Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002851
EA/13086/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 September 2022	**On 27 November 2022**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DEISY MARISCAL-TERAN
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr P V Thoree, Solicitor from Thoree & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against the decision of the Secretary of State refusing her leave to remain under the EU Settlement Scheme (EUSS).
2. I confirm that I have received Mr Thoree's Rule 24 notice prepared for the hearing, which, for some reason, was not included in my papers. As he indicated in the hearing room it did not add very much, if anything, of significance to his oral representations and/or the skeleton argument prepared for the First-tier Tribunal, but it had been prepared for my use

and it was regrettable it was not available to me before the hearing and I am grateful to him for sending it promptly after the hearing.

3. I set out below the Secretary of State's grounds because they are, with respect, succinct and clear. The Secretary of State said:

> "The [claimant] has never made an application under the EEA regulations and therefore has never been issued any form of registration document to recognise her as a durable partner under Appendix EU. She therefore cannot meet the requirements of the definition of durable partner under Annex 1 Immigration Rules Appendix EU - Immigration Rules - Guidance - GOV.UK (www.gov.uk).
>
> It is submitted that as she cannot meet the requirement of durable partner under Appendix EU she does not come into scope for the application of the Withdrawal agreement which only applies to those who were recognised as having a prior EU status before the end of the transition period.
>
> The [claimant] does not meet any of the requirements of Article 10(2), (3) or (4) and therefore the Withdrawal Agreement has no application in this case. Had the Immigration Judge correctly applied the Immigration rules to the [claimant's] case it is submitted that the appeal would have been dismissed."

4. Consistent with these grounds, it was Ms Everett's submission that I should set aside the decision of the First-tier Tribunal for error of law and substitute a decision dismissing the appeal because that is the only lawful outcome on the available evidence.

5. It is against that introduction I consider the Decision and Reasons of the First-tier Tribunal.

6. This identifies the claimant as a female citizen of Bolivia born in 1976. It says that she applied for leave to remain under the EU Settlement Scheme and the appeal was brought under the Immigration Citizen's Rights Appeals (EU Exit) Regulations 2020.

7. The judge noted that there was no challenge to the oral evidence from the claimant or her now husband who is a citizen of Spain who had been granted indefinite leave to remain in the United Kingdom under EU Settlement Scheme. Confirmation of his leave was confirmed on 9 February 2021.

8. The claimant entered the United Kingdom as a visitor from Dublin at the end of October 2019. She met the man who became her husband shortly after she arrived. They were introduced by mutual friends. They were living in different rooms in the same house and their friendship developed in stages so that they started to live together from 14 February 2020 and by the time the judge heard the appeal had been living together for two years.

9. The judge was satisfied that they planned to marry and the wedding was delayed because of the restrictions in the wake of the COVID-19 pandemic. They did marry on 29 May 2021.

10. The judge noted that in order to meet the eligibility requirements for settled status under the EU Settlement Scheme the appellant would have

had to have to have married by the specified date, that is 31 December 2020 and she did not. The judge then noted that "consideration can be given to the [claimant's] eligibility for pre-settled status under the EU Settlement Scheme via the durable partner route".

11. The judge further noted that this required the claimant to have a valid family permit or residence card issued under the EEA Regulations and evidence that the relationship continues to subsist. No such document had been issued to the claimant. The judge said: "That is the only problem here".

12. The judge then indicated that to qualify as a durable partner the claimant would have to have completed two years' cohabitation, which she had not, but the judge was nevertheless satisfied that their marriage was "genuine and subsisting". The judge then said: "I am satisfied for the purposes of the EU Settlement Scheme that the [claimant] was the durable partner of her husband at the time of the application."

13. The judge then considered the "Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – 16 October 2019" dealing with the issue of residence documents within Article 18 and particularly parts (o) and (r) which, together, oblige the authorities in the United Kingdom to help applicants prove their eligibility and to provide access for redress. The judge found that the Secretary of State had failed to assist the claimant by refusing the application on the basis of a lack of a relevant document, which the Secretary of State, according to the judge, could have provided and that this was a "disproportionate decision".

14. I have looked again at the reasons for refusing the application given by the Secretary of State in a letter dated 26 August 2021. I do not find this letter as helpful as it might have been. It looks to me as though there are standard paragraphs which cover several situations and which have been relied upon in the fairly confident belief that they cover the requirements of this application but they clearly cover things that are not strictly relevant and this is, at best, distracting. For example, the paragraph beginning "The required evidence of family relationship …" informs the reader that a residence card issued by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man can, in some circumstances, satisfy the Regulations. This is no doubt right but the claimant has never wanted to rely on such a document. It does not help me understand the decision. The point that I think the letter is trying to make is that the claimant had not proved that he was a "family member" of a relevant EEA national before the specified date, that is 31 December 2020. The appellant was not married at that time. The letter also makes plain that the appellant had not been issued with a family permit or residence card under the EEA Regulations as a relative as a dependent relative of an EEA national and without such a card was outside the scope of definition of durable partner.

15. Unlike the First-tier Tribunal I had the benefit of a decision of this Tribunal chaired by its president Lane J in **Celik v SSHD [2022] UKUT 220 (IAC)**. This makes plain that a person in the claimant's circumstances has no

recourse to the concept of proportionality under Article 18.1(r) of the Withdrawal Agreement or the "principle of fairness" to remedy apparent deficiencies in his ability to meet the Rules. That is a decision which may not strictly bind me but is certainly one I intend to follow and, to make sure I do not add to a complicated issue by a further layer of gloss, I respectfully adopt the reasons set out in there.

16. With respect there was not much that Mr Thoree could say in the light of this decision although he did not concede the appeal.

17. In the circumstances I conclude that the First-tier Tribunal was clearly wrong to allow the appeal for the reasons given, or at all. On the asserted case the claimant cannot succeed.

Notice of Decision

18. I set aside the decision of the First-tier Tribunal because it erred in law and I substitute a decision dismissing the claimant's appeal against the decision of the Secretary of State.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 20 October 2022