



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-
004673
First-tier Tribunal No:
EA/02690/2022

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 13 January 2023

Decision & Reasons Promulgated
On the 14 February 2023

Before

Upper Tribunal Judge RIMINGTON
Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr SYED ALI ABBAS
(NO ANONYMITY DIRECTION)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr S Bellara, Counsel
(Direct Access)

DECISION AND REASONS

1. Permission to appeal was granted to Secretary of State by First-tier Tribunal Judge Fisher on 23 September 2022 against the decision to allow the Respondent's appeal made by First-tier Tribunal Judge Shore in a decision and reasons promulgated on 1 August 2022. The Respondent had applied for pre-settled status under Appendix EU claiming to be the durable partner of a relevant EEA citizen. He accepted that he did not meet either of the two routes to pre-settlement status in Regulation 3 of The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the Regulations 2020"): being married to an EEA citizen before 31 December 2020 or holding a valid family permit or residence card issued under the EEA Regulations 2016. The judge found that he was a durable partner as there was sufficient evidence to substantiate the relationship although it had not yet lasted two years. The judge referred to Janko Rottman Case C-135/08 [2010] ECR I-1449 and had gone on to allow the appeal on proportionality grounds under the Withdrawal Agreement.
2. The Respondent is a national of Pakistan, born on 15 December 1986. He entered the United Kingdom as a Tier 4 (General) Student on 26 May 2011 and remained in the United Kingdom as an overstayer after his leave to remain had expired on 25 February 2014. He applied for pre-settled status under the EUSS on the basis that he was the durable partner of Ms Ricso-Andrea Sebok ("Ms Sebok"), born on 1 July 1991, a Romanian national who was granted pre-settled status on 24 December 2020. The Respondent and Ms Sebok claimed that they had been durable partners since September 2020. They married in the United Kingdom on 31 July 2021. The Respondent's application was made on 19 June 2021 and was refused on 27 February 2022.
3. Permission to appeal was granted because it was considered arguable that the First-tier Tribunal Judge had erred by failing to consider the scope of the Withdrawal Agreement and whether the Respondent was able to benefit from it in the absence of the relevant document. By implication there was arguably no proper consideration of whether the Respondent's residence in the United Kingdom was being facilitated by the United Kingdom under its national legislation, or whether an application had been made before the relevant date.
4. Mr Melvin for the Appellant relied on the grounds of appeal submitted, the grant of permission to appeal and his skeleton argument. Mr Melvin sought permission to amend the grounds of appeal to refer to Celik (EU exit; marriage; human rights) [2022] UKUT 220 (IAC) and Batool and others (other family members: EU exit) [2022] UKUT 219 (IAC). Given that these

were two directly relevant and binding decisions, such permission was probably not needed. There was no objection.

5. Mr Melvin submitted the Respondent did not hold the required relevant document and there was no facilitation of his presence. The Withdrawal Agreement had no application. There was a misunderstanding by the judge and the reasoning was defective. Any human rights issue would have been a new matter, for which consent would have been required. Such consent had not been given and would not be given, as the appropriate application had to be made, together with the appropriate fee. The decision should be set aside, remade and the appeal dismissed, as it had to be.
6. Mr Bellara for the Respondent submitted that the judge's reference to Rottman (above) was misconceived. The legal landscape had changed since the appeal was heard. Many had struggled with the new regulations and a number approaches had been taken. By the time the appeal was heard, the Respondent and his durable partner had married, and the appeal was decided on the facts as they existed at the date of the hearing. The law had been clarified since the appeal was heard and counsel was content to leave the decision to the Upper Tribunal in the light of those authorities. It was nevertheless important that there had been no challenge to the judge's finding that there was a durable partnership.
7. Mr Melvin wished to add nothing by way of reply. He had already indicated that if the panel found a material error of law, the decision should be remade and dismissed.
8. The Tribunal's error of law decision was reserved and now follows. The Tribunal noted that the Respondent's EUSS application was made after 31 December 2020 and just one day prior to 30 June 2021, i.e., after the transitional period but within the grace period. But as the Respondent was within the United Kingdom without any form of leave to enter or leave to remain, that did not help him. Because the Respondent's presence in the United Kingdom had not been facilitated by the Appellant under any relevant EU provision, the Respondent had no separate rights accruing under the Withdrawal Agreement, which had no application to him. Proportionality had no scope. The relevance of the judge's reference to proportionality in Rottman was not sufficiently explained.
9. There is a fundamental difference in EU/EEA law between family members, a category of persons specifically defined and limited in number, whose rights are automatic, and extended family members/other family members. Extended family members are potentially unlimited in number, and have always required

recognition following a successful application for admission to the host state, i.e., facilitation of entry.

10. The Tribunal accordingly ruled that the First-tier Tribunal Judge had misdirected himself. The judge did not have the benefit of the guidance in Celik (above), which was reported on 10 August 2022, after Judge Shore had promulgated his decision (although promulgated on 19 July 2022). As the President of the Upper Tribunal recognised in Celik which was reported to provide guidance to the judiciary, this is not a straightforward area of law. The point on which the Respondent had succeeded was not available to him. There was no disproportionality within the terms of Article 18 of the Withdrawal Agreement. The decision was accordingly set aside.
11. As no further findings of fact were required, the decision was remade. The situation was clear in the light of Celik, of which the headnote reads:
 - (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) *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.*
12. It follows that the Respondent, who could not meet Appendix EU of the Immigration Rules, had no rights under the Withdrawal Agreement. His appeal must be dismissed.

DECISION

The Secretary of State's appeal to the Upper Tribunal is allowed.

There were material errors of law in the First-tier Tribunal's decision and reasons, which is accordingly set aside.

Following a summary rehearing, the original decision was remade.

The original appeal is dismissed. There can be no fee award.

Signed R J Manuell

Dated 16 January 2023

Deputy Upper Tribunal Judge Manuell