Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/14025/2021
UI-2022-001910

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 1 December 2022	**On 15 February 2023**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

XHAFERR RINA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Mahmood, counsel instructed by Afzal Tahir Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Monson, promulgated on 28 February 2022.

2. Permission to appeal was granted by on Upper Tribunal Judge O'Callaghan on 21 July 2022.

Anonymity

3. No direction has been made previously, and there is no reason for one now.

Background

4. On 12 May 2021, the appellant made an application under the EU Settlement Scheme, as the spouse of a relevant EEA national. The appellant and his spouse married on 8 May 2021.

5. That application was refused on 5 August 2021 on the basis that the appellant held no relevant document as a durable partner and as such was not entitled to either settled or pre-settled status under EU 11 or EU 14.

The decision of the First-tier Tribunal

6. At the hearing before the First-tier Tribunal, the respondent's representative unsuccessfully sought an adjournment to await the publication of a Home Office policy regarding EUSS applicants who had attempted to marry before 31 December 2020 but had been unable to do so owing to the pandemic. In terms of findings, the judge did not accept that the appellant and his spouse were prevented from marrying prior to 31 December 2020 nor that the appellant was prevented from applying for a residence card as a durable partner and that he had no rights under the Withdrawal Agreement and as such could not benefit from its proportionality provisions.

The grounds of appeal

7. No discrete error of law was identified in the grounds of appeal, albeit there was a rather lengthy series of disagreements with the judge's findings. Nonetheless permission to appeal was granted on the following basis

> *'… at their core the grounds challenge the FtT's approach to the inability of the couple to marry before the United Kingdom's withdrawal from the European Union because of national restrictions imposed during the Covid-19 pandemic. This ground is arguable. 2 4.*
>
> *I am satisfied that the appellant should properly be permitted to advance all grounds relied upon but should be fully aware that focused submissions will be expected at the error of law hearing.'*

8. In the respondent's Rule 24 response, received on 29 September 2022, the appeal was opposed on all grounds for the reasons reproduced below.

> 3. *The grounds are wholly misconceived as to the appellant's ability to satisfy either Appendix EU or the Withdrawal Agreement. The judge's decision is correct in law and there is nothing that the appellant has referred to, which establishes a basis on which they can succeed as confirmed by the recent jurisprudence in the analogous case of Celik [2022] UKUT 00220.*

4. The appellant was not a family member prior to the departure of the UK from the EU. However, it was nonetheless open to the appellant to have had his status as an extended family member – namely a partner to have been facilitated by the UK prior to its departure from the EU. There can be no unfairness to the appellant if they favoured waiting to be married over and above having his residence facilitated by the SSHD which is a discretionary route. The fact that the route is no longer available to the appellant does not demonstrate a disproportionate decision in refusing the application under the EUSS framework and or Withdrawal Agreement; nor can the appellant establish any rights under the now ceased Regulations.

5. Extended family members did not enjoy an automatic right under the revoked EEA Regulations and therefore if the appellant wanted to have his status as a durable partner recognised, the requisite application should have been made before the UK's departure from the EU. There is nothing in the evidence to indicate that the appellant was in any way prevented from doing so. The grounds fail to demonstrate how the tribunal has any legal power to revive or create rights derived from what are now the defunct EEA Regulations (save where they have been preserved – which does not apply in this appeal).

The hearing

9. When this matter came before me, Mr Mahmood accepted that the decisions in *Batool and others (other family members: EU exit)[*2022] UKUT 00219 (IAC) and in *Celik (EU exit; marriage; human rights)* [2022] UKUT 00220 (IAC) effectively disposed of the arguments made in the grounds of appeal. He wished to make no further submission. Given Mr Mahmood's concession, there was no need to hear from Mr Tufan.

10. At the end of the hearing, I announced that there was no material error of law contained in the decision of the First-tier Tribunal and that the decision was, therefore, upheld.

Decision on error of law

11. The First-tier Tribunal judge made no material misdirection in law in concluding that the appellant failed to come came within the terms of the Withdrawal Agreement given the conclusions of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC), the headnote of which includes the following:

> *(1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P's entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.*
>
> *(2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ("the 2020 Regulations"). That includes the situation where it is likely that P would*

have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.

(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State.

12. The appellant does not claim to have been issued with a relevant document at any stage.

13. In addition, there was no challenge to the judge's findings that the appellant was not prevented from marrying prior to the relevant date of 31 December 2020 or from applying for a residence card as a durable partner before that date.

14. In the circumstances, the judge did not err in finding that the appellant was not a person whose entry and residence was being facilitated by the host state and therefore he did not come within the scope of the Withdrawal Agreement.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal is upheld.

No anonymity direction is made.

Signed: T Kamara Date: 2 December 2022

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email