



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002763
First-tier Tribunal No:
EA/11881/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 02 May 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

FATMIR BRAHAJ
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

At Phoenix House (Bradford) on 24 April 2024

DECISION AND REASONS

1. In a determination promulgated on 30 March 2022 First-tier Tribunal Judge Groom ('the Judge') allowed the appeal of the above appellant, a citizen of Albania born on 28 October 1999, against the refusal of his application made under the EU Settlement Scheme.
2. The Judge accepted the Appellant and his partner, the EU national, met on 4 January 2020 and that he proposed marriage to her on 10 October 2020. The Judge notes at [15] the Appellant and his partner married on 19 May 2021.
3. The Judge accepts that the marriage took place after the specified date of 11 PM 31 December 2020 and after the deadline for EUSS applications of 30 June 2021 ('the grace period').
4. The Judge at [20] found the Appellant became a family member of an EEA national after the specified date as a direct result of the impact of the COVID 19 pandemic which was beyond his control and that the decision refusing the application was not proportionate to the individual circumstances of the Appellant taking into account the impact of such a decision has on his spouse.
5. The Secretary of State sought permission to appeal which was granted by another judge of the First-tier Tribunal on the basis it was arguable the Judge had materially erred in the interpretation of Article 10 of the Withdrawal Agreement in the context of the Appellant's circumstances at the 'specified date' and in his approach to the 'grace period'.

6. The appeal was listed for an Error of Law hearing on 12 May 2023 but subsequently stayed following a grant of permission to appeal by the Court of Appeal against the decision of the Upper Tribunal in *Celik v Secretary of State the Home Department* (EU exit; marriage; human rights) [2022] UKUT 00220. That decision was subsequently upheld by the Court of Appeal in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921.
7. On 22 February 2024 directions were sent to the parties in the following terms:
 1. In a decision promulgated on 30 March 2022 the First-tier Tribunal allowed the above respondents appeal against the refusal of his application for settled or pre-settled status under Appendix EU of the Immigration Rules.
 2. The above respondent is a citizen of Albania born on 28 October 1999 who claimed he is the spouse of a relevant EEA citizen whom he married on 19 May 2021. The application was refused as the above respondent had not provided sufficient evidence to confirm he was a family member of a relevant EEA citizen prior to the specified date as defined in Appendix 1 of Appendix EU, namely 23:00 hours on 31 December 2020.
 3. The Judge notes at [8] that it was accepted the above respondent could not meet the requirements of Appendix EU and that the argument was that the refusal was not proportionate by specific reference to Article 18 (r) of the Withdrawal Agreement.
 4. At [10] the First-tier Tribunal Judge ('the Judge') finds the relationship between the above respondent and the EA national is genuine and subsisting, durable, and that the marriage is valid. The Judge accepts the marriage ceremony took place prior to the EUSS application deadline of 30 June 2021 meaning the above respondent became a family member of an EEA national after the specified date as a direct result of the impact of the Covid 19 pandemic, leading to finding the refusal was not proportionate in the individual circumstances of the above respondent at [21].
 5. Another judge of the First-tier Tribunal granted permission to appeal to the Secretary of State on 9 May 2022, on the basis it is arguable that the Judge materially erred in the interpretation of Article 10 of the Withdrawal Agreement in the context of the above respondent's circumstances at the 'specified date' and in his approach to the 'grace period'.
 6. On 5 May 2023 a letter was sent to the parties advising them that the appeal had been stayed pending the decision of the Court of Appeal in *Celik v Secretary of State for the Home Department*, and providing a direction that the appellant shall confirm in writing whether they intend to continue with the appeal, and if so, to set out the grounds relied upon in light of the decision of the Court Appeal by a specified time.
 7. The judgement of the Court of Appeal was handed down on the 31 July 2023 with neutral citation *Celik v Secretary of State for the Home Department* [2023] EWAC Civ 921.
 8. On 24 August 2023 the Secretary of State filed his skeleton argument maintaining the challenge and referring to the Court of Appeal's rejection of the argument they are obliged to read the definition of a durable partner in Annex 1 of Appendix EU down as if no application was made or residence permit granted by the end of the relevant period, and that, accordingly, the above respondent's status was not facilitated under Article 3(2) by the end of the transition period, meaning he could not meet Article 10(2) of the Withdrawal Agreement and benefit from Article 18(d), contrary to what was said by the Judge.
 9. There has been no further communication from the above respondent or his representatives.
 10. The preliminary view I have formed of the matter is that the Upper Tribunal is able to dispose of the merits of the appeal without a further hearing, on the papers, on the basis the finding of the Court of Appeal clearly establishes there is no arguable merit in the above respondent's challenge to the refusal of his application.
 11. The parties are granted a period of 14 days from the date of sending of this decision to file any response to this proposed outcome.

12. The matter shall be referred to me on the first available date after 21 days from the date of sending of this decision to enable the matter to be determined as set out above or any further directions to be given, if required.
 13. If the above respondent does not agree with the proposed outcome he must provide detailed reasons, supported by relevant legal arguments and text, for why he believes, despite the decision of the Court of Appeal, he is able to succeed.
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8. There has been no response from the above-named appellant, the respondent to the Secretary of State's error of law challenge, in any form.
 9. I am satisfied the direction was properly served giving the parties the opportunity to make any observations they wish the Tribunal to consider.
 10. I find clear material legal error in the decision of the First-tier Tribunal Judge for the reasons set out in the application for permission to appeal and grant of permission to appeal. I set the decision aside.
 11. The above appellant must understand this is not a challenge to the question of whether he is in a marriage or relationship with the EU national but a case involving the question of whether he had obtained the necessary evidence to enable him to satisfy the requirements of the relevant legal provisions. On the evidence he could not and cannot.
 12. On the basis of the law as it is now clearly understood and taking into account the content of the Secretary of State skeleton argument 24 August 2023, I substitute a decision to dismiss the appeal.
 13. If the Appellant has not taken steps to regularise his position he is advised to do so, such as an application for leave to remain on the basis of his family life pursuant to Article 8 ECHR or under the Immigration Rules. These are matters on which he may find it beneficial to seek legal advice.

Notice of Decision

14. The First-tier Tribunal Judge materially erred in law. I set that decision aside.
15. I substitute a decision to dismiss the appeal.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 April 2024