



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI-2022-002553

(EA/12696/2021)

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons Promulgated
on:**

On 17 November 2022

On 29 January 2023

Before

**UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON**

Between

**GABRIELA DIAS DE SANTANA
[NO ANONYMITY ORDER]**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr J Plowright, instructed by Mentor Legal LLP

For the respondent: Ms A Nolan, Senior Home Office Presenting Officer (by video-link)

DECISION AND REASONS

1. In a decision promulgated on 5 April 2022, First-tier Tribunal Judge Hobson (the judge) dismissed the appellant's appeal against the respondent's decision, dated 1 August 2021, to refuse the appellant's application for leave to remain under the EU Settlement Scheme (EUSS) on the basis of

her relationship with her partner, a relevant EEA citizen (the sponsor). The appellant appeals with permission granted by the Upper Tribunal.

Background

2. There was no dispute, either before us or before the First-tier Tribunal, as to the facts in this case. The appellant is a citizen of Brazil, born on 27 June 1997. She met the sponsor in Brazil in 2017 and they began a relationship in 2017, becoming engaged the same year. The appellant and her partner lived together in Brazil. The appellant and the sponsor entered the UK on 16 August 2019 (the appellant being 6 months pregnant at the time). The appellant was granted 6 months leave to remain as a visitor. The appellant's daughter was born on 2 March 2020, the appellant not returning to Brazil on expiry of her visit visa. In September 2020 the sponsor travelled to Italy to obtain documentary confirmation of his entitlement to Italian citizenship, the papers indicating his Italian citizenship was recognized at the end of December 2020. The sponsor obtained his Italian passport on 28 January 2021 and holds pre-settled status in the UK.
3. The appellant applied on 26 May 2021 for leave to remain (pre-settled status) under EUSS on the basis of her relationship with the sponsor. The respondent refused that application on the basis that the appellant and the sponsor were not married before the specified date of 31 December 2020. The respondent maintained that the appellant did not qualify as the durable partner of the sponsor as she had not been issued with a family permit or residence card under the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations). Therefore the respondent was satisfied that the appellant did not meet the eligibility requirements for settled status under rule EU11 as the family member of a relevant EEA citizen, or the eligibility requirements for pre-settled status under rule EU14 of Appendix EU of the Immigration Rules.

First-tier Tribunal Appeal

4. The judge considered Appendix EU and the respondent's guidance together with the oral and documentary evidence before her, and the law. The judge found that the appellant did not meet the requirements of Appendix EU. Although it was accepted by the respondent that the sponsor was a 'relevant EEA citizen' for the purposes of Appendix EU, as the appellant had not, before the specified date of 31 December 2020, been issued with a document under the EEA Regulations (such was accepted on the appellant's behalf before the First-tier Tribunal) she did not fall within the definition of family member. Specifically, the appellant did not hold a 'relevant document' as the durable partner of the relevant EEA citizen.
5. The judge considered the Withdrawal Agreement and was satisfied that Article 10(2) required that persons had to have been residing in the UK in accordance with the EEA Regulations before 11pm on 31 December 2021

(the specified date) for the Withdrawal Agreement to apply to them. The judge also considered the Withdrawal Agreement and proportionality and was satisfied that any finding, that the appellant's lack of a 'relevant document' should not have been a bar to a successful application, would have not been an exercise in proportionality but rather a disapplication of the law.

Upper Tribunal Appeal

6. The appellant sought permission to appeal on the grounds that: 1. The judge's assessment of the Withdrawal Agreement and EU Directive 2004/38/EC was flawed, in that even though the respondent has the power to require a family member to provide a 'relevant document' the respondent's exercise of that power was unlawful; 2. The judge failed to have regard to the principle of proportionality; 3. The judge failed to have regard to the best interests of the appellant's child. The Upper Tribunal considered grounds 1 and 2 arguable with permission granted on all grounds, although ground 3 was considered to be less meritorious.
7. The respondent's Rule 24 response opposed the appeal and relied on Batool and others (other family members: EU exit) [2022] UKUT 00219 which makes it clear that a person in the appellant's position is not to be regarded as a 'family member' and therefore unable to succeed in her application under the EU Settlement Scheme. On ground 2 it was submitted that having correctly determined the appellant was not a 'family member' as defined by Appendix EU, there was no requirement for the First-tier Tribunal to find the decision of the respondent disproportionate. In relation to ground 3 the best interests of the child did not appear to have been raised specifically before the First-tier Tribunal. In any event, it did not appear that the decision of the respondent would result in the appellant's removal, or that of her child.
8. Although neither representative had had prior sight of the Rule 24 response, both representatives confirmed that they were not disadvantaged. We noted the absence from the Rule 24 response of any mention of Celik (EU exit; marriage; human rights) [2022] UKUT 220 (IAC).
9. Mr Plowright noted that the Court of Appeal was currently considering an application for permission to appeal in Celik but conceded that the Upper Tribunal was bound by that case law. In light of this Mr Plowright was unable to put forward any positive arguments. We indicated that we did not need to hear from Ms Nolan. At the conclusion of the hearing we gave our decision, upholding the decision of the First-tier Tribunal.

Analysis

10. We agree with Mr Plowright that the decision of the (then) Presidential panel in Celik is determinative of the issues in this appeal. The appellant was required to satisfy the requirements of Appendix EU, in particular EU14 and annex 1, which required the appellant to have a 'relevant

document', which established her relationship as a durable partner, produced to the respondent prior to the end of the transition period, the specified date of 31 December 2020.

11. The appellant had neither applied to the respondent nor been accepted by the respondent to be a durable partner before the end of the transition period. Like the appellant in Celik therefore the respondent had no facilitation duty.
12. For the reasons set out at [44] to [60] of Celik, the appellant in this case is also not within the scope of the Withdrawal Agreement. As the Tribunal explained at [56] of Celik, the appellant:

“has no right to call upon the respondent to provide him with a document evidencing his ‘new residence status’ arising from the Withdrawal Agreement because that Agreement gives him no such status. He is not within the terms of Article 10 and so cannot show that he is a family member for the purposes of Article 18 or some other person residing in the United Kingdom in accordance with the conditions set out in Title II of Part 2”.
13. The appellant’s first ground therefore cannot succeed, as a person in the appellant’s position is not a family member for the purposes of Article 18 of the Withdrawal Agreement. The appellant’s entry and residence were not being facilitated by the respondent before 11pm on 31 December 2020 and P had not applied for such facilitation. As Celik made clear, a person in this position has no substantive rights under the Withdrawal Agreement. Although the decision of the First-tier Tribunal predated Celik, there was no error in the judge’s findings that, as a residence card had not been issued, no right of residence had been acquired.
14. The appellant’s second ground, on proportionality, is also unable to succeed, as without any substantive rights under the Withdrawal Agreement, the appellant can have no recourse to the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement (paragraphs 61-66 of Celik applied).
15. The third ground in respect of the best interests of the appellant’s child is equally unable to succeed. It was submitted in the grounds of appeal that the welfare of the appellant and sponsor’s child, born on 2 March 2020, and their best interests had not been considered as required under section 55 of the Borders, Citizenship and Immigration Act 2009. Whilst the absence of any mention before the First-tier Tribunal of those best interests does not obviate the need for decision makers to have regard to the need to safeguard and promote the welfare of children in the UK, any error is not material. The grounds do not identify what factors ought to have been considered by the judge and there is nothing in the evidence before the First-tier Tribunal that might have suggested that it was anything other than in the child’s best interests to continue to be with her

parents. Whilst the appellant's appeal was dismissed, there is no removal decision and as indicated in the respondent's Rule 24 review, it does not necessarily follow that appellant or her child will be removed.

16. Whilst it was quite properly not argued that there was any human rights ground before us in respect of any future removal, we note what was said in Celik, that whilst regulation 9(4) of the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 confers a power to consider a human rights ground of appeal, this is subject to the prohibition under regulation 9(5) where the consent of the respondent is required. No consent was sought or given in this case and the First-tier Tribunal Judge was therefore prevented from considering any Article 8 argument.

Notice of Decision

The appellant's appeal is dismissed. The decision of the First-tier Tribunal did not involve an error on a point of law such that it falls to be set aside. The decision to dismiss the appeal shall stand.

M M Hutchinson

Deputy Upper Tribunal Judge Hutchinson

Date: 21 November 2022

To the Respondent Fee Award

As we have dismissed the appeal, there can be no fee award.