Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-002910**
EA/13175/2021

THE IMMIGRATION ACTS

Heard at Bradford IAC
On the 16 November 2022

Decision & Reasons Promulgated
On the 23 January 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

XHEVAHIR LLANAJ
(Anonymity direction not made)

Respondent

Representation:
For the Appellant: Ms Z Young, a Senior Home Office Presenting Officer.
For the Respondent: no appearance.

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Hillis ('the Judge'), promulgated on 23 April 2022, in which the Judge allowed the appellant's appeal against the refusal of his application for a Family Permit on the basis of his claim to be married or alternatively in a durable relationship with an EEA national exercising treaty rights in the UK.

2. I am satisfied there has been proper service of the notice of hearing upon Mr Llanaj detailing the date, time, and venue of this hearing. There is no reason for any party to believe the hearing had been adjourned as no orders have been made to that effect. There is no explanation for Mr Llanaj's absence, and I find it appropriate in all the circumstances for the appeal to proceed having considered issues of fairness and the overriding objective.

Error of law

3. Mr Llanaj is a citizen of Albania born on 30 June 1986. The Judge recorded that he entered into a relationship with the EEA national on 14 August 2019 and that they married on the 23 March 2021. The EEA national's application under the EU Settlement Scheme was granted on 11 January 2021.

4. There was no Presenting Officer before the Judge who noted the procedural history including the claim the parties had not been able to marry earlier as a result of the Covid – 19 pandemic, and that no application had been made to facilitate entry as an extended family member before the relevant date of 31 December 2020.

5. At [23] the Judge writes:

> 23. I conclude on the evidence before me taken as a whole that the appellant is shown, on the balance of probabilities, he has reasonable grounds for their marriage not taking place until after 31 December 2020 and that he was in a genuine and subsisting durable relationship akin to marriage up until their actual marriage on 2 June 2021 which is genuine and subsisting.

6. The Judge concludes that the appellant had shown he was the husband and/or durable partner of his sponsor and so met the requirements of Appendix EU of the Immigration Rules.

7. The Secretary of State sought permission to appeal on the following grounds:

> 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. No such document was held as no application for facilitation had ever been made by the Appellant, in accordance with national legislation.

c) It is submitted that the question of whether and how the relationship was in fact "durable" at any relevant date, as is found by the FTTJ at [23] of the determination, is of no consequence. The scheme rules could simply not be met by a durable partner whose residence had not been facilitated. This is reflected in Article 10(2) of the Withdrawal Agreement permitting 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 therefore could not satisfy the requirements of Appendix EU.

d) It is therefore submitted that the FTTJ has materially erred in finding at [24] of the determination that the Appellant satisfies the requirements of Appendix EU of the Immigration Rules, despite the Appellant failing to demonstrate that they held a "relevant document" demonstrating their law residence under EU law as of the specified date.

e) It is further asserted that the FTTJ at [17] of the determination has incorrectly treated the "grace period", which ended on 31 June 2021, as extending the time period in which the Appellant is able to become lawfully resident under The Immigration (European Economic Area) Regulations 2016. It is submitted that this is an incorrect interpretation of the purpose of the "grace period" and has led to a material error in law when allowing the Appellant's appeal.

f) Reference is made to the policy document entitled "EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members Version 15", Published for Home Office staff on 9 December 2021, as supporting the position that the "grace period" does not allow the appellant to acquire rights after the specified date. Page 34 of the policy document states the following (emphasis added),

"30 June 2021 was the end of the grace period, during which an EEA citizen lawfully resident in the UK by virtue of the EEA Regulations at the end of the transition period at 11pm on 31 December 2020 (or with the right of permanent residence by virtue of them) and their family members could continue to rely on those EU law rights pending the final outcome of an application (and of any appeal) to the EU Settlement Scheme made by them by 30 June 2021. For the time being, you will give applicants the benefit of any doubt in considering whether, in light of information provided with the application, there are reasonable grounds for their failure to meet the deadline applicable to them under the EU Settlement Scheme, unless this would not be reasonable in light of the particular circumstances of the case. Any change in approach will be reflected in a revision of this guidance."

g) It is submitted that all the "grace period" did was extend the period in which those who satisfied the requirements of the EEA regulations as of 31/12/2020 would have their applications accepted. It did not, as the FTTJ appears to find, extend the time period for applicant to acquire EU residence rights following the UK's exit from the EU on 31/12/2020. It is submitted that the

"specified date" is the cut-off date for those to acquire rights of residence and the FTTJ has materially erred by finding that the guidance extends this time period.

h) Additionally, it is asserted that the FTTJ has failed to provide adequate, evidence-based reasons for finding that the Appellant satisfies the requirements of Appendix EU of the Immigration Rules. It is submitted that the FTTJ makes no reference to the requirements of Appendix EU or how the Appellant is able to satisfy those requirements without being in possession of a 'relevant document' prior to the specified date.

8. The Upper Tribunal has recently handed down guidance on the interpretation of the Withdrawal Agreement which is the document that regulates the relationship between the UK and certain EU Member States following Brexit. It is the Withdrawal Agreement that sets out the relevant law which preserves as of 31 December 2020 rights of individuals that existed prior to the U.K.'s withdrawal from the EU. There is no provision within the Withdrawal Agreement for that period to be extended or to allow the creation of new rights which was, in effect, the outcome of the Judge's decision.

9. The case providing guidance is Celik [2022] UKUT 00220 the head note of which reads:

> *(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.*

10. There is a clear finding by the Judge that Mr Llanaj had not applied for entry or residence to be facilitated before 11 PM on 31 December 2020 on the basis of a durable relationship. As domestic law required an individual to live in a relationship similar to that of marriage to satisfy the definition of a durable relationship, and as Mr Llanaj and his EU national had not lived in such for that duration as at the relevant date, it was not open to the Judge to find that Mr Llanaj had established any right by reference to relevant domestic law.

11. In relation to the application for a family permit as the spouse of an EU national, it was not made out Mr Llanaj was able to satisfy the definition of a spouse contained in Appendix EU at the relevant time.

12. Mr Llanaj claimed that he could not satisfy this requirement as he had been prevented from marrying the EU national as a result of the Covid –19 pandemic. A similar argument was raised by the appellant in Celik but rejected.

13. As noted at [68] of Celik, even taking such a claim at its highest, the principle of fairness did not assist the appellant as it did not give a judge the power to disregard the Withdrawal Agreement. Insufficient reasons are given, as there was insufficient evidence before the Judge to warrant a finding contrary to that in Celik in this appeal, which explain how this aspect entitled Mr Llanaj to succeed.

14. I find the Judge has erred in law in a manner material to the decision to allow the appeal for the reasons set out in the application for permission to appeal, the grant of permission to appeal, and a proper application of the relevant legal principles referred to above.

15. The Judge also refers at [15] to it being accepted that Article 8 ECHR does not apply to Mr Llanaj's claim as he is not being required to leave the UK, but there is no evidence within the papers or to which the Judge referred, that permission of the Secretary of State was sought to rely upon an Article 8 ECHR claim which was granted. As noted at headnote (3) of Celik, the First-tier Tribunal has power to consider a human rights ground of appeal subject to prohibition imposed by regulation 9(5) of the Immigration (Citizens Rights) (EU Exit) Regulations 2020. In this appeal there is no evidence such consent was sought or granted. The Judge therefore had no jurisdiction to consider the Article 8 issue.

16. I set the decision of the Judge aside.

17. Mr Llanaj chose not to attend the appeal, but it is clear when applying the law to the facts that this is an appeal without merit. Mr Llanaj cannot satisfy the requirements to succeed as a spouse nor as a durable partner, as he had not applied to facilitate leave on that basis prior to the relevant date. The only available decision, on the particular facts and applying the law, is that the appeal must be dismissed.

18. I therefore substitute a decision to dismiss the appeal on the basis there is no legal error made out in the decision to refuse Mr Llanaj's application.

Decision

19. The Judge materially erred in law. I set the decision aside.

20. I substitute a decision to dismiss the appeal.

Anonymity.

21. 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