



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002440
First-tier Tribunal No:
EA/13456/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 May 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

MOHAMMAD DELWAR HUSSAIN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

(ANONYMITY ORDER NOT MADE)

Representation:

For the Appellant: Mr G. Ó Ceallaigh, instructed by Legit Solicitors

For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

Heard at Field House on 19 April 2023

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 19 July 2021 to refuse leave to remain under the EU Settlement Scheme (Appendix EU) as the former durable partner of an EEA national.
2. The appeal is brought under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the CRA Regulations 2020'). The available grounds of appeal are:

- (a) the decision breaches any right which the appellant has by virtue of the Withdrawal Agreement ('WA'), EEA EFTA Separation Agreement or the Swiss Citizens' Rights Agreement;
- (b) the decision is not in accordance with the provision of the immigration rules by virtue of which it was made, is not in accordance with the residence scheme immigration rules, is not in accordance with section 76(1) or (2) of the 2002 Act (revocation of ILR) or is not in accordance with section 3(5) or (6) of the 1971 Act (deportation).
3. First-tier Tribunal Judge J. Austin ('the judge') dismissed the appeal in a decision sent on 11 February 2022. The judge noted that the appellant had lived in the UK since 2011, when he entered as a student. On 08 July 2016 he was issued with a five-year EEA residence card facilitating residence as the durable partner of an EEA national. The permit expired on 08 July 2021. The appellant's partner was a Hungarian citizen. The couple are said to have a child together, who was born on 12 June 2015. The judge accepted that there was evidence to show that the appellant was in a durable relationship with an EEA national until September 2019, when she returned to Hungary with their child. The appellant produced evidence to show that he sent money transfers to her in Hungary in 2020.
4. The judge noted what appeared to be conflicting evidence as to whether the appellant had made a false representation that he continued to be in a relationship with his former partner when he made this application for leave to remain in March 2021. No copy of the application form was included in the Home Office bundle to ascertain whether this was the case. The appellant denied it at the hearing and made clear that he had been open about the fact that the relationship had ended. It seems clear on the face of the decision letter that the appellant had contacted the respondent by 15 July 2021 to confirm that he had separated from the EEA sponsor. The judge's key findings were contained in the last three paragraphs of the decision:
- '20. The Application was made by the Appellant when he was not in an enduring relationship with an EEA citizen exercising Treaty rights in the UK. The EEA citizen he named as his sponsor was living in Hungary and not in the UK.
21. The Appellant's application for an EEA Family permit under the Immigration Rules EU11 and EU 14 (sic) was correctly refused on the basis that the Appellant did not show evidence of being in an enduring relationship with an EEA national.
22. Mr Timson argued that the Rules allowed the Appellant to qualify for the permit sought on the basis that the Appellant was formerly in a relationship with an EEA citizen which had ended approximately two years before his previous permit ended, and 18 months before his application for leave under the EU settlement (sic) Scheme. I considered that argument with Mr Timson and his submission that the Appellant retained a derivative right of residence as a result of that former relationship. I disagree. I do not consider that the Rules under EU 11-3(iii) (sic) allow such an argument to succeed on the facts I have found, and which the Appellant candidly admitted before me. I consider that in order to succeed under EU 11 or EU 14 the Appellant has to show that he is in an enduring relationship with an EEA partner. He cannot do so and therefore the refusal was correct.'
5. The appellant applied for permission to appeal to the Upper Tribunal. Although the appellant was represented by counsel at the hearing before the First-tier

Tribunal, the grounds of appeal were drafted by the appellant without the assistance of a legal representative. He made the following points:

- (i) The judge erred in their assessment of the durable relationship. He was in a relationship with his partner from 2014 until 2019 and argued that he had 'completed a continuous qualifying period of five years as the partner of an EEA national'. No intervening event had occurred, so he argued that he met the requirements of paragraph EU 11 of Appendix EU.
 - (ii) The judge failed to consider whether he was a family member who had retained a right of residence.
6. First-tier Tribunal Judge Karbani granted permission on the ground that it was arguable that the judge had erred in failing to consider whether the appellant had retained rights of residence for the purpose of paragraph EU11(1)(iii) of Appendix EU.
7. The discussion that took place at the hearing is a matter of record. In short, Mr Ó Ceallaigh said that he had advised his client and had no further submissions beyond what was already argued in the grounds. In light of this indication, it was not necessary for Mr Melvin to make submissions.

Decision and reasons

8. I gave a brief explanation to the appellant at the hearing, but will attempt to provide an written explanation to help him understand rather complex issues relating to the intersection of EU law and the domestic immigration rules following the United Kingdom's exit from the European Union on 31 December 2020.
9. In order to understand why the First-tier Tribunal's decision did not involve an error of law in interpreting the immigration rules relating to the EU Settlement Scheme, one must understand the appellant's previous status in the UK under EU law.
10. The appellant was in a durable relationship with a European citizen from July 2014 until the September 2019 (a period of five years). He was issued with a residence card facilitating his residence in the UK on 08 July 2016.
11. European Union ('EU') law relating to rights of free movement made an important distinction between the rights of residence of 'family members' and those of 'other family members' (aka 'extended family members') of an EEA national who exercised rights under the EU Treaties in the United Kingdom on or before 31 December 2020.
12. A person who qualified as a 'family member' under Article 2(2) of the Citizens' Rights Directive (2004/38/EC) had an automatic right of residence whether or not they were issued with a residence card recognising that right.
13. Any 'other family member' who did not fall within the definition in Article 2(2) did not have an automatic right of residence. Any other family member needed to meet the requirements of Article 3(2) of the Directive. A person was required to apply for entry or residence to be 'facilitated' by the host Member State in accordance with national legislation. The host Member State would undertake an

extensive examination of the person's personal circumstances and had to justify any denial of entry or residence.

14. A person who was married to an EEA national exercising rights of free movement in the UK would qualify as a 'family member'. However, an unmarried person who was in a durable relationship with an EEA national would be an 'other family member' whose rights of residence could only be established from the date which their residence was facilitated (granted) by the Secretary of State by issuing a residence card.
15. The appellant was an 'other family member' because he was not married to his partner. Although he had been in a relationship since 2014, his rights of residence under EU law did not begin until he was issued with a residence card on 08 July 2016. The appellant's right of residence under EU law relied upon a continuing relationship with an EEA national. When his partner returned to Hungary in September 2019, technically, his right of residence under EU law came to an end albeit that he continued to have a lawful presence in the UK because the residence card had not been revoked by the Secretary of State.
16. Another important distinction between 'family members' and 'other family members' was that a family member who was married to an EEA national could retain a right of residence in the UK in certain circumstances following a divorce. This right was contained in the Directive and was transposed into The Immigration (European Economic Area) Regulations 2016 in domestic law. In contrast, an 'other family member' who was in a durable relationship with an EEA national had no right under EU law to retain residence once the relationship had come to an end.
17. As an unmarried partner, the appellant could not retain a right of residence following the breakdown of the relationship. Nor did the appellant have time to acquire a right of permanent residence. The relationship came to an end and the UK exited the EU before he could acquire the required period of five years continuous residence under EU law.
18. The United Kingdom negotiated an agreement with the European Union, which set out the arrangements for its withdrawal. The Withdrawal Agreement recognised that it was necessary to protect the rights of Union Citizens and United Kingdom nationals and their respective family members where they had exercised free movement rights before the agreed date. The Withdrawal Agreement was implemented in domestic law through the combination of The European Union (Withdrawal) Act 2018 ('the EUW Act 2018'), The European Union (Withdrawal Agreement) Act 2020 ('the EUWA Act 2020'), and the immigration rules relating to the EU Settlement Scheme.
19. The immigration rules were designed to enable those who were residing in the UK with rights of residence under EU law before 31 December 2020 to transfer their status into leave to remain under UK immigration law.
20. Once one understands the appellant's position under EU law before 31 December 2020, it becomes clear why he could not meet the requirements of paragraph EU11(1)(a)(ii) (family member), EU11(1)(a)(iii) (family member with retained rights), or EU11(1)(b) (documented right of permanent residence) of Appendix EU. Nor could he meet similar requirements for limited leave to remain under paragraph EU14 of Appendix EU.

21. First, the appellant was no longer in a durable relationship with an EEA national so could not qualify for leave to remain as a family member under Appendix EU.
22. Second, the appellant could not retain a right of residence under EU law or within the definitions contained in Appendix EU because he was not married to his EEA national partner and did not retain a right of residence following a divorce.
23. Third, the appellant had not acquired a right of permanent residence under EU law by the time the UK exited from the European Union on 31 December 2020. His rights of residence under EU law ended when his partner stop exercising rights of free movement and returned to Hungary.
24. Fourth, although it was not dealt with in the First-tier Tribunal decision, for the same reasons, the appellant's situation at the date when the UK exited the European Union meant that he did not engage any rights under the Withdrawal Agreement.
25. For the reasons explained above, it is not arguable that the First-tier Tribunal's conclusion that the appellant did not meet the requirements of Appendix EU of the immigration rules involved the making of an error on a point of law.

Notice of Decision

The First-tier Tribunal decision did not involve the making of an error on a point of law

M.Canavan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 April 2023