Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/12731/2021
(UI-2022-001938)

THE IMMIGRATION ACTS

Heard at Bradford IAC	**Decision & Reasons Promulgated**
On the 5 October 2022	**On the 24 November 2022**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

MS DAULICE LOIZE MOREIRA DE ANDRADE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Diwnycz, Senior Presenting Officer
For the Respondent: No appearance or representation on behalf of the appellant

DECISION AND REASONS

Introduction:

1. The respondent appeals with permission against the decision of the First-tier Tribunal (Judge Hillis) (hereinafter referred to as the "FtTJ") who allowed the appeal against the decision made to refuse the application for a family permit under Appendix EU in a decision promulgated on 4 March 2022.

2. The FtTJ did not make an anonymity order no application was made for such an order before the Upper Tribunal.

3. Whilst this is an appeal brought by the respondent, reference is made to the parties as they were before the First-Tier Tribunal.

The background:

4. The background is set out in the decision of the FtTJ and the evidence in the bundle. The appellant is a citizen of Brazil. On 12 May 2021 she made an application for an EU settlement scheme (EUSS) family permit under Appendix EU (family permit) to the Immigration Rules on the basis of her being the partner of a relevant EEA national.

5. The respondent considered the application made but in a decision taken on 21 July 2021 was not satisfied that the appellant had provided sufficient evidence to show that she was the durable partner of a relative EEA citizen with a valid family permit or resident card issued under the EU regulations. The appellant's eligibility was also considered as set out under EU11 and EU4 of Appendix EU.

6. The appellant appealed and the appeal came before the FtT on 15 February 2022 and in a decision promulgated on 13 March 2022 the FtTJ allowed the appeal. Having heard the evidence of the parties he concluded that they were consistent in core aspects of the claim and accepted that the appellant and the sponsor were in a durable relationship from June 2019 and that they started to cohabit from approximately November 2019. They entered the U.K as visitors in November 2020 to holiday with the sponsor's sister. The judge was satisfied that the sponsor was granted pre-settled status under the EUSS. He found the relevant date for the existence of the relationship was 31 December 2020. He also found the relationship would not have been ongoing for 2 years at this point as they had only been cohabiting in a relationship akin to marriage from approximately November 2020.

7. At paragraph 43 the judge considered the guidance and concluded that the appellant and the sponsor had been in a durable relationship akin to marriage since November 2019. He therefore allowed the appeal under Appendix EU.

8. Permission to appeal the decision was sought and on 25April 2022 permission was granted by FtTJ Athwal.

The hearing before the Upper Tribunal:

9. The hearing before the Upper Tribunal took place on 5 October 2022. Mr Diwnycz, Senior Presenting Officer appeared on behalf of the respondent. There was no appearance or representation on behalf of the appellant. Mr Diwnycz referred me to the correspondence between the tribunal, the appellant's solicitors and the respondent.

An application had been made on behalf of the appellant to withdraw her appeal and on the basis that the appellant had departed from the UK. The decision was made by the Upper Tribunal Judge Lawyer on 28th of September 2022 refusing the application stating that "She has withdrawn her "case" under Rule 17 and not the appeal; this is the respondent's appeal and not the appellant's to withdraw. The appellant's departure from the UK does not automatically bring the proceedings to an end since this is an EUSS appeal. The respondent contests the decision of the FtTJ and therefore it would not be appropriate for the tribunal to consent to the withdrawal of the proceedings."

10. There followed further correspondence between the respondent and the appellant's solicitors. The last email was sent on 3 October 2022 stating that they had attempted to contact the appellant, but she was no longer in the UK, and they had no instructions and therefore were not able to consent to any order or attend the hearing on her behalf. Nothing further has been received from the appellant and there was no attendance by her or on her behalf on the date of hearing. Thus the application for permission to appeal was heard in her absence.

11. Mr Diwnycz relied upon the grounds. He submitted that the FtTJ erred in law by not considering the lack of any documentation facilitating residence as required under the EUSS and it had not been asserted that the appellant possessed such a document and in light of the decision in Celik v SSHD [2022] UKUT 220 the appeal should be dismissed.

Discussion:

12. As the grounds set out, the application for status was made under the EU Settlement Scheme (EUSS) as a family member of a relevant EEA national. The rule required a "relevant document" as evidence that residence had been facilitated under the EEA regulations which are transposed in Article 3 (2) (b) of the 2004 directive. No such document been held as no application for facilitation ever been made by the appellant prior to 31 December 2020 (the "specified date" as defined in Annex 1 of Appendix EU).

13. Whilst the respondent's grounds did not challenge the factual findings made by the FtTJ concerning the durability of the relationship (set out at paragraphs 42 and 44), that did not mean that the appeal would succeed. The rules could not be met by a durable partner whose residence had not been facilitated.

14. The FtTJ failed to address the requirement of Appendix EU that the appellant was documented as a durable partner prior to the specified date when allowing the appeal. Furthermore the FtTJ referred at paragraph 37 of his decision to Regulation 8 of the EEA regulations 2016. The application was made under the EUSS on 12 May 2021

after the UK's exit from the EU. Consequently the FtTJ was an error by considering the appeal by reference to the 2016 EEA Regulations rather than the requirements of Appendix EU of the Immigration Rules.

15. This is set out in the decision of Celik as follows and by reference to paragraphs 52-56

> ***(1) The Withdrawal Agreement***
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> 44. The Withdrawal Agreement lies at the heart of this case. It is therefore necessary to examine, in some detail, how the Withdrawal Agreement applies to a person, such as the appellant, who was (or may have been) in a durable relationship, prior to 31 December 2020, with an EU citizen but who did not marry the EU citizen until after that time.
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> 45. Article 126 provides for a transition period, which started on the day of the entry into force of the Withdrawal Agreement and ended at 23:00 hours GMT on 31 December 2020. During that period, EU law continued to apply in the United Kingdom. Thereafter, Article 4 provides for individuals to rely directly on the provisions of the Withdrawal Agreement, which meet the conditions for direct effect under EU law. In accordance with Article 4, the Withdrawal Agreement is given direct effect in the United Kingdom by section 7A of the European Union (Withdrawal) Act 2018.
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> 46. Part 2 of the Withdrawal Agreement makes provision in relation to citizens' rights. Article 10 sets out who is within scope of Part 2. That Part includes Article 18, upon which the appellant seeks to rely. Article 18.1 refers to "Union citizens... their respective family members and other persons, who reside in" the territory of the host State "in accordance with the conditions set out in this Title".
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> 47. "Family members "are defined in Article 9 in such a way that it is, for example, insufficient for a person merely to meet sub-paragraph (1) of the definition by reason of being the spouse of a Union citizen (Article 2(2)(a)) of Directive 2004/38/EC). The opening words of the definition of "family members" also require the person concerned to "fall within the personal scope provided for in Article 10" of the Withdrawal Agreement.
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> 48. The appellant is not a family member to whom Part 2 of the Withdrawal Agreement applies. He was not a person who, in the words of Article 10.1(e)(i), resided in the United Kingdom in accordance with Union law before 11pm on 31 December 2020 and who continues to reside here afterwards. Nor does he fall within the scope of Article 10.1(e)(ii) or (iii).
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> 49. By the same token, the appellant is not a person who falls within Article 10.1(f), as he was not someone who resided in the United Kingdom in accordance with Articles 12, 13, 16(2), 17 and 18 of Directive 2004/38/EC before the end of the transition period. Broadly speaking, those provisions relate to retained rights of

residence and rights of permanent residence, none of which are relevant in the appellant's case.

50. Accordingly, the only way the appellant can bring himself within the scope of Part 2 and, thus, Article 18, is if he can fall within Article 10.2. To reiterate, this provides as follows:

> "2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter."

51. Article 3(2) of Directive 2004/38/EC requires Member States to "facilitate entry and residence" for "any other family members" who are dependents or members of the household of the Union citizen; or where serious health grounds strictly require the personal care of the family member by the Union citizen. A person is also within Article 3.2 if they are a "partner with whom the Union citizen has a durable relationship, duly attested". For such persons, the host Member State is required to "undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".

52. There can be no doubt that the appellant's residence in the United Kingdom was not facilitated by the respondent before 11pm on 31 December 2020. It was not enough that the appellant may, by that time, have been in a durable relationship with the person whom he married in 2021. Unlike spouses of EU citizens, extended family members enjoyed no right, as such, of residence under the EU free movement legislation. The rights of extended family members arose only upon their residence being facilitated by the respondent, as evidenced by the issue of a residence permit, registration certificate or a residence card: regulation 7(3) and regulation 7(5) of the 2016 Regulations.

53. If the appellant had applied for facilitation of entry and residence before the end of the transition period, Article 10.3 would have brought him within the scope of that Article, provided that such residence was being facilitated by the respondent "in accordance with ... national legislation thereafter". This is not, however, the position. For an application to have been validly made in this regard, it needed to have been made in accordance with regulation 21 of the 2016 Regulations. That required an application to be submitted online, using the relevant pages of www.gov.uk , by post or in person, using the relevant application form specified by the respondent; and accompanied by the applicable fee.

54. After 30 June 2021, a favourable decision of the respondent by reference to a pre-31 December 2020 application, results in a grant of leave under the EUSS, rather than a grant of residence documentation under the 2016 Regulations.

55. As we have seen, the appellant made no such application.

> 56. The above analysis is destructive of the appellant's ability to rely on the substance of Article 18.1. He has no right to call upon the respondent to provide him with a document evidencing his "new residence status" arising from the Withdrawal Agreement because that Agreement gives him no such status. He is not within the terms of Article 10 and so cannot show that he is a family member for the purposes of Article 18 or some other person residing in the United Kingdom in accordance with the conditions set out in Title II of Part 2.

16. The appellant has not sought to challenge the grounds or make any further representations relating to the decision in Celik or by reference to the relevant Rules, the Withdrawal Agreement or Appendix EU. It is not said that the appellant has made an application for facilitation before 31 December 2020 or one which was validly made nor that there is any document held as required.

17. For those reasons, it has been demonstrated that the decision of the FtTJ involved the making of an error on a point of law. The decision shall be set aside and in substitution, the appeal is dismissed.

Notice of Decision

> The decision of the First-tier Tribunal involved the making of an error on a point of law, the decision is set aside and remade; the appeal is dismissed.

Signed Upper Tribunal Judge Reeds

Dated: 17 October 2022