



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004308
On appeal from: EA/10992/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 11th of January 2024

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VLADIMIR ZAJMI
(NO ANONYMITY ORDER)

Respondent

Representation:

For the Appellant: Mr Edward Tyrrell, a Senior Home Office Presenting Officer
For the Respondent: In person (no interpreter required)

Heard at Field House on 13 November 2023

DECISION AND REASONS

Introduction

1. The Secretary of State has permission to challenge the decision of the First-tier Tribunal on 26 July 2023 allowing the claimant's appeal against his decision on 20 October 2022 to refuse settled or pre-settled status under the EU Settlement Scheme and Appendix EU of the Immigration Rules HC 395 (as amended).

2. The claimant is a citizen of Albania. His wife is a Romanian citizen with pre-settled status in the UK. She does not yet have a documented permanent right of residence.
3. For the reasons set out in this decision, we have come to the conclusion that following the Court of Appeal's decision in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921 (31 July 2023), the claimant's challenge to the Secretary of State's decision cannot succeed, and that his appeal must be dismissed.
4. **Mode of hearing.** The hearing today took place face to face. The claimant did not require an interpreter.

Background

5. The parties met in May 2020 and began cohabiting shortly after, the claimant moving in to the sponsor's flat. The tenancy agreement from September 2020 was in their joint names.
6. The UK exited the EU on 31 January 2020. Appendix EU to the Immigration Rules makes special provision for parties who were either married or in a durable relationship (as defined in Annex 1 to Appendix EU) at the specified date of 11 p.m. on 31 December 2020.
7. On 18 February 2001, the Secretary of State refused the claimant an EU residence card under the Immigration (European Economic Area) Regulations 2016 (as they then were). The application had been made before the specified date.
8. The parties' marriage took place after the decision and was a 'new matter' in the February 2022 hearing in the First-tier Tribunal. The Secretary of State did not consent to the Judge considering it. It is not a 'new matter' in these proceedings.
9. Following a hearing on 14 February 2022, First-tier Judge Andrew accepted that the claimant's partner was exercising Treaty rights in the UK. She was not satisfied that their relationship was genuine and dismissed the appeal on that basis. That decision is the *Devaseelan* starting point for any further consideration of the parties' circumstances.
10. The parties married on 18 June 2021, almost four months after the EU Exit specified date of 11 p.m. on 31 December 2020. The claimant cannot demonstrate that he was a spouse, and therefore a family member, of a relevant EEA citizen before the specified date.
11. His appeal stands or falls on the definition of 'durable partner' in Annex 1 to Appendix EU.

Refusal letter

12. The Secretary of State approached this application on the basis that the claimant was not a spouse before the specified date. That is not disputed.
13. He concluded that the claimant could not meet the definition of 'durable partner' in Annex 1 to Appendix EU, which requires not only proof of the existence of the relationship for at least two years before the specified date, but also that the claimant holds, or had applied for, a 'relevant document' before the specified date for EU Exit.
14. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

15. The First-tier Judge allowed the appeal. First-tier Judge Juss correctly directed himself to treat Judge Andrews' decision as the *Devaseelan* starting point in reaching his own conclusions.
16. He noted that there was new evidence about the relationship, including from friends and relatives, whose evidence had not been subjected to cross-examination by the Home Office Presenting Officer at the hearing. The Judge found that the parties' durable relationship began in May 2020, seven months before the specified date. He was provided with 'extensive photographs in relation to their marriage'. One would have expected First-tier Judge Juss' decision to contain further reasoning after [22], engaging with the definition of 'durable partner' in Annex 1 of Appendix EU, but there is none. He simply allowed the appeal.
17. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

18. The Secretary of State sought permission to appeal in the following terms:
 - (a) It is respectfully submitted that the First Tier Tribunal Judge (FTTJ) has materially erred in law by failing properly to consider the provisions of Appendix EU of the Immigration Rules, when allowing the Appellant's appeal.
 - (b) The Appellant's application for status under Appendix EU was as the family member of a relevant EEA national. It is submitted that the Appellant could not succeed as a spouse, as the marriage took place after the specified date (31 December 2020), and so the application was considered under the durable partner route where it was bound to fail. 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. No such document was held as no successful application for facilitation had ever been made by the Appellant prior to the specified date.
 - (c) It is submitted that the question of whether and how the relationship was in fact "durable" at any relevant date, as is found by the FTTJ at [18] to [22] of the determination, is of no consequence. The requirements of Appendix EU of the Immigration rules could simply not be met by a durable partner whose residence had not been facilitated prior to the specified date.

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. As the Appellant had not been issued with “facilitated residence” prior to the specified date, they cannot satisfy the requirements of Appendix EU. ...”

19. Permission to appeal to the Upper Tribunal was granted on the following basis:

“2. The grounds assert that the Judge erred in making a material error of law by making a misdirection as to the law. The grounds disclose an arguable material error of law in regard to the application of the Withdrawal Agreement and permission to appeal is granted.”

20. There was no Rule 24 Reply.

21. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

22. The oral submissions at the hearing are a matter of record and need not be set out here. We had access to all of the documents before the First-tier Tribunal.

23. The factual matrix is not contentious. The parties, on their own account, lived together from May 2020. At the specified date, they had been together for 8 months. They married four months after the specified date.

24. It was asserted at the hearing before us that the claimant’s wife is now pregnant, but there was no medical evidence of that and in any event, it would have been a ‘new matter’. It is open to the parties to raise that separately if so advised.

‘Durable partner’ definition

25. The definition of ‘durable partner’ in Annex 1 is that:

“(a) the person is, or (as the case may be) was, in a durable relationship with the relevant EEA citizen (or, as the case may be, with the qualifying British citizen), with the couple having lived together in a relationship akin to a marriage or civil partnership for at least two years (unless there is other significant evidence of the durable relationship); and

(b) where the applicant was resident in the UK and Islands as the durable partner of a relevant EEA citizen before the specified date, the person held a relevant document as the durable partner of the relevant EEA citizen or, where there is evidence which satisfies the entry clearance officer that the applicant was otherwise lawfully resident in the UK and Islands for the relevant period before the specified date (or where the applicant is a joining family member) or where the applicant relies on the relevant EEA citizen being a relevant person of Northern Ireland, there is evidence which satisfies

the entry clearance officer that the durable partnership was formed and was durable before the specified date; and

(c) it is, or (as the case may be) was, not a durable partnership of convenience; and

(d) neither party has, or (as the case may be) had, another durable partner, a spouse or a civil partner with (in any of those circumstances) immigration status in the UK or the Islands based on that person's relationship with that party."

26. A relevant document is defined in Annex A:

"Relevant document

(a)(i)(aa) a family permit, registration certificate, residence card, document certifying permanent residence, permanent residence card or derivative residence card issued by the UK under the EEA Regulations on the basis of an application made under the EEA Regulations before (in the case, where the applicant is not a dependent relative, of a family permit) 1 July 2021 and otherwise before the specified date (or, in any case, a letter from the Secretary of State, issued after 30 June 2021, confirming their qualification for such a document, had the route not closed after 30 June 2021)"

The *Celik* judgment

27. The *Celik* judgment was handed down by the Court of Appeal on 31 July 2023, after interventions from The Aire Centre, Here for Good, and the Independent Monitoring Authority for the Citizens' Rights Agreements. Lord Justice Lewis gave the judgment of the Court, Lord Justices Singh and Moylan concurring.

28. The Court of Appeal held that a person who was not a family member as defined, and did not have one of the specified documents, was not a 'durable partner' as defined in Annex 1 to Appendix EU. The Court considered a range of submissions regarding the correct application of Appendix EU, and at [68] found that:

"The Upper Tribunal was correct in deciding that the decision of 23 June 2021 was in accordance with the requirements of the rules in Appendix EU and rule EU11 and EU14 in particular. The fact is that the appellant was not a family member at the material time. He had not married an EU national before 11 p.m. on 31 December 2020. He was not a durable partner within the meaning of Annex 1 to Appendix EU as he did not have a residence card as required and he did not have a lawful basis of stay in the United Kingdom (he was in the United Kingdom unlawfully). The appellant did not qualify for leave to remain under Appendix EU. There is no obligation to interpret or "read down" the relevant rules to reach a different result."

Discussion

29. The First-tier Judge erred in not applying the provisions of Appendix EU to this claimant's circumstances. His decision contains no reasoning beyond

the setting out of the parties' evidence as to cohabitation and marriage. He does not explain why he finds their account credible, when the first Judge did not, but more importantly, he does not engage at all with the 'durable partner' test set out above. The decision must be set aside for that reason.

30. The factual matrix is not disputed, and we consider that it is appropriate to remake the decision by applying the *Celik* guidance to the accepted facts. The question for this Tribunal is whether the special arrangements made for EEA citizens and their partners in Appendix EU and the Withdrawal Agreement avail this claimant. We find that they do not.
31. The parties were not married on 31 December 2020 so the claimant is not a spouse for this purpose.
32. To succeed in his appeal, the claimant would need to bring himself within the 'durable partner' definition in Annex 1 of Appendix EU. He cannot do so: the undisputed evidence is that before 31 December 2020, he had lived with his partner in a relationship akin to marriage for 8 months, not for 2 years. Nor can he show that he has any of the relevant documents.
33. He is not, therefore, a 'durable partner' as defined in Annex 1 and the EUSS arrangements do not apply to him.
34. The claimant's appeal must be dismissed.

Notice of Decision

35. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

We set aside the previous decision. We remake the decision by dismissing the claimant's appeal.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 3 January 2024