



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002052
First-tier Tribunal No:
EA/01905/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 02 May 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DAVID MOLIFE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Z Young, a Senior Home Office Presenting Officer.
For the Respondent: Mr T Hussain, instructed by Immigration Advice Service Ltd (via Teams)

Heard at Phoenix House (Bradford) on 24 April 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Hillis ('the Judge') promulgated on 28 July 2022 in which the Judge allowed Mr Molife's appeal against the refusal of his application made on 23 April 2021 under the EU Settlement Scheme (EUSS) Family Permit under Appendix EU of the Immigration Rules on the basis he is a durable partner of a relevant EU national, his sponsor.
2. The Judge sets out his findings from [23] of the decision under challenge. Although it is accepted Mr Molife did not have a required document and that his status as a durable partner of an EEA national had not been 'facilitated' by the Secretary of State, the Judge finds at [39] that he had nonetheless shown on the balance of probabilities that he was a durable partner of the EEA national at the relevant date and remains a durable partner, and therefore met the requirements of Appendix EU of the Immigration Rules.
3. The Secretary of State sought permission to appeal which was granted by Upper Tribunal Judge Gleeson on 18 February 2024 in the following terms:

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1. The claimant is a citizen of Zimbabwe, who appealed to the First-tier Tribunal against the respondent's decision on 29 January 2022 to refuse him settled or pre-settled status under the EU Settlement Scheme (EUSS) and Appendix EU (Family Permit) of the Immigration Rules HC 395 (as amended) as the durable partner of his EEA sponsor. He is a citizen of Zimbabwe.
 2. The First-tier Tribunal allowed the appeal on the basis that the claimant met the definition of 'durable partner' in the respondent's own guidance. The First-tier Tribunal also refused permission to appeal to the Upper Tribunal, noting that under Appendix EU (Family Permit) as opposed to Appendix EU, the definition of 'durable partner' did not require the possession of a relevant document or UK residence at the date of application.
 3. The Secretary of State renews his application for permission to appeal, observing that the claimant was in the UK at the date of application; that his application was made and considered under Appendix EU, not Appendix EU (Family Permit); and that *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921 (31 July 2023) is dispositive of his claim for that reason.
 4. The grounds of appeal are arguable.
4. There was no Rule 24 response from Mr Molife and so at the outset Mr Hussain was asked to state his position. He submitted that things had moved on substantially since the hearing before the Judge in respect of guidance that had now been provided in relation to such issues, and that Mr Molife had other options open to him rather than being able to oppose the Secretary of State's application.
 5. That submission is correct. The Court of Appeal upheld the decision of the Upper Tribunal in its judgement reported as *Celik v Secretary State for the Home Department* [2023] EWCA Civ 921 which held that an extended family member had to have had a right to enter or remain as a durable partner 'facilitated' by the Secretary of State by the specified date of 11 PM 31 December 2020 or to have made an application under the Immigration (EEA) Regulations 2016 before that date which was still awaiting determination at the specified date. There was no evidence before the Judge of any such application having been made by Mr Molife.
 6. A further decision of relevance is that of the Upper Tribunal in *Hani v Secretary of State for the Home Department* [2024] UKUT 68 the headnote of which reads:
 - (1) *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".*
 - (2) *Nothing in the amendment to paragraph (aaa) made by HC 1160 with effect from 12 April 2023 calls for a different approach.*
 - (3) *Secretary of State for the Home Department v Kabir UI-2022-002538 did not seek to give guidance about para. (aaa) and does not establish any proposition to be followed.*
 - (4) *A "lawful basis of stay" under para. (aaa) does not include residence in the United Kingdom on immigration bail.*
 7. I find the Judge has erred in law in a manner material to the decision to allow the appeal on the basis that it is impermissible to read the requirements of the Withdrawal Agreement down in the manner in which the Judge appears to have attempted to do to enable Mr Molife to succeed, when he had no lawful right to

do so as he was not in possession of a relevant document and had no pending application at the specified date.

8. I substitute a decision to dismiss the appeal as it is not made out there is any lawful basis on which Mr Molife is entitled to succeed on the facts.
9. I agree with the observation of Mr Hussain that Mr Molife has alternative routes available to him, as it was not disputed he is in a genuine and subsisting relationship with his EU national partner with whom he has an established family life and children. Mr Molife received advice from Mr Hussain in relation to such issues and is reminded of the need to make any application without further delay to ensure he is not removed from the UK.

Notice of Decision

10. The First-tier Tribunal judge has been shown to have materially erred in law. I set that decision aside.
11. I substitute a decision to dismiss the appeal.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 April 2024