IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2022-004607

First-Tier Tribunal Nos: EA/11588/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24th May 2024

Before

UPPER TRIBUNAL JUDGE L SMITH
DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

UKAJ RADOMIR

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Radomir did not attend and was not represented
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Heard at Field House on Tuesday 14 May 2024

DECISION AND REASONS

1. The Appellant appeals against the decision of First-Tier Tribunal Judge G Richardson promulgated on 7 February 2022 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 1 July 2021 refusing him status under the EU Settlement Scheme ("EUSS") as the family member (spouse) of an EEA national.

2. The Respondent refused the Appellant's application on the basis that he had not married until after 31 December 2020. He had not applied for facilitation of his residence as a durable partner prior to 31 December 2020. Accordingly, the

Appellant was not recognised as a family member or extended family member prior to the date of the UK's departure from the EU and could not benefit as such under either the rules relating to EUSS (Appendix EU) or the withdrawal agreement between the UK and the EU on the UK's departure from the EU ("the Withdrawal Agreement").

3. The Judge rejected the Appellant's argument that he was entitled to succeed based on a grace period which extended time to 30 June 2021 for residence applications by EEA citizens and their family members lawfully resident as at 31 December 2020. The Judge pointed out that this could only apply where an individual had a right of residence as at 31 December 2020. He rejected an argument that time should be extended as the Appellant could not marry his now spouse prior to 31 December 2020 due to the pandemic. The Judge did not accept that the Appellant was in a durable relationship with his now spouse as at 31 December 2020 or at the date of the hearing.

4. The Appellant also put forward a human rights ground of appeal (under Article 8 ECHR). The Judge did not accept that the Appellant was entitled to rely on that ground of appeal having regard to secondary legislation governing the right of appeal. He found that the Appellant had never made a human rights claim and there was no refusal of one.

5. The Appellant appealed the Decision on three grounds as follows:

Ground one: the Judge erred in finding that the Appellant could not benefit from the grace period.
Ground two: the Judge erred in finding that there was insufficient evidence of a durable relationship.
Ground three: the Judge erred in deciding that the Appellant could not raise a human rights ground of appeal.

6. Permission to appeal was granted by First-Tier Tribunal Judge Dainty on 20 April 2024 for the following reasons:

> "1. The application was made in time.
> 2. The grounds assert that the judge was wrong in law to find that there was no evidence of a durable relationship and that the relationship had not been doubted in the decision. They further argue that the judge was wrong not to consider human rights and that Amirteymour v SSHD [2017] EWCA Civ 353 can now be distinguished as the present European applications are now under the rules and not the 2016 Regulations. It was further argued that the Article 8 point was not a 'new matter'.
> 3. It appears to me that there is an arguable ground of appeal based on whether human rights matters are now capable of being considered where appeals are made against decisions under Appendix EU. Whilst it is right to say that the grounds of appeal are stated in Regulation 8 of The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, Regulation 8(4) states that it is subject to Regulation 9 and Regulation 9 makes reference to grounds of appeal within s84 as well as within

> Regulation 8. Section 84 refers to breaches of s6 of the Human Rights Act. There was therefore an arguable error of law in finding that Article 8 could not be considered."

7. The Respondent filed a very full Rule 24 reply dated 8 June 2022, the substance of which we deal with below.

8. The matter was due to come before this Tribunal at an error of law hearing on 7 February 2023 but was adjourned and stayed behind the case of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) ("Celik"). By then, the Tribunal's decision was the subject of an appeal to the Court of Appeal. The Tribunal therefore granted a stay and did not determine the error of law issue.

9. The Tribunal's guidance in Celik was subsequently upheld by the Court of Appeal ([2023] EWCA Civ 921). Following the Court of Appeal's judgment, on 13 November 2023, directions were issued by Upper Tribunal Judge Macleman, inviting the parties to agree a consent order to dispose of the appeal. If that were not agreed, the appeal would be listed for hearing.

10. Under cover of an email dated 22 November 2023, the Respondent sent a draft consent order to the Appellant's representative. So far as we can see, that received no response.

11. The appeal was therefore listed before us for hearing on Tuesday 14 May 2024. By an email dated 9 May 2024, the Appellant's solicitors informed the Tribunal that they were without instructions and had therefore ceased to act.

12. There was no appearance before us by or on behalf of the Appellant. We were satisfied that the Tribunal had given notice of the hearing by post to the Appellant's last known address on 19 April 2024. It was also evident from the email from the Appellant's solicitors that they had sought instructions but that the Appellant had lost contact.

13. There was no application by the Appellant for adjournment of the hearing nor any explanation for his absence. We therefore decided that it was in the interests of justice to proceed with the appeal in the Appellant's absence.

14. We deal first with the Appellant's first two grounds. We are satisfied that the Appellant's first ground is hopeless in light of the decision and Court of Appeal judgment in Celik. The Appellant had not made any application under the Immigration (European Economic Area) Regulations 2016 prior to 31 December 2020 for facilitation of his residence as a durable partner. The grace period extended time for an application by an EEA citizen or that citizen's family member. As the Judge found at [9] of the Decision, for the grace period to apply, "would require the applicant to have a right of residence by the law by the 31st of December 2020". The Appellant had no such right having failed to apply for prior facilitation of his right of residence as a durable partner. Put another way, the Appellant was not recognised as a family member of an EEA citizen on 31 December 2020.

15. Further, and in any event, the Judge did not accept that the Appellant was in a durable relationship as at 31 December 2020. The Judge recognised that the Appellant had since married his EEA partner but found at [14] of the Decision that "there is very little other evidence which goes to support that the appellant and sponsor live together or are in a genuine relationship". That finding was based on reasons given at [12] to [14] of the Decision which are adequate to explain why the Appellant lost on this point. The Appellant's second ground is therefore simply a disagreement with a finding which was open to the Judge for the reasons given.

16. We observe that the Appellant's third ground could make no difference to the outcome given the finding that he is not and was not in a durable relationship with his EEA partner. On the facts, he could not establish an Article 8 right based on that finding.

17. However, for the sake of completeness, we deal with the reason why the third ground also fails as a matter of law.

18. The Appellant's right of appeal against a decision under the EUSS is governed by The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations"). Broadly, paragraph 8 of the 2020 Regulations provides a right of appeal on the grounds that the Respondent's decision is not in accordance with domestic scheme rules (here Appendix EU) or the Withdrawal Agreement.

19. However, paragraph 9 of the 2020 Regulations extends those grounds to other matters as follows:

> **"Matters to be considered by the relevant authority**
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> **9.**—(1) If an appellant makes a section 120 statement, the relevant authority must consider any matter raised in that statement which constitutes a specified ground of appeal against the decision appealed against. For the purposes of this paragraph, a 'specified ground of appeal' is a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act.
> (2) In this regulation, 'section 120 statement' means a statement made under section 120 of the 2002 Act and includes any statement made under that section, as applied by Schedule 1 or 2 to these Regulations.
> (3) For the purposes of this regulation, it does not matter whether a section 120 statement is made before or after the appeal under these Regulations is commenced.
> (4) The relevant authority may also consider any matter which it thinks relevant to the substance of the decision appealed against, including a matter arising after the date of the decision.
> (5) But the relevant authority must not consider a new matter without the consent of the Secretary of State.
> (6) A matter is a 'new matter' if—
> (a) it constitutes a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act, and
> (b) the Secretary of State has not previously considered the matter in the context of—
> (i) the decision appealed against under these Regulations, or

(ii) a section 120 statement made by the appellant."

20. As will be apparent from that paragraph, there are two restrictions on the introduction of an Article 8 ground of appeal. First, the claim must be made to the Respondent in response to a section 120 notice. No such claim had been made in this case. Second, if that claim was not made, the ground could only be introduced and considered by the Tribunal if the Respondent consented to its introduction as a "new matter". There is nothing to indicate that such consent was sought or given. As such, the Tribunal Judge was correct to say as he did at [17] and [18] of the Decision which reads as follows:

> "17. The appellant does not suggest that the Regulations provide for an appeal under Article 8 ECHR, rather it is suggested that as the decision is a refusal of leave to remain, and it makes him liable for removal and therefore engages Article 8.
> 18. I do not accept the appellant's submission for the following reasons:
> (a) When asked, Mr Ade Ruano could provide me no statutory basis for saying that this appeal should be considered on ECHR grounds.
> (b) The appellant has not made a human rights claim, he has made an application based upon what he believes are his rights as a spouse or durable partner under the EU Settlement Scheme. There has been no consideration of any human rights aspect of his application and therefore no refusal of a human rights claim, which might attract a right of appeal.
> (c) The grounds of appeal on which an appeal against a decision, as in this case, are set out in the Regulation 8,k see above, they do not provide for an appeal on the basis of a breach of Article 8 ECHR and therefore an appeal on this ground cannot be considered."

21. Although we accept that the Judge did not there refer to paragraph 9 of the 2020 Regulations, that cannot affect the outcome because, as we have noted, the Appellant had not made a human rights claim to the Respondent (as the Judge noted) and even if he had, as a new matter, it would have required the consent of the Respondent before the Tribunal could consider it.

22. The judgment in Amirteymour v Secretary of State for the Home Department [2017] EWCA Civ 353 referred to in the grounds of appeal is we accept distinguishable from this case as the scheme has changed but the Judge did not rely on that judgment in reaching his conclusions in any event.

23. The Tribunal is a creature of statute and is limited in the matters it can consider by primary and secondary legislation. The 2020 Regulations place certain restrictions on the grounds of appeal which can be raised. Paragraph 9 of the 2020 Regulations is not met in this case. Accordingly, it was not open to the Judge to consider a human rights ground of appeal and he was right so to find.

24. In those circumstances, we are satisfied that the grounds do not disclose an error of law in the Decision. We therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

NOTICE OF DECISION

The Decision of Judge G Richardson promulgated on 7 February 2022 does not involve the making of an error of law. We therefore uphold that Decision. The Appellant's (Mr Radomir's) appeal therefore remains dismissed.

L K Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber 15 May 2024