



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003062
FtT No: EA/14437/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 26th of March 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ELION KADIU
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Presenting Officer

For the Respondent: In Person

Heard at Field House on 15 March 2024

DECISION AND REASONS

Introduction

1. Mr Kadiu is referred to as the “claimant” and the Secretary of State for the Home Department as the “Secretary of State”.
2. The Secretary of State appeals a decision of the First-tier Tribunal (Judge of the First-tier Tribunal Latta) sent to the parties on 28 April 2022 allowing the claimant’s appeal in respect of an adverse EU Settlement Scheme (‘EUSS’) decision.
3. This case was stayed pending the judgment of the Court of Appeal in *Celik v. Secretary of State for the Home Department* [2023] EWCA Civ 921, [2023] Imm. A.R. 1599. After the Court of Appeal's judgment being delivered on 31 July 2023, Upper Tribunal Judge Owens issued directions that were served on the parties on 16 November 2023 which, *inter alia*, required the claimant to consider his position in light of the Court of Appeal’s judgment. The claimant was informed that if no response was received from him to the directions and no consent order was filed the appeal would be listed for disposal.
4. The Secretary of State filed and served a response to directions, accompanied by a draft consent order, on 22 November 2023.
5. The claimant’s former legal representatives, Sentinel Solicitors, wrote to the Upper Tribunal on 13 February 2024 confirming that they were no longer instructed.
6. No response was received by or on behalf of the claimant to the directions. This appeal was therefore listed for disposal by a Notice of Hearing dated 23 February 2024.
7. The claimant attended the hearing with his wife Mrs. Ana Maria Mihalache.

Brief Facts

8. The claimant is a national of Albania and aged 35. He met his wife, a Romanian national, in January 2019. They began dating soon afterwards and in September 2019 they moved in with each other. They initially resided in a house they shared with friends before moving into a flat of

their own in March 2000. During lockdown they decided to marry. They initially contacted Barnet Registry Office in May 2020 to book an appointment and give notice of marriage. In the meantime, the claimant's wife took steps to divorce her first husband, which was finalised on 22 February 2021. The couple married on 24 June 2021.

9. The claimant applied for leave under the EUSS as a spouse on 25 June 2021. The Secretary of State considered the application under Appendix EU to the Immigration Rules and refused the application by a decision dated 30 September 2021. The claimant exercised his right of appeal.

Decision of the First-tier Tribunal

10. The appeal was heard by the Judge sitting at Taylor House on 28 April 2022. The claimant was represented by Counsel, instructed by his former legal representatives. No Presenting Officer attended on behalf of the Secretary of State.

11. The Judge found, *inter alia*:

“37. Given the witness evidence, which is also corroborated by documentary evidence in AB1, then I am willing to find that it is more likely than not that the Appellant and Sponsor have been in a durable relationship since at least September 2019.

38. I therefore find that the second branch of the Respondent's requirement has been met, that being that the Appellant has established that the durable partnership was formed before the specified date.

39. That leaves the first branch, and the lack of a relevant document as the durable partner of the relevant EEA citizen.

...

41. In my opinion, the failure of the Respondent to assist the Appellant, and to refuse the application on the basis of a lack of a relevant document which they have within their power to provide, results in a disproportionate decision which goes against the terms of Article 18 (r).

42. I therefore find that the Appellant meets the relevant eligibility requirements for presettled status under the EU Settlement Scheme. In my opinion, any refusal on the basis of a lack of a

relevant document would be disproportionate, and a breach of the Appellant's rights under the Withdrawal Agreement."

12. The Judge considered the appeal without the benefit of several relevant decisions and judgments which were issued after he promulgated his decision: the Upper Tribunal decisions in *Batool (Family Members: EU Exit)* [2022] UKUT 219 (IAC), [2022] Imm AR 1382 (19 July 2022) and *Celik (EU Exit: Marriage: Human Rights)* [2022] UKUT 220 (IAC), [2022] Imm AR 1438 (19 July 2022), as well as the Court of Appeal judgments in *Celik* (31 July 2023) and *Siddiqa v. Entry Clearance Officer* [2024] EWCA Civ 248 (14 March 2024).

Grounds of Appeal

13. By grounds of appeal dated 9 May 2022 the Secretary of State contended that the Judge materially erred in law by failing to properly consider the provisions of Appendix EU of the Immigration Rules. The grounds detail, *inter alia*:

"b) The Appellant's application for status under the EU Settlement Scheme was as the family member of a relevant EEA national. As the Appellant and his spouse were married after the 'specified date' (31 December 2020), the application was considered under the durable partner route. Appendix EU requires a 'durable partner' to hold a 'relevant document' as evidence that residence had been facilitated in accordance with national legislation. This requirement transposed the requirements of Article 3.2(b) of Directive 2004/38/EC. No such document was held, as no application for facilitation as a 'durable partner' had ever been made by the Appellant prior to the 'specified date'. Therefore, the Appellant was not lawfully resident in accordance with EU law as of the 'specified date'.

c) It is submitted that the question of whether and how the relationship was in fact "durable" at any relevant date, as is found by the FTTJ at [38] of the determination, is of no consequence. The requirements of the Immigration rules cannot be met by a durable partner whose residence had not been facilitated in accordance with national legislation. This is reflected in Article 10(2) of the Withdrawal Agreement permitting the continued residence of a former documented Extended Family Member, with an additional transitional provision in Article 10(3) for those who had applied for such facilitation before 31 December 2020. This Appellant had not made any such application and therefore could not satisfy the requirements of Appendix EU."

14. The Secretary of State further contended that the Judge materially erred in law by allowing the appeal on the ground that the claimant's rights under the Withdrawal Agreement were breached. The claimant had not had his residence facilitated by being issued with a residence card under the Immigration (European Economic Area) Regulations 2016 and so does not come within the scope of the Withdrawal Agreement.
15. Judge of the First-tier Tribunal Povey granted permission to appeal by a decision dated 19 May 2022.

Law

16. Whilst the United Kingdom was a member of the European Union, it was bound to give effect to European Union law including the law governing freedom of movement for EEA citizens and their family members. The United Kingdom gave effect to Union law by means of the European Communities Act 1972.
17. The United Kingdom left the European Union on 31 January 2020 and repealed the 1972 Act with effect from that date.
18. Article 126 of the Withdrawal Agreement provided a transition or implementation period ending on 31 December 2020. Article 127 provided that European Union law was applicable to, and in, the United Kingdom during the transition period. That was given effect in domestic law by the provisions of section 1A of the European Union (Withdrawal) Act 2018. Consequently, the provisions of European Union law governing free movement continued to have effect within the United Kingdom until 11 pm (2300 GMT) on 31 December 2020.
19. The EUSS is an immigration regime of the United Kingdom introduced by the respondent in 2019, by means of Appendix EU and Appendix EU (Family Permit) of the Rules. Appendix EU enables EU, EEA and Swiss citizens, and their family members, resident in the United Kingdom by 31 December 2020, to obtain the immigration status required to work and live in this country.
20. In respect of the claimant's application the definitions of "durable partner" and "family member of a relevant EEA citizen" are provided in Annex 1 to Appendix EU.

Decision

21. The claimant and wife were not married at 11pm on 31 December 2020. The Court of Appeal confirmed in *Celik* that on the proper interpretation of article 10 of the Withdrawal Agreement a non-EU national who married an EU national after the end of the post-EU exit transition period (11pm on 31 December 2020) does not have any right to reside in the United Kingdom. The fact that their marriage had been delayed due to the COVID-19 pandemic does not alter the interpretation of the Withdrawal Agreement.
22. For the reasons given by the Court of Appeal in *Celik*, the First-tier Tribunal erred in law in allowing the claimant's appeal under Appendix EU as the claimant was not in possession of a relevant document as the durable partner of the relevant EEA citizen and such possession is a requirement of Appendix EU. Additionally, the First-tier Tribunal erred in law in allowing the claimant's appeal under the Withdrawal Agreement. The claimant was not within the personal scope of the Withdrawal Agreement, and he could not therefore benefit from any of the provisions within it. As such, the First-tier Tribunal's decision must be set aside and remade to dismiss the appeal on all grounds. The claimant cannot succeed either under the EUSS itself or under the Withdrawal Agreement.
23. I explained relevant law to the claimant at the hearing and provided him with a copy of the Court of Appeal judgment in *Celik*.
24. I confirmed to the claimant that I would record the finding of the First-tier Tribunal that the couple have been in a genuine relationship since at least September 2019 and that this finding of fact would be preserved by my decision.

Notice of Decision

25. The decision of the First-tier Tribunal sent to the parties on 28 April 2022 is subject to material error of law. The decision of the First-tier Tribunal is set aside in its entirety save for the finding as to genuine relationship at [37].
26. The decision is re-made. The claimant's appeal is dismissed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 March 2024