



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003237
First-tier Tribunal No:
EA/00886/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 20 March 2024

Before

UPPER TRIBUNAL JUDGE HANSON
UPPER TRIBUNAL JUDGE MANDALIA

Between

ANGELA WATHONI GATHU
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person.

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

Heard at Birmingham Civil Justice Centre on 8 March 2024

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Row ('the Judge'), promulgated on 26 June 2023, which the Judge dismissed the appellant's appeal against the refusal of her application as the dependent relative, durable partner, of her husband Mr Pa Modou Faal, a citizen of Belgium, under Appendix EU.
2. The appellant is a national of Kenya born on 10 July 1992.
3. The operative part of the refusal reads:

We have considered whether you meet the requirements for settled status (also known as indefinite leave to enter or remain) or pre-settled status (also known as limited leave to enter or remain) under the EU Settlement Scheme. Unfortunately, based on the information and evidence available and for the reasons set out in this letter, you do not meet the requirements.

To qualify under the scheme, you need to meet the requirements set out in Appendix EU to the Immigration Rules. You can find out more about the

requirements here [www.gov.uk/settled - status - EU - citizens - families/eligibility](http://www.gov.uk/settled-status-EU-citizens-families/eligibility)

Careful consideration has been given as to whether you meet the eligibility requirements for pre-settled status under the EU Settlement Scheme. The relevant requirements as set out in rule EU 14 of Appendix EU to the Immigration Rules.

You state that you are a dependent relative of a relevant EEA citizen. However, you have not provided sufficient evidence to confirm this. The reasons for this are explained below.

The required evidence of family relationship for a dependent relative of a relevant EEA citizen, where the dependent relative does not have a documented right of permanent residence, is a valid registration certificate or registration card issued under the EEA Regulations (or by the Bailiwick of Jersey, or Bailiwick of Guernsey or the Isle of Man) as the dependent relative of that EEA citizen and evidence which satisfies the Secretary of State that the relationship continues to subsist. Home Office records do not show that you have been issued with a registration certificate or registration card under the EEA Regulations as a relative of an EEA national who was a dependent of the EEA national of their spouse or civil partner, a member of their household or in strict need of their personal care on serious health grounds, and you have not provided a relevant document issued on this basis by any of the Islands.

Therefore you do not meet the requirements for pre-settled status as a family member of a relevant EEA citizen.

It is considered that the information available does not show that you meet the eligibility requirements for pre-settled status set out in rule EU 14 of Appendix EU to the Immigration Rules. This is for the reasons explained above. Therefore, your application has been refused under EU 6.

We have also considered whether you meet any of the other eligibility requirements under Appendix EU. However, from the information and evidence provided, or otherwise available, you do not meet any of these other eligibility requirements and your application has, therefore, been refused under rule EU 6 of that Appendix.

4. The Judge's findings are set out from [7] of the decision under challenge. In that the Judge notes the appellant and the sponsor met in 2018 and considered their relationship to be serious by the beginning of 2019. They did not cohabit pre-marriage. The Judge records the appellant stating they approached the Registrar in October 2020 to arrange a date for the wedding although the initial attendances had to be adjourned on several occasions. It was therefore not until 31 March 2021 that they married.
5. At [13] the Judge, having accepted that the account of the relationship is accurate, found that by the specified date of 11 PM 31 December 2020 the appellant and sponsor were partners in a durable relationship within the meaning of regulation 7 of the EEA Regulations. The Judge finds at [14], however, that did not avail them as they had not obtained a residence card or applied for one before the specified date. At [15] the Judge concludes that as the law stands the appellant did not meet the definition of a durable partner in Appendix EU Annex 1 and could not rely on an argument of proportionality within the Withdrawal Agreement, leading to the appeal being dismissed.

6. The appellant sought permission to appeal claiming the decision was not in accordance with the law as she would have married prior to 31 December 2020 but for Covid, that the Judge failed to exercise discretion in allowing the appeal or to accede to a request for an adjournment of the appeal as her case was on “all fours” with the current litigation in Celik v Secretary of State of the Home Department [2020] UKUT 00220, that the appeal should have been allowed under the heading of “durable partner” as there was no legal requirement according to the Withdrawal Agreement to first apply for an EEA Residence Permit.
7. Permission to appeal was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:
 2. The grounds assert in summary that the Judge materially erred in acceding to the appellant’s request for an adjournment of the appeal given his case being on “all fours” with the current litigation of Celik and SSHD (2020) UKUT 00220.
 3. There is an arguable error of law that has been identified which merits further consideration. There is a reasonable prospect that a different Tribunal would reach a different decision.
8. The Secretary of State has filed a Rule 24 reply dated 11 August 2023, the operative part of which is in the following terms:
 2. The respondent opposes the appellant’s appeal. In summary, the respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately.
 3. The grounds of appeal do not establish a material error of law. The Court of Appeal (CA) has handed down the decision of Celik [2023] EWCA Civ 921 on 31 July 2023. The grounds argue that the FTTJ erred by not acceding to the appellant’s request for an adjournment. The FTT determination does not make any reference to the adjournment request. However, the PO minute refers to the fact that the appellant’s representative informed the FTTJ that the appellant had asked for an adjournment based on waiting for the case of Celik to be heard. The PO minute then records the following: Rep - Appellant has asked for an Adjournment based on waiting for Celik to be heard. Judge - Celik has been appealed to the COA but as it stands, the FTT is bound by the decision of the UT. Rep - we are no longer going to be making an application on the case of Celik.
 4. It is submitted that the appellant’s representative appears to have stated that the application for an adjournment was no longer pursued. Therefore, the FTTJ cannot have erred in law by refusing a request which was not pursued at the hearing.
 5. The grounds also argue that but for Covid the appellant and would have been married prior to the specified date and that the FTTJ should have allowed the appeal on the basis the appellant was a durable partner and there was no legal requirement according to the withdrawal agreement to first apply for an EEA residence permit. As per [4] and [15] the appellant’s counsel at the FTT hearing accepted as the law stood at date of hearing, the appellant did not meet the definition of a durable partner under Appendix EU Annex 1. The FTTJ made that finding at [15]. That acceptance and finding by made by the Judge was correct in law and that is confirmed by the CA in Celik at paragraph 54 and 55 as set out below:

“....In order to be resident in accordance with EU law before the end of the transition period, such persons would have to have been 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 (paragraph 54).”

“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 (paragraph 55).”

6. The appellant had not made an application for facilitation before the end of the transitional period. The FTTJ was correct to conclude at [15] that the appellant could not rely upon an argument of proportionality within the Withdrawal Agreement. The decision of the FTT does not disclose a material error of law and should not be set aside.

Notice of Decision

9. At the commencement of the appeal hearing Mr Bates indicated that, following consultation with his colleague Mr Deller in relation to relevant legal provisions, and in light of the facts as found by the Judge that the appellant and her partner were in a durable relationship prior at the specified date of 11 PM 31 December 2020, it was accepted there was an alternative legal basis on which the appellant was entitled to succeed.
10. In light of the Secretary of State’s acceptance that the appellant must succeed we find the Judge has erred in law in a manner material to the decision to dismiss the appeal in failing to consider the alternative legal basis, based on the facts as found, and substitute a decision to allow the appeal.

C J Hanson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 March 2024