



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003310
First-tier Tribunal No:
EA/00756/2022

THE IMMIGRATION ACTS

Heard at Field House IAC
And by remote CVP hearing
On the 25th November 2022

Decision & Reasons Promulgated
On the 06 February 2023

Before

UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NANDO ISMALAJ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the respondent: Mr G Davison, Counsel, instructed by Mayfairs Law Solicitors

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 25th November 2022.
2. To avoid confusion, I refer to the appellant as the Secretary of State, and the respondent as the Claimant.
3. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Phull (the 'FtT') promulgated on 13th June 2022, by which she allowed the Claimant's appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. That in turn was an appeal against the Secretary of State's decision on 26th January 2022 to refuse the Claimant's application for an EUSS residence card. In the refusal letter, the Secretary of State noted that records did not show the Claimant had been issued with a family permit or residence card under the Immigration (EEA) Regulations as a relative of an EEA national. To meet the requirements of Annex 1 of Appendix EU, the Secretary of State concluded that the Claimant needed to hold a valid relevant document.

The FtT's decision

4. The FtT noted the Claimant's claim to have met his partner in April 2019 and their intention to marry in September 2020. They had been prevented from doing so because of the Covid pandemic and the closure of registry offices. They later married on 5th August 2021. They were in a genuine and subsisting relationship and still lived together.
5. The FtT recorded at paragraph [8] that the Claimant accepted that he could not meet the definition of Annex 1 to Appendix EU, but at paragraph [10], his argument that the Secretary of State's decision breached his rights under the Withdrawal Agreement. At paragraph [15] the FtT found that the Claimant was the partner of his now wife, in a durable relationship prior to the specified date and therefore fell within the scope of article 10 (1)(e) of the Withdrawal Agreement. At paragraph [19], the FtT concluded that the Secretary of State's decision was in breach of the Claimant's rights under the Withdrawal Agreement, and at paragraph [25] that it was disproportionate.

The grounds of appeal and grant of permission

6. The Secretary of State appealed on 28th July 2022 on the basis that the Withdrawal Agreement provided no applicable rights to the Claimant and therefore the FtT had erred in law.
7. Permission was initially refused by first-tier Tribunal Judge Moon, but on renewal, permission was granted by Upper Tribunal Judge Grubb on 16th September 2022. The grant of permission was not limited in its scope.

The hearing before me

8. I explored with Mr Davison at the beginning of the hearing the authority of Celik (EU exit; marriage; human rights [2022] UKUT 220 (IAC). He conceded, rightly, that the FtT had erred in law, as the Claimant's circumstances were analogous to those in Celik. No application for facilitation of entry or residence had been made before 11pm GMT on 31st December 2020. The Claimant could not benefit from the application of the Withdrawal Agreement, or any consideration of proportionality. He emphasised that he made this concession on the basis that the Claimant had never been offered any opportunity to make a human rights claim, nor had any human rights decision been made, which was before me. Mr Melvin accepted this.
9. Without any discourtesy to Mr Melvin, I was able to reach a decision on whether the FtT had erred in law, without his needing to make substantive submissions beyond his skeleton argument, which cited Celik. Whilst that decision is not binding on me, there was no argument advanced against, nor any reason to depart from, its headnote principles, namely that:

“(1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P's entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.

(2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ("the 2020 Regulations"). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.”

Decision on whether the FtT erred in law

10. There is no suggestion the Claimant had applied for facilitated entry or residence and in the circumstances, the FtT's analysis by reference to the Withdrawal Agreement was an error of law. As a consequence, her decision is unsafe and cannot stand.
11. However, I was also invited by both representatives to preserve the FtT's findings of fact in their entirety. In setting aside the FtT's decision, I preserve her findings.
12. I canvassed with the representatives whether I should retain remaking in the Upper Tribunal or remit back to the First-tier Tribunal. Both were agreed that I should retain remaking. I have considered each of

paragraphs 7.2(a) and (b) of the Senior President's Practice Statements. The effect of the FtT's error had not been to deprive a party of a fair hearing nor was there any additional judicial fact-finding necessary. I therefore retained remaking in the Upper Tribunal.

Remaking decision on the Claimant's appeal

13. Both representatives invited me to remake the appeal today. The Claimant relied on no additional written evidence, nor was any oral evidence given. I note the preserved findings. Mr Davison accepts that the Claimants appeal falls to be dismissed, on the basis of Celik.
14. In the circumstances, I apply the guidance in Celik and dismiss the Claimant's appeal.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside, subject to preserving the FtT's findings in their entirety.

I remake the appeal by dismissing the Claimant's appeal.

No anonymity direction is made.

Signed J Keith

Date: 25th November 2022

Upper Tribunal Judge Keith