IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002989
First-tier Tribunal No: EA/00260/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 March 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAJAN TAFANI
(Anonymity direction not made)

Respondent

On the Papers at Phoenix House (Bradford) on 16 November 2022

DECISION AND REASONS

1. The Secretary of State appeals a decision of a judge of the First-tier Tribunal in this matter ('the Judge'), promulgated on 11 April 2022, in which the Judge allowed the appeal against the refusal of an application made under Appendix EU of the Immigration Rules.
2. The matter was originally listed for an oral hearing but for reasons set out below was converted to a hearing that could be determined on the papers.
3. The Secretary of State challenged the Judge's decision on the following basis:

The Judge of the First-tier Tribunal has made a material error of law in the Determination.

1. Making a material misdirection of law on any material matter.

a) It is respectfully submitted that the First Tier Tribunal Judge (FTTJ) has materially erred in law by failing to properly consider the provisions of the Appendix EU contained within the Immigration Rules.

b) The Appellant's application for status under the EU Settlement Scheme was as the family member of a relevant EEA national. It Is submitted that the Appellant could not succeed as a spouse, as the marriage took place after the specified date (31 December 2020), and so the application was considered under the durable partner route where it was also bound to fail. The rule requires a "relevant document" as evidence that residence had been facilitated under the EEA regulations which had transposed Article 3.2(b) of Directive 2004/38/EC. This requires residence as a 'durable partner' to have been facilitated in accordance with national legislation. No such document was held as no successful application for facilitation had ever been made by the Appellant prior to the specified date. The Appellant's previous application under the regulations was refused on 17 February 2021 and dismissed by the Tribunal in a paper appeal (EA/04654/2021) on 29 September 2021.

c) It is therefore submitted that the FTTJ's interpretation of the requirements of paragraph (b)(ii)(bb)(aaa) of Annex 1 of Appendix EU at [25] to [28] of the determination is incorrect and not compatible with the requirements of the Withdrawal agreement that the EUSS scheme is designed to implement.

d) Article 10(1)(e) of the Withdrawal Agreement confirms that beneficiaries are limited those who were residing in accordance with EU law as of 31 December 2020. Additionally, Article 10(2) of the Withdrawal Agreement permits 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 was not residing in accordance with EU law as of the specified date.

e) It is submitted that the FTTJ's interpretation of the requirements of paragraph b)(ii)(bb)(aaa) of Annex 1 of Appendix EU would mean that the requirements to have been lawfully resident under EU law as of 31 December 2020 would be obsolete (hence the requirement for a relevant document to show lawful residence as of the specified date). Therefore, it is submitted that the FTTJ has materially erred in law in finding that the Appellant satisfies the requirements of Appendix EU, despite not being lawfully resident as of 31 December 2020.

f) Additionally, it is asserted that the Withdrawal Agreement also provides no applicable rights to a person in the Appellant's circumstances. Article 10(1)(e) of the Withdrawal Agreement confirms that beneficiaries are limited those individuals who were residing in accordance with EU law as of 31 December 2020. The Appellant was not, and therefore did not come within the personal scope of the Withdrawal Agreement. Accordingly, there was no entitlement to the full range of judicial redress including the Article 18(1)(r) requirement that the decision was proportionate. As no such right is conveyed by the relevant parts of

the Withdrawal Agreement, there can be no conceivable breach of the Appellant's rights. Therefore, it is submitted that the FTTJ has erred in finding at [29] to [31] of the determination, that the decision to refuse the Appellant's claim under Appendix EU is in breach of the Appellant's rights under the Withdrawal Agreement

4. Permission to appeal was granted to the Secretary of State on the basis it was said the grounds are arguable.
5. The Upper Tribunal has handed down guidance in relation to the interpretation of the Withdrawal Agreement and the EU Settlement Scheme in the reported decision of Celik [2022] UKUT 00220.
6. Mr Tafani has been granted leave to remain in the UK separate from these proceedings and through his legal representatives confirmed that he does not oppose the Secretary of State's application, accepts the Judge erred in law, and that the decision should be set aside.
7. An email from the Upper Tribunal advised the parties that in addition to setting the decision aside the Upper Tribunal will remake the decision on the papers dismissing the appeal, for on the facts the appellant is not entitled to the relief he sought under the Withdrawal Agreement or Appendix EU and no error of law has been made out in the refusal under challenge; such that a decision will be substituted dismissing the appeal. Neither party has objected to that course of action.
8. For the reasons set out in the application seeking permission to appeal, the grant of permission to appeal, and the decision of the Upper Tribunal in Celik in relation to the proper interpretation of the Withdrawal Agreement, I find the judge of the First-Tier Tribunal has erred in law in a manner material to the decision to allow the appeal. I set that decision aside. I substitute a decision to dismiss the appeal.

Decision

9. The Judge materially erred in law. I set the decision aside.
10. I substitute a decision to dismiss the appeal.

Anonymity.

11. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated 16 November 2022