IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006168

First-tier Tribunal No: EA/03838/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19th of December 2023

Before

UPPER TRIBUNAL JUDGE LINDSLEY
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MZINGAYE NGWENYA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms A. Everett, Senior Home Office Presenting Officer
For the Respondent: None (the appellant attended the hearing)

Heard at Field House on 12 December 2023

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Zimbabwe born on 19th October 1995. He applied to remain in the UK as a spouse of an EEA citizen under Appendix EU of the Immigration Rules. This application was refused on 10th March 2022. His appeal against the decision was allowed by First-tier Tribunal Judge Iqbal in a determination promulgated on the 3rd August 2022.

2. Permission to appeal was granted to the Secretary of State by Judge of the First-tier Tribunal LJ Murray on 15th November 2022 on the basis that it was arguable that the First-tier judge had erred in law in allowing the

appeal with reference to the Withdrawal Agreement when Celik (EU exit; marriage; human rights) [2022] UKUT 220 found that if a person in durable relationship had no substantive rights under the Withdrawal Agreement by virtue of their residence having been facilitated by 11pm on 31st December 2020 then it was not possible for that person to invoke the concept of proportionality under Article 18.1(r) of the Withdrawal Agreement or the principle of fairness to succeed in an appeal. This included those who were unable to marry their EU partner prior to the specified date due to Covid-19 pandemic restrictions on wedding ceremonies. As a caveat however the grant of permission puts the Secretary of State to proof as to whether the application made by the appellant on 29th December 2020 was made under the EEA Regulations 2016 or under the EUSS.

3. The matter came before us to determine whether the First-tier Tribunal had erred in law, and if so to determine whether any such error is material and thus whether the decision should be set aside and remade.

4. For ease of reference with the decision of the First-tier Tribunal, we refer to the parties as they were at that hearing.

Submissions – Error of Law

5. At the error of law hearing, Ms Everett argued, in short summary, as follows.

6. Firstly, she disputes the suggestion in the grant of permission to appeal that there is a burden upon the respondent to prove what application was made by the appellant. She added that the appellant alone has access to the online form and additionally, there was no duty upon the respondent to treat an application under the EU SS as if it was an application under the 2016 EEA Regulations, applying Batool & Ors (other family members: EU exit) [2022] UKUT 219 (IAC), ("Batool") at paragraph 71.

7. Secondly, it is argued that there is a material misdirection in law by the First-tier Tribunal in applying the provisions of the Withdrawal Agreement. It is argued that the appellant did not come within the personal scope of Article 10 of the Withdrawal Agreement because he had not had his residence facilitated prior to 31st December 2020 or applied for his residence to be facilitated. The appellant had only made an application under Appendix EU of the Immigration Rules and had made no application for facilitation of his residence under the Immigration (EEA) Regulations 2016 prior to the specified date. As the appellant did not come within the personal scope of the Withdrawal Agreement he could not benefit from Article 18(1)(r), the provision requiring proportionality. It was also not permissible to allow the appeal on the basis that the decision breached the rights of the sponsor, as the ground of appeal under the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020 the ground of appeal is that it breaches any right which the appellant has by virtue of the Withdrawal Agreement.

8. There is no Rule 24 notice. In short summary the appellant submits that he was not sure what application he in fact made and he confirmed that he did not previously have a document issued under the 2016 EEA Regulations.

Conclusions – Error of Law

9. It is the unchallenged finding of the First-tier Tribunal at paragraph 19 of the decision that the appellant and his partner were in a durable relationship at the relevant date given the evidence which included the birth of their child.

10. At paragraph 20 of the decision the First-tier Tribunal finds however that the appellant cannot meet the terms of the Immigration Rules at Appendix EU to be a durable partner as defined under Annex 1 as he did not have a relevant document (EU residence card) at the specified date, namely 31st December 2020.

11. We find that the First-tier Tribunal erred in law however at paragraph 22 of the decision in concluding that the appellant did not have to be within the personal scope of Article 10 of the Withdrawal Agreement to benefit from the provisions regarding proportionality at Article 18(1)(r), as this is contrary to the finding of the Upper Tribunal in Celik in the first point in the head note, namely that: "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", which has since been upheld by the Court of Appeal in Celik v SSHD [2023] EWCA Civ 921.

12. We also record that the certificate of application document in the respondent's bundle confirms that the appellant did in fact make an application under the EU SS not the 2016 EEA Regulations.

13. For completeness, we also find that the Upper Tribunal's decision in Batool makes plain that the respondent was not obliged to treat an EU SS application as one made under the 2016 EEA Regulations.

Decision:

1. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
2. We set aside the decision in its entirety.
3. We re-make the decision in the appeal by dismissing it.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

13th December 2023