Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI–2022–001730
On appeal from EA/13963/2021

THE IMMIGRATION ACTS

Heard at Field House
On the 5 September 2022

Decision & Reasons Promulgated
On the 31 October 2022

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

LIAQAT KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Ahmad of counsel
For the Respondent: Ms Ahmed, a Home Office Presenting Officer

DECISION AND REASONS

Introduction and background

1. The appellant is a citizen of Pakistan who was born on 9 July 1977.

2. The present appeal is from the decision of FTT Judge Randall (the FTT Judge) who, having considered the papers on 12th January 2022, found that the appellant was unable to meet the requirements of Appendix EU of the Immigration Rules.

3. The appellant, who first came to the UK on 28 November 2015 having travelled here unlawfully, states that he started to live with a Romanian partner called Maricica Toader, the sponsor, who was born on 11 April 1966.

4. The current application was made on 27th of July 2020 and determined on 10th February 2021. In the meantime the UK-EU transition period came to an end on 31 December 2020 at 11pm (exit day).

The Upper Tribunal proceedings

5. On 18 February 2022, the appellant appealed the FTT's decision. The grounds state that the appellant was in a durable relationship with Ms Toader which was akin to marriage and that they had lived together for two years. The appellant claimed he was entitled to rights under Appendix EU which contains details of the EU Settlement Scheme (EUSS). His relationship had existed prior to exit day on 31 December 2020. The appellant claimed, given the FTT had been satisfied as to this existence of the relationship prior to December 2020, this ought to result in the appellant being found to satisfy the requirements of Appendix EU.

6. The appellant was granted permission to appeal by FTT Judge Landes. Judge Landes considered that the appellant did not qualify under "EUSS", because of the lack of a "relevant document". Nevertheless, he could "potentially" have qualified for a residence card as a durable partner of an EEA national, if his application had been made under the EEA Regulations. The respondent had not decided the application until 10 February 2021. The appellant was unrepresented. It was arguable that the respondent's decision breached the UK-EU Withdrawal Agreement under which the UK left the EU. The appellant was arguably a person falling within article 3 (2) (b) of the 2004 Directive (2004/38/EC/) (the 2004 Directive) which requires a person, whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive, to retain his right of residence in that State thereafter. Judge Landes thought it was at least arguable that if he had applied for recognition of his residence before the end of the transition period his application would have been successful. Alternatively, the respondent was potentially in breach of article 18 (o) of the Withdrawal Agreement in that she had failed to "help the appellant" prove his eligibility. If the appellant needed to make a further application, other than the one he had made, which may have been successful, the respondent should have assisted him to do so. Therefore, all the grounds were arguable.

The hearing

7. At the hearing Ms Ahmad said that her client was pursuing the appeal. Her main point was that article 18 (o) of the Withdrawal Agreement provided that:

> "(o) the competent authorities of the host State shall help the applicants to prove their eligibility and to avoid any errors or omissions in their applications; they shall give the applicants the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions"

8. Ms Ahmad submitted that this placed an obligation on the respondent to assist potential applicants to prove their eligibility. She said that this obligation applied in this case. The respondent had failed in that duty. The Tribunal pointed out that if this is what the Secretary of State was expected to do it would have been difficult for the FTT Judge to dispose of the matter given this was a paper case and the argument now raised had not been ventilated in the documents before him. In particular, it was noted that there was no ground raised in relation to article 18 (o) in the grounds of appeal to the First-tier Tribunal. Ms Ahmad took the Tribunal to a number of passages in the FTT Judge's decision including paragraph 11 where the judge had identified the fact that the application was made prior to the deadline. This is a point that Judge Landes had made when she granted permission to appeal. Essentially, it was argued that the appellant should not have applied under EUSS but could have applied under the EEA Regulations. Again the Tribunal questioned the extent to which the judge was expected to engage with these issues given the scope of the appeal before him.

9. Ms Ahmad conceded that the case of **Celik [2022] UKUT 00219**, which have been decided by the Upper Tribunal since the permission to appeal was given in this case, was determinative of the issue of whether or not the appellant had provided the documentation required of him. However she maintained that the this is not determinative of all the arguments in the appeal. Upper Tribunal Judge Blundell pointed out the number of these cases were potentially the subject of very similar arguments.

10. At this point an interpreter was sworn to interpret anything of relevance to the appellant's case. It appears that he had been asked to attend the Tribunal on the assumption that the appellant would be unrepresented. It was pointed out by the Tribunal that it was unlikely his services would be needed other than to summarise the key points, but it was decided this could be left until the end of the hearing. It was explained that the hearing was to hear legal argument in favour of and against his appeal. Ms Ahmad agreed with the proposed approach.

11. Ms Ahmed relied on the rule 24 response, pointing out that the facts of this case were fairly and squarely within the **Celik** decision. She pointed to paragraphs 4 – 6, where the facts are summarised, and [60] where the President explained that there was nothing in article 18 of the Withdrawal Agreement to suggest that those who did not meet the requirements by

the deadline of 11 PM on 31 December 2020 can nevertheless be treated as if they met those requirements. She said that before the Tribunal could consider article 18(o) it had to be satisfied that the appellant fell within the Withdrawal Agreement. She acknowledged there was a certain degree of uncertainty at the present time as to the correct interpretation of the above-mentioned provisions, but the arguments now advanced had not been raised before the FTT Judge. There had to be some sensible limit to what FTT judge can be criticised for and in this case the Tribunal was invited to uphold the decision of the FTT Judge in this appeal.

Conclusions

12. At the conclusion of the hearing the Upper Tribunal decided to uphold the decision of the FTT Judge for the following reasons:

(i) The appellant applied for settlement (ILR) under the EU Settlement Scheme which required him to satisfy the requirements of Appendix EU and in particular EU 11 and annex 1 thereof;

(ii) These regulations required him to have a "relevant document" for the purposes of annex 1 which had been produced to the respondent prior to the exit day which established his relationship with a "durable partner";

(iii) In this case the appellant admits his inability to provide such a document, although unlike the appellant in **Celik**, he was actually in a relationship with a qualified partner and made his application prior to exit day, on 27th of July 2020;

(iv) In contrast to the case of **Celik**, the application here was not delayed by coronavirus regulations, the respondent's decision in this case to refuse the application was taken on 10 February 2021 and the appeal was submitted on 19 February 2021;

(v) The respondent was entitled to refuse the appellant's application for leave to remain under the EUSS in circumstances where he had not provided sufficient evidence to confirm that the appellant was a family member of a relevant EEA citizen prior to the exit day. In particular, in this case, no marriage certificate was produced;

(vi) The appellant had not been accepted by the respondent to be a durable family member and had not been issued with a residence card on that basis. The respondent was accordingly under no facilitation duty before Exit Day or afterwards;

(vii) The suggestion that the respondent pursuant to article 18 (o) of the Withdrawal Agreement was under an obligation to consider a different application than that actually made would place an additional burden on the respondent. Such an additional burden cannot be justified and the terms of Article 18(o) do not support the existence of such a duty. The duty in that provision clearly and unarguably extends only to the consideration of the application actually made, and does not require the respondent to identify for any relevant applicants that they might have a better claim under the EEA Regulations;

(viii) The sole issue before the FTT Judge was whether the appellant had complied with the relevant regulations set out above;

(ix) This was a case in which the appellant opted to have a paper decision in his appeal. It is possible, but speculative, to suggest that had he elected to have an oral hearing of his appeal the FTT Judge may have allowed more flexibility in terms of the arguments to be advanced and documents produced. In circumstances where the appeal proceeded on paper it is difficult to see how any further flexibility may have been applied without potentially prejudicing the other party to the appeal;

(x) We recognise that there are circumstances in which a judge in the First-tier Tribunal is obliged to consider arguments not advanced by an appellant, especially one who is not professionally represented. The duty is often labelled as the duty to consider '**Robinson** obvious' points. That label derives from the decision of the Court of Appeal in **R v SSHD ex parte Robinson [1998] QB 929**. As Maurice Kay LJ subsequently observed, in his concurring judgment in **Miftari v SSHD [2005] EWCA Civ 481**, the rationale for the principle in **Robinson** was to ensure that the United Kingdom was not in breach of its obligations under the Refugee Convention.

We pressed Ms Ahmad at the hearing for the basis upon which the judge in this case was under a duty to consider arguments which had not been raised by the appellant. She was unable to formulate any such basis, and we are not able to accept that any such duty exists. Even assuming that there is a comparable duty, it only arises where the argument in question has a strong prospect of success: **Robinson** refers, at [39]. It was not incumbent on the judge, in other words, to cast about for any arguments which might have been available for the appellant and to deal with those arguments *seriatim*. The article 18 argument was not raised by the appellant and it was not one which appears to have had a strong prospect of success. It was not incumbent on the judge to deal with it of his own volition;

(xi) Subject to certain exceptions, there was no scope for arguing article 8 of the ECHR. This is for the reasons explained by the President in **Celik** at paragraph 87 et seq, although that may be made as a separate application in future.

13. The FTT Judge had to deal with the matter before him and he did so in a decision which is clearly sound based on the law as set out in **Celik**.

Notice of Decision

The appeal is dismissed.

Signed Dated this 16 September 2022

Deputy Upper Tribunal Judge Hanbury