IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005446

First-tier Tribunal No:
EA/09950/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

6th March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

MRS LALITA SHARMA
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Khan, Counsel, instructed by Synthesis Chambers Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 28 February 2024

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal Judge Cameron ('the Judge') who dismissed her appeal brought against the respondent's refusal to grant her pre-settled status under appendix EU.

Background

2. The appellant is a national of India who is, at the date of hearing before me 23 years old. She entered the UK as a student. She had student leave granted in January 2020 valid to 8 March 2023.

3. After arriving in the UK in 2020 she met her now husband. They entered into a relationship and moved in together in September 2020. They became engaged and applied for permission to marry in December 2020. They finally did marry on 29 March 2021.

4. The appellant applied for pre-settled status on 25 January 2021, this was refused on 10 May 2021 on the basis that she does not qualify because they married after 31 December 2020. The respondent considered whether the definition of durable partner was met and concluded that:

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 durable partner of a relevant EEA citizen is a valid family permit or residence card issued under the EEA Regulations (or by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man) as the durable partner of that EEA citizen and, where the applicant does not have a documented right of permanent residence, evidence which satisfies the Secretary of State that the durable partnership continues to subsist.

Home Office records do not show that you have been issued with a family permit or residence card under the EEA Regulations as the durable partner of the EEA national 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 settled status under the EU Settlement Scheme.

5. The appellant applied for administrative review on 10 May 2021. A response was received on 29 September 2022. In that review the respondent maintained the decision, and further added that the evidence provided did not show that the relationship was durable as of 31 December 2022. The decision was maintained. The appellant appealed.

6. Her appeal came before the Judge on 8 September 2023. He dismissed the appeal on 26 September 2023. In his decision he found that:

> *14. The relevant legal framework is cited at length at paragraph 20 of Celik [2022] UKUT 219 (IAC).*
>
> *15. The Court of Appeal in Celik [2023] EWCA Civ 921 refused the appellant's appeal and confirmed the position set out by the Upper Tribunal.*
>
> *16. I have taken into account the arguments put forward by Mr Raza that the unreported decision of the Upper Tribunal dealt with facts very similar to the appeal before me.*

17. Although I have no doubt that the arguments set out in the unreported decision have been well considered the Court of Appeal have upheld the decision in Celik and I after considering all of the evidence before me have come to the conclusion that I should follow the rationale set out in Celik both before the Upper Tribunal and Court of Appeal.

18. The appellant's appeal under the EUSS must fail since she was not a "family member" before the conclusion of the IP. Nor had she been recognised as, or applied for "facilitation" as, the durable partner of the sponsor before the conclusion of the IP.

19. I therefore find that the appellant cannot meet the requirements of the regulations.

20. The respondent has not raised a section 120 notice under the 2002 Act and there are no removal directions. In accordance with Amirteymour and others (EEA appeals; human rights) [2015] UKUT 00466 (IAC) the appellant cannot bring a human rights challenge in relation to the respondent's decision.

7. The appellant appealed. Permission was initially refused, by the FTT, but then in renewing her application, granted by Upper Tribunal Judge Reeds on 25 January 2024.

8. The respondent responded to the appeal by way of notice under rule 24 in which the following was expressed:

2. The respondent does not oppose the appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider whether the appellant had applied for facilitation by way of EUSS application and whether, or not, the Appellant could be considered to be in a durable relationship at the specified date [31.12.2020].

3. As regards Grounds as lodged raising the 'Celik' point the SSHD notes that the Court of Appeal have considered this in the case of Siddiqa on 8th/9th February 2024 and the SSHD would therefore invite the UT to stay a decision on this ground pending promulgation of the Court of Appeal guidance.

4. As regards the additional Ground raised by UTJ Reeds via the Grant of Permission it is accepted that the Appellant held alternative leave as at 31.12.2020 by way of a Student Visa valid to 8.5.2023. That would therefore engage a paragraph b(ii)(bb)(aaa) ground (Appendix EU- definitions- Durable Partner). However, whilst the Appellant would not therefore to required to hold an EEA document issued for facilitation as recognition of a durable relationship the burden remained upon the Appellant to demonstrate that they were, nonetheless, in a durable relationship as at 31.12.2020. The SSHD does not accept that a relationship that commenced cohabitation only in September 2020 had attained a durable nature by December 2020.

5. The issue of the durability of the relationship as at 31.12.2020 therefore still requires determining. Attention being drawn to the Durable Partner definition (a) that as a general rule 2-years cohabitation would have been required to meet the definition at the first hurdle.

(a) the person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA citizen (or, as the case may be, with a qualifying British citizen or with a relevant sponsor), 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….
Immigration Rules - Immigration Rules Appendix EU - Guidance - GOV.UK (www.gov.uk)

Decision and reasons

9. As is plain there is a material error of law in the Judge's decision. The appellant had leave to remain at the relevant time and so did not need to have a residence card. The provisions of (aaa) plainly enable someone with extant leave to remain to rely on appendix EU. However, the issue really before the Judge was whether they were in fact in a durable relationship at the relevant date of 31 December 2020. He failed to resolve this.

10. The advocates were in agreement that the decision would need to be remade. The only question was whether the appropriate forum for that was the Upper Tribunal or for it to return to the FTT. Mr Melvin did not address me on the staying point, in any event I did not see the utility of a formal stay of proceedings given, as set at paragraph 4 and 5 of the response, that there is an evidential issue still between the parties.

11. The issue which needs resolving is centres on whether the appellant and her now husband, were in a durable relationship as of 31 December 2020, and presumably continuing to when they married in March 2021. No evidence had previously been given on this as the appellant and her husband were not called to give evidence before the FTT.

12. Given the error accepted, namely that the Judge had in effect asked himself the wrong question and that there were no findings of fact made, the appropriate course of action is to remit the matter to the First-tier Tribunal to be heard afresh.

Notice of Decision

The decision of the First-tier Tribunal is infected with an error of law as agreed by both parties and is set aside by consent.

The case is remitted to the First-tier Tribunal to be heard afresh before any Judge other than Judge Camreron.

Judge T.S. Wilding

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 28th February 2024