IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001054

First-tier Tribunal No:
EU/52846/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 20th of June 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

VENUS BUENAVISTA
(no anonymity order made)

Respondent

Representation:
For the Appellant: Ms A Nolan
For the Respondent: Ms J Fathers

Heard at Field House on 26 April 2024

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of the First-tier Tribunal of 5 January 2024, allowing the appeal of Venus Buenavista, a national of the Philippines, born 26 June 1990.

The application and its refusal

2. The key facts underlying this appeal are that Ms Buenavista arrived in the UK as a domestic worker in September 2016 with leave until May

2017, which she overstayed having been abused by the Dubai-based family with whom she resided in the UK. She began a relationship with Mohamedamine El Zomor, an Italian national, in December 2018, and they cohabited from February 2019; an application to remain as his durable partner made in the course of 2019 was refused on 17 September 2020. On 27 February 2023 (by which time they had had a daughter who suffers from cerebral palsy) she applied for settled status as Mr El Zomor's durable partner, under Appendix EU, that application being refused on 26 April 2023.

3. Her application was refused because, in the Secretary of State's view, she had not established herself as holding a residence card or other relevant document attesting to having been previously accepted as being in a durable relationship with Mr El Zomor as at 23:00 hours on 31 December 2020; furthermore there was inadequate evidence proving cohabitation or otherwise demonstrating the relationship's durability.

The appeal

4. The First-tier Tribunal allowed Ms Buenavista's appeal for three reasons: because the Secretary of State had wrongly refused her first durable partner application (acting contrary to the relevant guidance) made in 2019, thereby depriving her of the benefit of the residence card that would then have entitled the present application to succeed; because the Rules were very unclear, even to a trained lawyer, as at least one Upper Tribunal decision had remarked; and because Ms Buenavista's daughter had significant medical and care needs, such that her best interests called for her application's success.

5. The Secretary of State appealed on the grounds that the suggestion that the December 2020 decision was contrary to published guidance could not make good Ms Buenavista's failure to obtain a relevant document, because absent the success of that earlier application she lacked the necessary "relevant document" to qualify as a durable partner and thus could not contend that her UK residence had been facilitated by the authorities here. The lack of such document was fatal to her application under Appendix EU.

6. The First-tier Tribunal granted permission to appeal on 12 March 2024 on the basis that the Judge had arguably taken into accounts matters that were irrelevant to the requirements of Appendix EU.

The hearing before me

7. For the Secretary of State Ms Nolan submitted that the First-tier Tribunal had effectively relied on considerations that might be relevant in a human rights appeal to enter a Citizens Rights Appeal by the backdoor.

8. Ms Fathers for Ms Buenavista produced a concise and useful rule 24 notice arguing that the Tribunal below had been entitled to take the

approach it did given that child welfare and safeguarding duties mandated by section 55 of the Borders, Citizenship and Immigration Act 2009 had not been addressed by the Secretary of State's refusal letter, whereas the EU Settlement Scheme guidance indicated that the best interests of any affected child should be considered (interests which had been here raised in the underlying application's covering letter and the skeleton argument below). Refusing to permit the matter to be raised now would be contrary to the UKVI Guidance on rights of appeal which indicated that consent would be given to raise new matters where necessary absent some particular need to investigate documents or conduct criminal record checks.

9. In reply Ms Nolan contended that any such missing section 55 consideration could only be attacked via the public law remedy of judicial review; the fact was that consent had never been given for any human rights arguments to be raised.

Decision and reasons

10. This is an appeal where the nature of the issues in play are ones of pure law such that either the appeal falls to be dismissed, or to be allowed outright. Neither advocate suggested that any further evidence would be required in so doing. I will therefore take questions that would normally fall separately into the two arenas of "error of law" and "continuation" hearing together. The definition of "durable partner" at the date of the Secretary of State's decision is found in Annex 1 of Appendix EU:

> "(a) the person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA 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)
> (i) the person holds a relevant document as the durable partner of the relevant EEA citizen … for the period of residence relied upon; for the purposes of this provision, where the person applies for a relevant document … as the durable partner of the relevant EEA citizen … before the specified date and their relevant document is issued on that basis after the specified date, they are deemed to have held the relevant document since immediately before the specified date; or
> (ii) where the person is applying as the durable partner of a relevant sponsor … and does not hold a document of the type to which subparagraph (b)(i) above applies, and where:
> (aa) the date of application is after the specified date; and
> (bb) the person:
> (aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) on a basis

> which met the entry for 'family member of a relevant EEA citizen' in this table … at … any time before the specified date, unless (in the former case):
> - the reason why they were not so resident is that they did not hold a relevant document as the durable partner of that relevant EEA citizen for that period; and
> - they otherwise had a lawful basis of stay in the UK and Islands for that period."

11. These passages of Celik [2023] EWCA Civ 921 are relevant to understanding the broader place that durable relationships take within the UK's post-Brexit immigration arrangements:

> "60. Articles 10(2) and (3) [of the Withdrawal Agreement] are dealing with situations where the residence of persons is facilitated by the host State in accordance with its legislation. Article 10(2) applies where an application has been made and residence facilitated before the end of the transition period. Article 10(3) applies where an application was made before the end of the transition period but only granted, and residence facilitated, after the end of that period.
> 61. 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. That interpretation reflects the language and purpose underlying Article 10(2) and (3) (and is also consistent with the provisions of the Directive on the position of extended family members discussed above). Article 10(2) refers to persons "whose residence was facilitated". Article 10(3) requires that a person "has applied" – i.e. that an individual has sought the right to enter or reside in the relevant state – and "whose residence is being facilitated" (i.e. the application has been granted and residence permitted). 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 EU nationals may apply for residence under national law and, if granted such rights, those persons fall within the scope of Part Two of the Agreement. The requirements are not satisfied simply because a state adopts national legislation under which residence may be facilitated.
> 62. Consequently, the mere fact that the United Kingdom had adopted national legislation under which persons could apply for and be granted residence rights did not mean that the appellant's residence had been facilitated. The position is that the appellant's residence was not, in fact, being facilitated by a decision granting leave to remain made before the end of the transition period or pursuant to an application made before that date but granted after it.
> 80 … the Withdrawal Agreement sets out the categories of persons who would continue to be entitled to rights of residence after the end of the transition period. They included persons who were married to an EU national and resident in the United Kingdom in accordance with

EU law before the end of the transition period. They did not include persons such as the appellant who did not marry an EU national before that date and were not resident in the United Kingdom in accordance with EU law."

12. Hani UKUT 68 [2024] (IAC) considered the definition of durable partner under Appendix EU and holds, head note at (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"."

13. Reading the Rules and those authorities together, it can be seen that

(a) The requisite evidence of being a durable partner requires proof of the relationship's genuineness, subsistence and durability, plus either possession of a residence card in that capacity or confirmation of having a pending application for one made before 31 December 2020, or the possession of lawful residence on another basis.

(b) Celik holds there to be no incompatibility between Appendix EU and the Withdrawal Agreement; Hani confirms that the amendment to the domestic rules via HC 1160 with effect from 12 April 2023 does not change this analysis.

14. The text chosen to achieve this result is, like so much of Appendix EU, not the most pellucid, but however inscrutable it may be in its original form, its meaning has now been rendered transparent in a series of judicial decisions of which practitioners advising migrants, and one would hope judges, should be aware. Thus Celik shows that Ms Buenavista has no rights under the Withdrawal Agreement, and Hani confirms that the residence scheme rules do not provide for a durable partner application to succeed without a residence card having been obtained, or applied for, before 31 December 2020. The First-tier Tribunal erred in law in holding otherwise.

15. The First-tier Tribunal was also wrong to rely on the perceived wrongful treatment of Ms Buenavista's application in 2019 as relevant to her subsequent possession of a residence card.

(a) Firstly, the remedy against a wrongful refusal of the 2019 application would have been an appeal under the EEA Regs 2016, a point made in Celik §91. The Home Office's decision

otherwise stands until and unless set aside by a judicial body competent to overturn it.

(b) Secondly, the First-tier Tribunal does not identify why it is that the earlier decision fell to be treated as defective. I note that Ms Buenavista's witness statement referred to having no knowledge of any requests by the Home Office for further evidence, and so perhaps the inference the Judge drew was that information had been sought, provided, and then overlooked; but I can see no evidence demonstrating precisely what material *had* been supplied on her *original* application. True it is that Ms Buenavista provided evidence to establish herself as a durable partner in the present proceedings, but what information was put forward in the application leading to the September 2020 refusal is unclear.

16. Ms Fathers, dealt as she was a rather poor hand by the doctrine of precedent, did not seriously contest the interpretation set out above of Annex 1's definition of durable partner, and nor did she defend the Judge below's conclusion that the treatment of the 2019 application was relevant to the present appeal. Rather she argued that the section 55 safeguarding duty was a matter that fell within the appellate jurisdiction. Thus the First-tier Tribunal was correct to implemented that duty in the face of the Secretary of State's failure so to do.

17. The availability of this argument to Ms Buenavista is governed by The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

> "**Right of appeal against decisions relating to leave to enter or remain in the United Kingdom made by virtue of residence scheme immigration rules**
> 3.—(1) A person ("P") may appeal against a decision made on or after exit day—
> (c) not to grant any leave to enter or remain in the United Kingdom in response to P's relevant application
> **Grounds of appeal**
> 8.—(1) An appeal under these Regulations must be brought on one or both of the following two grounds.
> (2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of … [Withdrawal Agreement issues]
> (3) The second ground of appeal is that— …
> (b) where the decision is mentioned in regulation 3(1)(c) …, it is not in accordance with residence scheme immigration rules; …
> **Matters to be considered by the relevant authority**
> 9.—(1) If an appellant makes a section 120 statement, the relevant authority must consider any matter raised in that statement which constitutes a specified ground of appeal against the decision appealed against. For the purposes of this paragraph, a "specified ground of appeal" is a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act.

(2) In this regulation, "section 120 statement" means a statement made under section 120 of the 2002 Act and includes any statement made under that section, as applied by Schedule 1 or 2 to these Regulations.
(3) For the purposes of this regulation, it does not matter whether a section 120 statement is made before or after the appeal under these Regulations is commenced.
(4) The relevant authority may also consider any matter which it thinks relevant to the substance of the decision appealed against, including a matter arising after the date of the decision.
(5) But the relevant authority must not consider a new matter without the consent of the Secretary of State."

18. To summarise the effect of those provisions:

    (a) The statutory appeal countenances only two grounds within its purview: the Withdrawal Agreement, and residence scheme immigration rules, *viz* the provisions of Appendix EU (and, perhaps, any other rules which are procedurally connected to that Appendix, though it would seem that there is no such reference to section 55 duties elsewhere in the rules in any event).

    (b) There is scope for further matters to be raised by way of a statement pursuant to section 120 of the Nationality Immigration and Asylum Act 2002, but only if the Secretary of State consents to a new matter entering the proceedings.

    (c) Whether or not a s120 notice was here served, the Secretary of State had refused consent for human rights matters to be raised in the review of 5 October 2023.

19. Whilst the lack of a merits appeal may be thought unsatisfactory, that does not preclude a legal challenge, for example by way of judicial review against the refusal of consent. Celik §81 notes the possibility of bringing a judicial review against decision making which is contrary to public law principles. Cumbersome that this may be, the will of Parliament is to distribute the availability of remedies in the manner specified. I therefore conclude that the First-tier Tribunal was also wrong to conclude that the best interests of the child was a matter that fell within its jurisdiction in a Citizens Rights appeal.

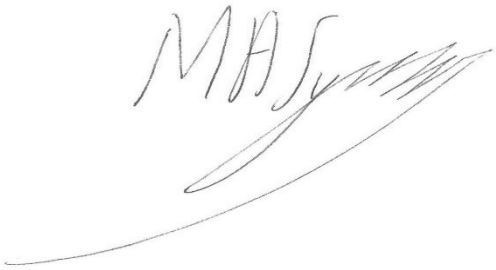
20. To summarise my conclusions, Ms Buenavista's application was doomed by the lack of a residence document acquired prior to 31 December 2020, the alleged procedural impropriety in the treatment of her 2019 application making no difference to that conclusion. The best interests of her daughter, vulnerable as she is and important that they may be, are beyond the appellate jurisdiction, notwithstanding the elegant concision of Ms Fathers' advocacy to the contrary.

Decision:

The decision of the First-tier Tribunal contained material errors of law.

I have remade the decision.

The Secretary of State's appeal is allowed outright.



Deputy Upper Tribunal Judge Symes
Immigration and Asylum Chamber

15 June 2024