



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001220
First-tier Tribunal No: EA/08675/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
6 September 2024

Before

UPPER TRIBUNAL JUDGE SMITH
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

MOHAMED MOKRANE
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In Person

For the Respondent: Mr E Terrell, Senior Presenting Officer

Heard at Field House on 22 July 2024

DECISION AND REASONS

Introduction

1. The appellant appeals a decision of Judge of the First-tier Tribunal Khawar ("the Judge"). The decision was sent to the parties on 11 January 2023.

2. By a decision dated 4 September 2022 the Secretary of State refused to grant the appellant pre-settled status under the EU Settlement Scheme ("EUSS") as the dependent relative of his sponsor, Maria Caltea, a Romanian national exercising EU Treaty rights in the United Kingdom.
3. Before the First-tier Tribunal the appellant was represented by Joshi Advocates. The firm continued to represent the appellant before the Upper Tribunal until an email request to come off the record was received on 16 July 2024. Prior to coming off the record, Joshi Advocates filed an appellant's bundle running to 147 pages.

Relevant Facts

4. The appellant is a national of Algeria and presently aged 43. He met his wife in person in May 2018, having previously been in contact with her via social media. They commenced residing with each other the same month and subsequently married by Islamic ceremony in April 2019. Subsequent efforts by the couple to marry at a register office were impeded by the COVID-19 pandemic. The couple were married at a Register Office on 13 April 2021.
5. The appellant sought pre-settled status under the EUSS by an application dated 22 June 2021. His wife was granted pre-settled status on 12 July 2021
6. By her decision of September 2022, the respondent concluded that the appellant had failed to provide sufficient evidence that he was a family member of a relevant EEA citizen at 23.00 GMT on 31 December 2020. Additionally, she concluded that the appellant did not possess the required valid relevant document at the relevant time and so was unable to meet the definition of durable partner as set out in Appendix EU to the Immigration Rules.

First-tier Tribunal Decision

7. The appeal was listed before the Judge at Taylor House as a CVP remote hearing on 4 January 2023. The appellant, who was represented, attended with his wife.
8. The Judge observed that there was no challenge by the respondent to the appellant's stated personal history, at [14] of the decision. The Judge also noted the appellant's concession that he could not rely upon his marriage as it took place after 31 December 2020, at [15].
9. Through his legal representative the appellant advanced his appeal as follows:
 - i) He was entitled to status consequent to the application of regulation 3 of the Citizens' Rights (Application Deadline and

Temporary Protection) (EU Exit) Regulations 2020 (“the Grace Period Regulations”); alternatively

- ii) He was entitled to status under the EUSS consequent to being a dependent family member of an EEA national who had been granted pre-settled status in the United Kingdom.
10. In respect of ground (i) the appellant’s then representative submitted that the definition of ‘family member’ in regulation 3(6) of the Grace Period Regulations has the same meaning as regulation 7(1) of the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”) and so includes an extended family member within the meaning of regulation 8 of the 2016 Regulations.
 11. Consequently, the appellant contended that there was no requirement for him to provide a residence card as an unmarried partner when applying for pre-settled status under the EUSS when he could meet the requirements for a residence card under regulation 8(5) of the 2016 Regulations. The appellant relied upon his cohabitating with his now wife from May 2018 onwards and their religious marriage in April 2019.
 12. By reference to the Explanatory Note to the Grace Period Regulations the Judge considered this submission to be wholly misconceived, at [17].
 13. As to ground (ii) the Judge concluded, at [20]:

“20. In my judgement the arguments relied upon under Ground 2 appear to reveal the author has “lost sight of the wood for the trees” because the conclusion which it is suggested can be drawn (paragraph 11 of the skeleton argument) is diametrically opposed to the substantive requirements contained at paragraphs (a) and (b) of the definition of “durable partner” under Appendix EU – paragraphs (a) and (b) impose the requirements of residence akin to marriage for 2 years and the requirement of a relevant document as a durable partner for the period of residence. In my judgement the said paragraphs (a) and (b) would be completely unnecessary/otiose if Ms Joshi’s submissions were to be considered correct.’
 14. The Judge found the appellant to be in the same position as the appellant in *Celik (EU Exit: Marriage: Human Rights)* [2022] UKUT 220 (IAC); [2022] Imm AR 1438; his residence was not being facilitated by the respondent prior to 31 December 2020 and consequently he enjoyed no substantive rights under the Withdrawal Agreement.

Grounds of Appeal

15. Having been refused permission to appeal to the Upper Tribunal by a decision of the First-tier Tribunal sent to the parties on 12 April 2023, the appellant filed an in-time appeal notice with this Tribunal.
16. Upper Tribunal Judge Norton-Taylor issued case management directions on 27 February 2024 following the Court of Appeal judgment in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921; [2023] Imm AR 1599. He directed that if the appellant considered his original grounds remained arguable, or if he considered that there were other grounds on which permission may be granted, confirmation was to be provided within 14 days.
17. Two days later, the appellant filed amended grounds of appeal which advanced three grounds of challenge:
 - i) He was not required to provide a residence card as a durable partner as he was able to benefit from Grace Period Regulations.
 - ii) Faced with a conflict between the Grace Period Regulations and the reported decision of *Celik* the Judge should have applied the Grace Period Regulations.
 - iii) The appellant is able to meet the requirements of Appendix EU. In particular, he is a “durable” partner as defined in annex 1 to Appendix EU as he meets the requirements in (b)(ii)(bb) (aaa).
18. Upper Tribunal Judge Jackson granted the appellant permission to appeal on grounds i) and ii) by a decision sent to the parties on 22 April 2024. The first ground was considered arguable. The second ground enjoyed less independent arguable merit but was arguable in conjunction with the first ground.
19. Ground three was identified by Judge Jackson as enjoying no merit. Though noting that permission to appeal was not granted on ground three, we observe that no direction was issued limiting the grounds which may be argued before the Upper Tribunal. Consequent to rule 22(2)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ground three remains to be considered by this panel: *EH (PTA: limited grounds; Cart JR) Bangladesh* [2021] UKUT 00117 (IAC); [2021] Imm AR 1187.

Law

20. The appeal is brought under regulation 8(2)(a) and (3)(c) of the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020. The first regulation permits us to consider whether the respondent’s decision breaches any right enjoyed by the appellant under certain provisions of the Withdrawal Agreement.

21. Article 10 of the Withdrawal Agreement is concerned with “personal scope” and Article 10(1)(a) confirms Union citizens as a group of Rights holders:

“(a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter”

22. Article 10(1)(a) requires that persons exercising free movement rights must have exercised their right to reside pursuant to Union law in the host State before the end of the transition period and continue to reside there after the end of the transition period. In accordance with Article 126, the transition period ended at 23.00 GMT on 31 December 2020.

23. Article 10(1)(e)(i):

“(e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:

(i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter ...”

24. Article 10(2) and (3):

“2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.

3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter.”

25. Article 10(2) applies where an application has been made and residence facilitated before the end of the transition. Article 10(3) applies where an application has been made before the end of the transition period and residence facilitated afterwards.

26. The Court of Appeal held in *Celik*, at [61], that the reference to residence being facilitated in Articles 10(2) and (3) means that a decision has been taken in relation to a particular individual under the relevant national legislation granting that individual a right to enter or reside in the relevant state. It is a means of ensuring that people who are not family members as defined but are extended family members (such as unmarried partners in a durable

relationship) of EEA nationals may apply for residence under national law and, if granted such rights, those persons fall within the scope of Part Two of the Withdrawal Agreement. The requirements are not satisfied simply because a state adopts national legislation under which residence may be facilitated.

27. In *Vasa v Secretary of State for the Home Department* [2024] EWCA Civ 777, at [65], Lewis LJ confirmed that the reference to national legislation in Article 10(2) reflected the fact that extended family members did not derive rights of residence from EU law but from national law.

Hearing

28. At the beginning of the hearing the panel provided the parties with two unreported decisions: *Moustefaoui* (UI-2022-001888), a decision of Judge Smith, promulgated on 17 January 2023, and *Sadok-Cherif* (UI-2022-006120), a decision of Judge O’Callaghan, promulgated on 12 April 2024. In both matters, Ms K Joshi, a representative of Joshi Advocates, advanced submissions consistent with the first ground in this matter. On both occasions the Upper Tribunal concluded that the submissions in respect of the interpretation of the Grace Period Regulations possessed no merit.
29. By happenstance, this error of law hearing was listed before this panel. We observe that Joshi Advocates did not include either decision referenced above in the bundle prepared for this hearing. We give the firm the benefit of the doubt and proceed on the basis that it would have abided by the duty of candour when attending the hearing, particularly noting that these decisions address the application of secondary legislation, albeit we accept that neither decision was reported. We therefore proceed on the basis that copies would have been provided to both the Upper Tribunal and the respondent by the time of the hearing.
30. We provided Mr Mokrane and Mr Terrell sufficient time to read and consider the two decisions during a short break. On our return, the parties confirmed they were ready to proceed. We heard short submission from both parties.

Discussion

31. The appellant does not dispute that he married his wife after 31 December 2020. We observe that he was not issued with a family permit or residence card under the 2016 Regulations.
32. The Court of Appeal confirmed in *Celik* that on the proper interpretation of article 10 of the Withdrawal Agreement an applicant marrying an EEA citizen after the end of the post-European Union exit transition period does not have any right to

reside in the United Kingdom. The fact the marriage had been delayed consequent to the COVID-19 pandemic did not alter the interpretation of the Withdrawal Agreement.

33. The Court held that 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, it does not include persons who married an EEA national after the end of the transition period and who were not, therefore, residing in the United Kingdom as a spouse or civil partner in accordance with EU law at the end of the transition period. 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 the obligation in Article 5 of the Withdrawal Agreement to act in good faith and to take all appropriate measures to ensure fulfilment of the obligations arising from the Withdrawal Agreement. The relevant obligation is to ensure that family members, defined to include spouses and civil partners of EEA nationals, but not unmarried partners in a durable relationship, resident in the United Kingdom at the end of the transition period could continue to enjoy rights of residence after the end of the transition period. The United Kingdom complied with that obligation. 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.

Ground 1: Grace Period Regulations

34. The ground as advanced contends that there is no requirement for the appellant to provide a residence card as an unmarried partner for pre-settled status under the EUSS when he met the requirement for a residence card under regulation 8(5) of the 2016 Regulations before the relevant date of 23.00 GMT on 31 December 2020. This state of affairs is said to be established by regulation 3(1), (2) and (6) of the Grace Period Regulations.

(1) This regulation has effect if the EEA Regulations 2016 are revoked on IP completion day (with or without savings).

(2) The provisions of the EEA Regulations 2016 specified in regulations 5 to 10 continue to have effect (despite the revocation of those Regulations) with the modifications specified in those regulations in relation to a relevant person during the grace period.

...

(6) In this regulation—

...

- (a) has the same meaning as in paragraph (1) of regulation 7 of the EEA Regulations 2016 (read with paragraph (2) of that regulation) as those Regulations had effect immediately before IP completion day, and
 - (b) includes an extended family member within the meaning of regulation 8 of those Regulations as they had effect immediately before IP completion day if that person—
 - (i) immediately before IP completion day satisfied the condition in regulation 8(5) of those Regulations (durable partner), or
 - (ii) holds a valid EEA document (regardless of whether that document was issued before or after IP completion day)
35. A fundamental problem for the appellant is that regulation 8 of the 2016 Regulations is concerned with ‘extended family members’. This status only came into existence under the Regulations once a residence card was issued by the respondent. An extended family member could only be issued with a residence card on the basis of a durable relationship with an EEA national if the respondent had undertaken “an extensive examination of the personal circumstances” of the applicant in accordance with regulation 18(5) which could only happen after an application for a residence card had been made: *Macastena v Secretary of State for the Home Department* [2019] 1 WLR 365, at [17]. As at 23.00 GMT on 31 December 2020 the appellant had no entitlement to be considered for residence as an extended family member because at that time he did not possess that status. It is no answer for the appellant to now say that he met the requirements of regulation 8(5) by the relevant date and this alone is sufficient. Potential or putative rights that could have been made good during the durable relationship do not establish a substantive right: *CS (Brazil) v Secretary of State for the Home Department* [2009] EWCA Civ 480, [2010] Imm AR 1 at [13].
36. Consequently, meeting the requirements of regulation 8(5) does not by itself establish the existence of the status now asserted and so the foundation of the appellant’s contention falls away. This is determinative of the ground, which is properly to be dismissed. However, we proceed to address the “Grace Period Regulation” submission below.
37. The 2016 Regulations were the primary vehicle by which the United Kingdom implemented its European Union obligations concerning the free movement of European Union citizens and their family members. They were revoked following the United Kingdom’s withdrawal from the European Union, but remain in force for certain specified purposes, some of which are set out in the Grace Period

Regulations which allowed some EEA nationals and their family members to make an application under the EUSS up to the deadline of 30 June 2021.

38. The Grace Period Regulations had two purposes. Firstly, it established the deadline of 30 June 2021 for applications to the EUSS by those EU citizens and their family members who were resident in the United Kingdom by 31 December 2000. This was the end of the transition period. Secondly, it saved existing relevant EU law rights for those EU citizens and their family members who were lawfully resident in the United Kingdom at the end of the transition period but who had not by then obtained status under the EUSS.
39. We consider the appellant's submission is underpinned by an erroneous understanding of Article 18 of the Agreement concerned with the issuance of residence documents. It is in relation to Article 18 that a 'grace period' permitted Union citizens to retain their residency rights and apply for a new residence status.
40. The Court of Appeal has confirmed in *Siddiqa v Entry Clearance Officer* [2024] EWCA Civ 248, at [80], that the provisions of Article 18, when properly interpreted, apply to extended family members whose entry (or leave) was being, or had been, facilitated at the specified date. Once that step under domestic law and the 2016 Regulations has been achieved, a successful applicant can apply for residence pursuant to Article 18 under the relevant United Kingdom scheme.
41. The appellant had neither secured, nor was seeking, facilitation at the specified date. Consequently, he is not such an applicant and therefore cannot rely on the provisions of Article 18.
42. Ultimately, on a proper reading of the Grace Period Regulations, the appellant secures no benefit from regulation 3, which specifies the persons in relation to whom the 2016 Regulations continue to have effect. A "relevant person" who enjoys the continued effect of the 2016 Regulations is defined in regulation 3(6) and, in summary, is one who held a right to reside under the 2016 Regulations immediately before the conclusion of the implementation period. Such person continues to enjoy a right to reside and the corresponding protection from removal conferred by those regulations.
43. A "relevant family member" is also defined as a person who "was a family immediately before [the conclusion of the implementation period]" or becomes a family member after that date "by virtue of being issued with an EEA document". The definition of a family member (as set out above) makes clear that it only applies to those falling with regulation 7 of the 2016 Regulations or those within regulation 8 if they satisfied the respondent that they met

regulation 8(5) of the Regulations or held a relevant document prior to the conclusion of the implementation period. Neither applies here.

44. The appellant did not hold a right to reside under the 2016 Regulations immediately before the conclusion of the implementation period because he was not married to his sponsor, nor was he provided with a residence card consequent to being in a durable relationship. He was therefore not a “family member”. He is not a “relevant person” of a “relevant family member” for the purposes of the Grace Period Regulations and so does not secure any benefit from it.
45. The submission advanced by the appellant is unsustainable as it seeks to establish a substantive right from a transitional provision and requires the Grace Period Regulations to be read in a manner that is not in accordance with the Withdrawal Agreement. We are agreed that the Regulations should properly be read to have a meaning that conforms with the Withdrawal Agreement and conclude that the appellant seeks to modify the scope of the Withdrawal Agreement by an unsustainable reading of the Regulations, which when properly read cannot have a bearing on whether the appellant, in any sense, applied for facilitation before the conclusion of the permitted time.
46. The appellant did not apply for facilitation before 23.00 GMT on 31 December 2000 and for the reasons provided by the Court of Appeal in *Celik* this ground is properly to be dismissed.

Ground 2: The First-tier Tribunal erred in placing precedence on *Celik* [2022] UKUT 220 (IAC) over the Grace Period Regulations.

47. This ground is parasitic upon ground 1 and is properly to be dismissed.

Ground 3: The appellant benefits from paragraph (b)(ii)(bb)(aaa) of the definition of “durable partner” in Annex 1 of Appendix EU to the Immigration Rules

48. We consider that there is no reason to depart from the guidance given in the reported decision of *Hani* (*EUSS durable partners: para. (aaa)*) [2024] UKUT 00068 (IAC) and consequently this ground cannot succeed.

Notice of Decision

49. The decision of the First-tier Tribunal sent to the parties on 11 January 2023 is not subject to material error of law.
50. The decision of the First-tier Tribunal is confirmed. The appeal is dismissed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 August 2024