relation to any possible Article 8 issue, Mrs Nolan had confirmed with us that if indeed any consent for a new matter to be considered at any later stage were even possible, such consent would be refused.
10. It is clear that the Judge materially erred in law when allowing the Appellant's appeal at first instance. On any view the Appellant had not applied for, or been issued with, a residence card as an extended family member of an EEA national or otherwise, pursuant to the Immigration (European Economic Area) Regulations 2016.
11. The fact (a fact which is unchallenged) that the Appellant was in a durable relationship with his partner before the end of December 2020 and that he was as a consequence a durable partner did not of course mean that he was able to satisfy the relevant definitions under Annex 1 to Appendix EU. It is clear from the Court of Appeal's judgment in Celik that individuals in the Appellant's situation simply could not succeed under Appendix EU.
12. The Judge had not considered the Withdrawal Agreement and did not purport to allow the appeal on that basis. In any event, it is also clear from Celik and other cases that individuals in the Appellant's situation were unable to rely on the principle of proportionality contained within the Withdrawal Agreement.
13. It follows that the Judge's decision must be set aside.
14. We have decided that it is appropriate to go on and re-make the decision in this case on the materials before us.

15. We start with the Appendix EU issue. Essentially, for the reasons already set out the Appellant's appeal against the Respondent's refusal of his EUSS application cannot succeed. We make it clear that the Judge's finding on the genuine and subsisting relationship with his partner stands, there having been no challenge to it and that finding having been open to the Judge on the evidence.
16. Prior to this hearing, the Appellant had put in what he described as a response to a Section 120 Notice, relying on Article 8 and asserting that he should be able to rely on this in these proceedings.
17. We conclude that the Appellant cannot rely on Article 8. First and foremost, an ability to rely on that provision would only be possible if the Respondent had issued a Section 120 Notice at the time or following the refusal of the EUSS application. In this case, that was not done. Therefore, although the Appellant had purported to respond to such a Notice, there was no Notice to respond to. Further or in any event, the relatively recent decision of the Upper Tribunal in Dani (non-removal human rights submissions) Albania [2023] UKUT 293 (IAC) suggests that absent the issuing of a Section 120 Notice, Article 8 cannot be relied on in an appeal under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020 by an individual in the Appellant's situation.
18. Even if it had been open to the Respondent to give consent to Article 8 being relied on, as mentioned earlier, Mrs Nolan clearly stated that consent would be refused, thus from whichever angle one approaches it, Article 8 is not a live issue in this case.
19. We reiterate the point made earlier that the Appellant is not able to rely on the Withdrawal Agreement either.
20. It follows that we must dismiss the Appellant's appeal against the Respondent's refusal of his EUSS application.
21. We note the following. The Appellant has an outstanding Appendix FM application before the Respondent. We were informed that this was

made on 16 September 2023. The decision that will eventually be reached on that application will consider the Appellant's relationship with his wife and the situation of their child. If that application is refused, there may be a right of appeal. If that case is certified, it may be that judicial review is open to the Appellant. If the application is granted, the Appellant would be given the usual period of limited leave to remain in this country. That all may provide a degree of comfort for the Appellant, but in respect of these proceedings the appeal is dismissed on all grounds.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision is set aside.

We re-make the decision by dismissing the appeal on all grounds, pursuant to the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020.

H Norton-Taylor

**Judge of the Upper Tribunal
Immigration and Asylum Chamber**

Dated: 23 February 2024