Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/01221/2022**
UI-2022-003536

THE IMMIGRATION ACTS

Heard at Field House
On the 14th November 2022

Decision & Reasons Promulgated
On the 19th January 2023

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

CARLO MAURICIO ALVAREZ CARIAS
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Mr J Gajjar, instructed by Freeman Chambers Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The appellant is a national of Honduras born on 2 October 1988. His appeal against the refusal of pre-settled status as a family member under the EU Settlement Scheme ('EUSS') was allowed by First-tier Tribunal Judge Issacs ('the judge') on 17 June 2022.

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2. The appellant met the sponsor, a Polish national, and they started living together in the UK in April 2020. Their daughter was born on 24 June 2021 and they were married on 3 August 2021. The appellant applied for pre-settled status as a family member under the EUSS on 2 September 2021. The application was refused on 21 January 2022.

3. The judge found the appellant and sponsor were in a durable relationship at the specified date and were now married. The Covid-19 pandemic had delayed the marriage. The judge also found that it was in the best interests of the child to remain with both her parents. The judge allowed the appellant's appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the 2020 Exit Regulations') on the grounds the respondent's decision was disproportionate and breached the Withdrawal Agreement ('WA').

4. Permission to appeal was granted by First-tier Tribunal Judge Hollings-Tennant on 14 July 2022 for the following reasons:

> "3. The Judge makes clear findings that the Appellant is the durable partner of a relevant EEA citizen but did not hold a residence card or family permit in that capacity before the 'specified date', such that he does qualify under Appendix EU of the Immigration Rules. Whilst she states that the Withdrawal Agreement maintains a need for proportionality [at paragraph 31], she makes no findings as to how the Appellant comes within the personal scope of the agreement. Therefore, it is at least arguable that the Judge provides inadequate reasons for finding that the decision to refuse breaches the Appellant's rights under an agreement which only provides for durable partners who already had, or had applied for, a document in that capacity before the 'specified date'."

Relevant law

5. In Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC), the Upper Tribunal held:

> "(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.
>
> (3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal,

> subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State."

Submissions

6. Mr Gajjar conceded the judge had erred in law and invited the Upper Tribunal to remit the appeal to the First-tier Tribunal to consider Article 8 as a new matter given the judge's factual findings at [29] and [31]. Mr Gajjar submitted he was in difficulty in resisting the respondent's grounds following Celik.

7. Ms Everett relied on the grounds of appeal and submitted the appellant could not benefit from the WA and the respondent refused consent to the new matter. The appeal should not be remitted to the First-tier Tribunal but remade by the Upper Tribunal and dismissed. She did not dispute the judge's factual findings at [29] and [31] and it was open to the appellant to make an application on Article 8 grounds.

Conclusions and reasons

8. It was accepted the appellant applied under the EUSS as a family member and he did not satisfy the definition of durable partner in Appendix EU of the immigration rules. It is not in dispute that the appellant did not apply for facilitation of entry or residence before the end of the transition period and his residence in the UK was not facilitated by the respondent prior to 11pm on 31 December 2020. The appellant cannot not satisfy Article 10(2) or 10(3) WA.

9. I agree with the conclusions and reasons in Celik. The appellant cannot rely on the WA and the judge erred in law in allowing the appeal on that basis. I set aside the decision and remake it. I preserve the factual findings at [29] and [31] of the decision which I have summarised at [3] above.

10. The appellant has no substantive right under the WA and he cannot satisfy Appendix EU. Article 8 was a new matter and the respondent had not given her consent. I dismiss the appeal under the 2020 Exit Regulations.

Notice of Decision

The respondent's appeal is allowed.

The decision of the First-tier Tribunal dated 17 June 2022 is set aside.

The appellant's appeal is dismissed under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 14 November 2022

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal, I make no fee award.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 14 November 2022

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.